Comments on the ECJ’s Markus Stoss Decision

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(Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07)

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The present decision, issued on September 8, 2010, is another of the many that have been issued in recent years relating to sports betting and gambling in general. The case took place in Germany where the Federal Governments (Laender) in 2004 introduced a uniform framework for organizing gambling (except casinos), with a view to containing the propensity of the public to gambling and suppress the incitement to squander money on gambling. In other words, the policy of the State is seeking to attract the public to legal providers of gambling services thus confining the operation of gambling within controlled channels and to eliminate the propensity of the public to illegal gambling. The selected means of implementing this policy was to establish a State monopoly for betting, which monopoly was challenged before national courts by individuals seeking to provide betting services themselves.

Based on previous case law of the European Court of Justice (henceforth ECJ),¹ such a measure should be considered in principle as a restriction on the freedom to provide services and/or freedom of establishment. Nevertheless the Court has ruled that such a restriction of fundamental freedoms can be allowed if they are justified by overriding reasons of general interest.² The purpose of preventing the natural

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propensity of the public to gambling and suppressing the excessive inducement to gambling can be considered as overriding reasons of general interest.\(^3\)\(^4\)

Furthermore, each Member State has a wide discretionary power to choose which specific restrictive measures will be taken to achieve the above purpose of public interest.\(^5\) To this date not all the Member States have selected the same degree of protection and the same measures. The selected measures range from a licensing system for gambling service providers to even private monopolies. The restrictive measure taken however to achieve this should in any case meet the criteria of proportionality. Therefore it cannot go beyond what is necessary to achieve the purpose sought and it must also be appropriate to achieve that purpose in the sense that it should contribute to reducing the betting in a coherent and systematic manner.\(^6\)

So the questions arise, first, whether a monopoly is necessary since there are milder measures to reduce the propensity for gambling, secondly, whether a monopoly can help to reduce the propensity for gambling in a consistent and systematic manner even in cases where a Member State seems to tolerate the promotion of other types of gambling which are presumed to present an equivalent or even greater risk of addiction. The ECJ concluded that as a principle the fact that a certain Member State has opted for a measure of State monopoly for betting services and a licensing system for other games of chance, does not by itself mean that the selected policy does not fulfill the requirements of the principle of proportionality and it does not by itself mean that the State’s ability to prevent the public’s propensity to gamble is reduced. But when the authorities of a State encourage the public to participate in gambling for the financial benefit of the Public Purse, it cannot in the same time invoke the public order to justify restrictions on gambling.\(^7\)

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\(^7\) See Gambelli and Others [2003] ECR I-13031 (paras. 7, 8 and 69).
A certain amount of advertising, which aims to channel the public’s demand for gambling to legal providers away from the illegal ones, may be permitted. But when the authorities (as in this case) are undertaking intensive advertising campaigns to attract the public to lotteries highlighting the need to fund cultural and sporting events from the amounts collected, they seem to suggest that the purpose of imposing the restrictive measure of monopoly is to increase public profits. Also when the authorities appear to tolerate the offering of new online gambling methods or the implementation of an expansionary policy related to other types of games of chance such as casino games or automated games installed in gambling arcades, cafes, restaurants etc., which games present an even greater social danger, they cannot at the same time invoke the argument that they are imposing a monopoly in order to protect the public from the dangers of gambling.

According to ECJ’s case law so far many questions could be raised about the future of the monopoly system, followed in Greece. In fact it seems that it will not be long before Greece is brought before the ECJ on this matter. It is reminded that Greece has also imposed a monopoly which is granted to a private company listed on the stock market, while the State shows little interest in limiting the public’s natural propensity to gambling. To the contrary according to the reports preceding the issuing of the law on gambling but also according to articles in the press, the policy followed is mainly associated with the effort to raise revenue for the public purse and not so much to protect the public. Obviously the time has come for the State strategy to change and to link the imposed restrictive measure of monopoly, with a policy of protecting the public and not with the aim of increasing Public revenues.

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8 See para. 61 of the Opinion of Advocate General Paolo Mengozzi of 4th March 2010 on the present case.
9 See decision 231/2011 and 232/2011 of the Supreme Administrative Court of Greece making a preliminary reference to the ECJ.
11 See article published on the newspaper NAFTEMPORIKI, Friday 27th August 2010 titled «Predictions about 700 million euros of Profits from the Reinstitution of Games of Chance ».