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REACHING A CRITICAL POINT

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SPORTS BETTING MONOPOLIES REACHING A CRITICAL POINT

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Every Member State in Europe has a wide discretionary power to choose which specific restrictive measures will be taken to achieve the purpose of containing the consumer’s natural propensity to gambling and suppress the incitement to squander money on gambling. To this date Member States have not selected the same degree of protection nor the same measures. The selected measures range from introducing a licensing system for gambling service providers to even imposing private monopolies. ECJ’s decision in the famous Markus Stoss case answered what was supposed to be the last of many questions on betting monopolies and oligopolies. However there is one last case scenario that remains unanswered. In some countries sports betting monopolies are entrusted to companies listed on the stock exchange without any obligation to implement a responsible gambling policy. These questions have recently been referred to the ECJ. Is the ECJ’s answer to these questions going to be the beginning of the end for sports betting monopolies in Europe?

KEYWORDS: sport betting, sport gambling, online gambling, sport law, EU law, competition law, internal market, CJEU case law
I. Sports Betting and Fundamental Freedoms Restrictions

According to the EC Treaty Member States should abolish restrictions on the freedom to provide services (even if those restrictions apply without distinction to national providers of services and to those from other Member States), when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The Court of Justice of the European Union (henceforth the CJEU) has ruled that a Member State’s legislation which prohibits sports betting providers established in another certain Member State from offering via the internet services in the territory of the former Member State, constitutes a restriction on the freedom to provide services. Such legislation also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.

It is necessary to consider to what extent the restriction of these fundamental freedoms may be allowed as a derogation expressly provided for by Treaty Articles, or justified, in accordance with the case-law of the CJEU, by overriding reasons in the public interest. The Treaty allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in favour of the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order. In that context the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required.

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4 See, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 54.
5 See Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, paras. 51-54.
6 See articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC
7 Article 46(1) EC
in order to ensure that the interests in question are protected. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State does not mean that any of these Member States’ measures are in breach of Treaty provisions. It is for each Member State to decide the degree of protection which it wishes to ensure and impose the respective restrictive system concerning sports betting provided that proportionality requirements are satisfied.

II. Gambling and Monopolies in Europe

In order to prevent incitement to squander money on gambling and combating addiction a Member State is allowed to go as far as to even establish a public monopoly concerning sports betting. However according to the CJEU, Treaty provisions do not preclude legislation of a Member State, which prohibits sports betting operators established in one Member State, in which they lawfully provide similar services, from offering games of chance within the territory of another Member State, even if the latter has imposed a system of monopoly.

A Member State’s choice to impose a State monopoly rather than a licensing system is capable of satisfying the requirement of proportionality, in so far as the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities. This however does not mean that in order to justify this public monopoly the national authorities concerned should necessarily be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter.

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13 See Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa.
In addition the State Monopoly Member States are even allowed to take advertising measures attracting consumers towards the sole legal operator. These advertising actions should however be limited to what is necessary in order to channel consumers towards the offer emanating from that holder of the monopoly by turning them away from other channels of unauthorised games. These measures should not reach as far as to encourage the propensity of consumers to gamble and to stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities. National legislation, which seeks to curb addiction to games of chance and to combat fraud, and which in fact contributes to the achievement of those objectives, is regarded by the CJEU as limiting betting activities in a consistent and systematic manner even where the holder of the monopoly is entitled to make its product attractive on the market by introducing new games and by means of advertising. In some cases unlawful gaming activities constitute such a problem in a Member State which can only be tackled by the expansion of authorised and regulated betting activities. In such cases it is possible that the extent of illegal gambling problem makes it possible to reconcile such marketing measures with the objective of curbing such addiction. Therefore 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 illegal operators offering clandestine betting to operators 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.

Solely the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring compliance with such a monopoly by organisers of games and bets established outside that Member State, who, via the internet and in breach of the said monopoly, conclude bets with persons within the

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16 See Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, Markus Stoß v Wetteraukreis.
17 See Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, Markus Stoß v Wetteraukreis.
18 See Case C-258/08, Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator
territorial area of the said authorities, is not capable, as such, of affecting the potential conformity of such a monopoly with the said provisions of the Treaty.\textsuperscript{20}

In cases however where there is a State monopoly and at the same time a licensing system for private operators for other types of games of chance not covered by the said monopoly, and presenting a higher potential risk of addiction than the games subject to that monopoly and the State authorities appear to be tolerating policies of expanding supply in such a way as to develop and stimulate gaming activities, then such a monopoly should be considered unsuitable for guaranteeing achievement of the objective for which it was established (i.e. that of preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner).\textsuperscript{21,22}

\textbf{III. The Last Private Monopoly}\textsuperscript{23}

In the above mentioned cases a State Monopoly was imposed on Gambling. A public authority was entrusted with the task of protecting consumers from the gambling risks (gambling addiction, fraud risks etc.). So far the CJEU has issued decisions that preserve the rights of every Member State to deal with the matter of sports betting. Thus under certain conditions oligopolies and monopolies in this sector have been able to navigate around the icebergs of Treaty provisions on fundamental rights such as freedom to provide services. It would be very interesting to examine what the case would be if a Member State imposed by law a private monopoly on gambling and the sole operator in the market were a company whose responsibility would be to its shareholders in the Stock Market.

