Betting on Sports Events

Marios Papaloukas, University of Peloponnese
ABSTRACT
European Union case law affects many areas of the economic sector. One of them is betting on sports events. In recent years betting on sports events has increased significantly. However, betting on sports events is subject to restrictive regulation in most Member States of the European Union. It comes as no surprise that sports betting enterprises have challenged these restrictive laws before the European Court of Justice. The Court therefore is faced with a dilemma. On one hand we have the rights of businesses providing the service of betting on sports events and on the other the rights of Member States to protect their citizens from excessive gambling and perhaps even the whole sports sector from failing to perform its public service. The Court via the principle of proportionality has to interpret the freedom to provide services as well as competition rules so as to find a compromise between these rights of businessmen and the rights of Member States to protect consumers and maintain public order. However is the principle of proportionality enough to justify the imposition of a State monopoly as well as a private company monopoly in the sports betting market?
**Introduction**

The games of chance are a very ancient activity and common to many societies. Historians situate their origin in the third millennium BC in the Far East and Egypt. Such games were common in ancient Greece and Rome. These games have changed considerably in the course of history and there is a very wide variety of them today. Nowadays they constitute what may be described as a considerable economic factor. They should not be regarded merely as a leisure activity since they generate a very large income for the businessmen providing them as well as a large number of jobs in the different Member States. They however entail serious risks to society. The family budget may be jeopardised and it may also lead to a situation of real addiction to games of chance and gambling, comparable to addiction caused by drugs or alcohol. Also, because of the very considerable stakes involved in games of chance, they may be manipulated by the organiser or others. Finally, games of chance may be a means of ‘laundering’ money obtained illegally.

But there is also another reason why national legislation usually imposes restrictions on games of chance. These games have always been considered as anti-social because by definition they allow only a very small number of players to win. In the great majority of cases players lose more than they gain. The game can go on for ever but it definitely ends when the player has exhausted his financial resources. Therefore, contrary to other leisure activities which are healthy and educating (travelling, sports etc.) games of chance can sometimes reach a point where they are decaying the very social structures. (Bot, 2008, paras. 15-17 and 27-33)

When a member state measure imposing restrictions on betting is contested before the ECJ there are two different paths that this case can take. The first is to consider it as an infringement of the freedom to provide services and the second as an infringement of competition. So far all relevant cases have taken the former rather than the latter path, i.e. they are examined as to their compatibility with the freedom to provide services. The Treaty however includes provisions according to which these cases could also be examined from the point of view of competition law.
I. The Exception of Article 86 (2) of the EC Treaty

State measures restraining competition are referred to only once in the Treaty. According to article 86 (1) even in the case of enterprises to which the state has granted a monopoly, the State is not allowed to maintain measures contrary to Treaty provisions (Temple, 2003).

According to Article 86 (2) of the Treaty «Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.»

Article 86(2) therefore is introducing an exception from the rules of competition and allows the imposition of a monopoly as long as three requirements are satisfied:

- there is an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly
- the application of competition rules obstruct the performance, in law or in fact, of the particular tasks assigned to these undertakings
- the development of trade must not be affected to such an extent as would be contrary to the interests of the Union

Article 86(2) is a unique provision, very interesting and politically revealing. It is a reminder of the political confrontation between the EU and the sovereign Member States and introduces a ranking of EU and Member State’s goals (Papaloukas, 2009). It appears that a Treaty provision is less important than the will of a Member State to provide a public service. Insofar as a Treaty provision obstructs the performance of this public service, the Treaty provision will not apply. It contains a derogation from competition rules. This derogation is not allowed to all undertakings but only to a special, privileged kind of undertakings, the ones entrusted with the operation of services of general economic interest. In order to examine every time a case arises if article 86(2) is applicable one has to see if the performance of the service by the privileged undertaking is obstructed (in law or in fact) by the application of competition law. The above rule containing these three conditions does not appear prima facie to be related to the principle of proportionality. However the derogation from the Treaty introduced by this provision means that the interests of
Member States have to be reconciled with those of the community. This can only be done by using the proportionality test (Hou, 2007).

II. Case Law on Betting

The ECJ has consistently held that games of chance and gambling represent a particular economic activity (Papaloukas, 2005, p. 39). Member States may legitimately provide for restrictions on the operation of sports betting, on grounds of consumer protection (limiting the passion of human beings for gaming, preventing citizens from being tempted to spend excessively on gaming) and defending the social order (preventing the risks of crime and fraud created by gaming). These are reasons of overriding general interest which may justify restrictions on the freedoms of movement (Placanica and Others, 2007, para. 46; Papaloukas, 2008, p. 309 et seq.).

Therefore, limited authorisation of sports betting could be justified, when it confines the desire to gamble and the operation of gambling within controlled channels or when it prevents the risk of fraud or crime in the context of such operation, and of using the resulting profits for public interest purposes (Läärä and Others, 1999, para. 36; Zenatti, 1999, Gambelli, 2001, para 34).

In other words, such legislation could be justified if, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. It is for the national court to verify whether, national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives (Zenatti, 1999, paras. 34-43). The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end (Läärä and Others, 1999, para. 36; Zenatti, 1999, Gambelli, 2001, para 34).

The ECJ in Gambelli drew the limit, ruling that in so far as the authorities of a Member State incite and encourage consumers to participate in betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings (Gambelli, 2001, para. 74).
III. The Principle of Proportionality in the ECJ’s Case Law

The principle of proportionality (Papaloukas, 2009) was not first used in cases of gambling. It is a very old principle and one that the ECJ has used in many occasions. In the case of art. 86(2) as early as 1982 in the Fromancais case (Fromancais, 1983) the Court stated that in order to define if a measure is disproportionate to the aim sought one should examine «in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and in the second place, whether they are necessary for its achievement». This combination of suitability-necessity test in the case of article 86(2) would mean that the means of granting a special or exclusive right to an undertaking should be suitable and necessary to achieve the aim of the specific general economic interest. This would mean also that the public service purpose cannot be achieved more efficiently (suitability test) by any other less infringing competition law measure (necessity test).

In the case of gambling the ECJ has stated (Gambelli, 2003, para. 65, Papaloukas, 2008, p. 125) that the restrictions on betting imposed by a Member State should:
- be justified by imperative requirements in the general interest,
- be suitable for achieving those objectives,
- not go beyond what is necessary in order to achieve this.
- serve to limit betting activities in a consistent and systematic manner.

The principle was also further clarified by the Court requiring that member states should also:
- Specify the reasons of general interest invoked in order to impose the restrictions. (Lindman, 2003, para. 25, Papaloukas, 2008, p. 181)

Whether one adopts the proportionality test stricto sensu which contains three sub-principles (Emiliou, 1996, p. 191-194) or the more simple suitability-necessity test (Hou, 2007) is, at least in this case, of no importance. The point is that whether sports betting is considered an area where the Member States have a specific general economic interest or not, the principle of proportionality is going to define whether a certain State legislation granting special or exclusive sports betting rights will be deemed contrary to competition rules.

IV. The Encouragement of Players to Bet in a Monopolistic Market
According to the Gambelli rule Member States could not choose to impose a restricting system and at the same time encourage players to bet using the few legal licensees. In Placanica however the Court took a different path by ruling that, it is possible that a policy of controlled expansion in the betting sector may be entirely consistent with the objective of drawing players away from clandestine betting to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques (Placanica, 2007, para. 55, Bot, 2008, paras. 60-68; Papaloukas, 2007, p. 40).

This argument was also used by Advocate General Bot in his opinion concerning the Santa Casa v. Bwin case. He proposed therefore that a certain degree of encouragement to bet could be justified even in a system imposing a monopoly in betting. By defining encouragement as the offering of new betting games as well as advertisement of these games, he considered that in order to satisfy the prospective players’ desire to gamble, it is justified to channel that desire into a legal framework. The creation of new games could achieve that result only if it was accompanied by advertising on a certain scale to inform the public of their existence.

Does this mean that even the promotion and advertising of the sole provider of sports betting services in a state monopoly will be considered as a justified measure from now on?

V. Monopolies as a measure against Illegal Betting

Short of a complete ban on betting services, there are four hypothetical features of state regulation, which in order of rigour are:

1. State monopoly.
2. State controlled licensing under certain conditions.
3. Licensing based on formal procedures.
4. Absolute freedom to provide betting services.

According to the third term of the principle of proportionality the state provision should not exceed what is necessary to achieve the objectives intended in the general interest. In order not to exceed what is necessary there should not be any other, more flexible way to regulate the matter that can achieve the same public interest objectives.

Judging by these requirements of the principle of proportionality Member States
cannot opt for the imposition of a state monopoly, since it would be very difficult to present convincing arguments that public interest could only be protected by imposing the most radical measure from the point of view of competition rules and not by using any other more flexible measure i.e. a licensing system. It would be very difficult for a Member State to justify by using the principle of proportionality the imposition of a state monopoly since there would always be a less restrictive measure to achieve the same objective, i.e. the imposition of a state controlled licensing.

However in Placanica the ECJ concluded that when clandestine betting poses a considerable problem, a licensing system may in fact constitute an efficient mechanism in order to control operators active in the betting sector with a view to preventing the operation of those activities for criminal or fraudulent purposes. This groundbreaking argument in the Placanica case however was referring to the imposition of a licensing system and not a system of monopoly.

What came as a great surprise is that the same argument was used by Advocate General Bot in his opinion in the Bwin v. Santa Casa case (Bot, 2008, paras. 85-88) but contrary to the Placanica case, this case was not about a licensing system but about the imposition of a state monopoly on betting. According to this view even the imposition of a monopoly could constitute an efficient mechanism in order to control operators active in the betting sector with a view to preventing the operation of those activities for criminal or fraudulent purposes.

Does this mean that even the imposition of a monopoly will be considered as a proportionate measure from now on?

VI. ECJ’s Justification for a Member State’s Restrictions

In ECJ’s recent case law two reasons are reported as a justification for the imposition of restrictions on sports betting by member states. The first is to combat the expansion of illegal gambling and the second to combat people’s temptations and desires to gamble.

To what the first reason is concerned, one has to wonder in what way a system granting exclusive or special rights protects consumers from being tempted to spend excessively in gambling and how it is confining the desire to gamble especially when this system is advertised extensively. Prospective gamblers could always turn to one of the State licensed enterprises or even gamble on the internet. In short, notions such as the "desire to gamble" as well as "temptation to gamble" are mens rea. The restriction of competition rules as a means to achieve the protection of individuals from their own desires and temptations sounds very awkward. The principle of
proportionality assumes a whole different meaning when human desires and
temptations are taken into account. The state control of desires and temptations is
attributed to totalitarian regimes.

To what the second reason is concerned, that of preventing the risk of fraud or
crime in the context of the gambling operation, it is criminal laws and Member State’s
police authorities that provide the protection needed, not a monopoly of providers.
Gambling providers not holding a license to operate in a Member State are referred
to as providers of illegal services and thus are en bloc and a priori without serious
arguments considered clandestine, unreliable providers. However all unlicensed in
one Member State gambling providers should not be treated the same. Some of
them hold licenses in other Member States, are active in the business for a sufficient
amount of time to prove themselves and abide to all regulations imposed on them at
least as rigorously as exclusive right holders. The arguments of a State in order to
protect the monopoly imposed, should take into account the fact that these “illegal
gambling providers” are and remain illegal and thus included in the criminal sector
only because this State’s law does not allow them to become legal by granting a
license although some of them have even applied for one. In these cases it is not the
so called “illegal providers” but the restrictions themselves that nurture the so called
“criminal sector” and increase “criminality” in the gambling sector.

The aim to avoid criminal behaviour by clandestine providers as used in the
proportionality test cannot be construed to cover all enterprises operating without
license after a State has denied the granting of this license. Criminal behaviour has
to mean something more than that. Law-abiding, tax paying, candid legal entities
providing gambling services cannot be considered without serious justifications as
related to the criminal underworld just because a license to operate legally in a
Member State is denied to them.

VIII. Conclusion

When a State imposes a monopoly in betting and the entity entrusted with the
betting business is a public one (as the case is in Portugal) the member state can
use as an argument to justify its choice both the exception of art 86 (2) as well as the
arguments presented in the ECJ’s case law on betting. So far though, cases brought
before the ECJ were argued on the freedom to provide services and on the right of
establishment and not on competition grounds. This is probably because usually
private betting services providers consider that in a case based on competition
grounds the state could have an advantage by using the exception of art 86 (2).
However, not all State monopolies in Europe have as a sole betting provider a public
company. In cases were the State monopoly is entrusted on a private, profit making company, plaintiffs could also base their case on competition grounds and not merely on the right of establishment or the right to provide services.

In both cases the case will be decided by using the proportionality principle. In addition to this principle’s requirements, one interpretation of ECJ’s recent case law (Placanica & Bwin)) could be that a member State is allowed to impose a State monopoly on betting as long as these restrictions are used in order to combat illegal betting or the peoples desire to gamble. So far no case was brought before the ECJ involving a private company monopoly on betting. There is a possibility however that such a case will appear very soon as a request for a preliminary ruling from the Greek Highest Administrative Court.
References

Case 34/79 Henn and Darby [1979] ECR 3795
Case 66/82, Fromançais [1983] ECR I-00395
Case C-275/92 Schindler [1994] ECR I-1039
Case C-189/95 Franzén [1997] ECR I-5909
Case C-124/97 Läärä and Others [1999] ECR I-6067
Case C-67/98 Zenatti [1999] ECR I-7289, Case C-243/01
Case C-209/98, Sydhavnens Sten & Grus [2000] ECR I-3743
Case C-268/99 Jany and Others [2001] ECR I-8615
Case C-6/01 Anomar and Others [2003] ECR I-8621
Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007] ECR I-1891
Case C-65/05 Commission v Greece [2006] ECR I-10341
Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009], not yet reported.


Papaloukas, M., Article 86(2) EC and the Principle of Proportionality in Sports Betting. Submitted for publication to the Sport Management International Journal, 
http://www.choregia.org/


(http://www.gclc.coleurop.be/documents/288536_2.pdf)