Greece is the only Member State which has adopted a State imposed private monopoly and the provider of the betting services is a company enlisted in the Stock Market. According to its constitutional documents it is not entrusted with the task of protecting consumers against gambling risks. After all such a task would be contradicting its main purpose as an enlisted company which is the safeguarding of

\textsuperscript{20} See Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, Markus Stoß v Wetteraukreis.
\textsuperscript{21} See Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, Markus Stoß v Wetteraukreis.
\textsuperscript{22} See Case C-46/08, Carmen Media Group Ltd v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein
the investors-shareholders money. Companies enter the Stock Exchange Market in order to attract investments from the public. Anyone investing does so in the hope to make a profit from its investment. The company in turn receives the investors money with the promise to make all efforts possible in order to increase the invested capital and pay dividends. Putting money in a company whose purpose is to protect the public from the risks of gambling, sounds more like a subsidy to perform a public function rather than a private investment. In that sense it would be an oxymoron if such a private company was trying to maximize gambling profits and at the same time sought to protect the consumers from the risk of squandering money to gambling.

IV. Preliminary references before the CJEU (C-186/11 & C-209/11)

In 2005 and 2007 two UK based private operators providing betting services and listed on the London Stock Exchange aimed at expanding their business in other European countries. These companies intended to establish themselves in Greece, by providing a betting network similar to the one provided by the holder of the Greek betting monopoly. To that purpose, in 2007 they lodged an application to the Greek authorities in order to be recognised in Greece as legitimate betting services providers and to be granted the relevant license and/or authorization to conclude the relevant concession contract. The application also included the request to immediately stop the activity of the public monopoly’s holder denouncing the relevant exclusive contract with the Greek State as being contrary to European Community Law.

The Greek government did not respond to this application within the legally prescribed time limit, so based on the Greek law, these companies have submitted requests for cancellation to the Supreme Administrative Court against the implied rejection of their request. As there is no appeal against the Supreme Administrative Court’s decisions, an issue was raised as to making a request for a preliminary question to the CJEU. The Supreme Administrative Court issued a decision in 2011 to make a preliminary reference about this matter to the CJEU. The CJEU will be soon issuing a decision in the joined cases C-186/11 & C-209/11. The questions referred concerned the following points:

1. Whether it is compatible with Articles 43 and 49 EC a national legislation which, in order to achieve the objective of limiting the supply of betting services, assigned the exclusive right to provide these services to a private enterprise in the
form of a limited company and is listed on the stock market and in addition this company takes extensive advertising and expanding measures.

2. In case the answer to the first question is negative, the Greek court also asked whether it is compatible with Articles 43 and 49 EC a national legislation which, in order to tackle the problem of illegal gambling, assigns the exclusive right to provide these services to a company with the characteristics mentioned above.

3. In case the Greek Monopoly is considered contrary to EC law, would it be compatible to EC law to implement measures providing for a transitional period in order for the State to adopt the necessary measures regulating the market in a way that is compatible to EC law and what are the criteria in order to define the extent of such a transitional period.

V. The Future of Gambling

Therefore so far the CJEU has ruled in favour of the legislative measures taken by Member States which impose the restriction of the betting market by a licensing system or by a public monopoly provided that the requirements of the principle of proportionality are satisfied. Under the same conditions the CJEU could even allow a private monopoly to exist. It also does not object to advertising and promotional measures in order to channel prospective clients away from illegal betting providers and towards regulated operators.

It is expected that this is where the CJEU will draw the line. A national system entrusting a betting monopoly to a private company enlisted to the Stock Market, with no responsible gambling policy, extensively advertising and expanding abroad cannot be tolerated as an adequate and effective measure in order to restrict the public’s propensity to gamble.

This case therefore, on which the CJEU has not issued a decision yet, concludes all possible scenarios concerning sports betting regulation systems. Given the fact that the CJEU so far ruled in favour of all State Monopolies, a decision prohibiting a private monopoly with no responsible gambling policy whatsoever, sounds like a slap on the wrist of the Betting Monopolies in Europe. In the near future it should come as no surprise if the bitter blow to Monopolies is delivered not by land-based private betting operators by the internet service providers.

Before all modern technological means (internet, smartphones etc.), States could impose their will on the gambling market. When private operators started using the
internet, online gambling started threatening the monopolistic establishment.\textsuperscript{24} Therefore States had to adopt a whole new set of rules to cope with this situation and online gambling regulations were being introduced.\textsuperscript{25} However with new case law from the CJEU and new laws being introduced in all member States regulating online gambling, private operators are becoming more and more creative when they design their websites in an effort to by-pass gambling regulations. It seems that the new trend is to set up a quasi-gambling site giving virtual start up money to prospective players with which they start betting on sports events. If a player is winning and its virtual money reaches a certain amount, the player can collect the money. If the player looses its virtual money the site offers the player again another such amount to start again. The site also hosts many ads from gambling sites from which the operators receive a percentage of the player’s loss. This is where their profit comes from. So far it is not considered that these quasi-gambling sites should be considered as gambling sites since the player is using virtual money and does not risk any of its own money. However the fact that they receive a percentage from the loss of the players they introduce to other gambling sites could be interpreted as being in de facto partnership with these gambling sites. The situation is even more complicated when one considers the fact that not only quasi-gambling sites host gambling sites ads and receive a percentage from the loss of the players they introduce.\textsuperscript{26} Therefore although case law on monopolies seems to have taken its course, many more Court decisions on gambling cases are expected.

Bibliography


- Case 34/79 Henn and Darby [1979] ECR 3795
- Case C-76/90 Säger [1991] ECR I-4221
- Case C-275/92 Schindler [1994] ECR I-1039
- Case C-124/97 Läärä and Others [1999] ECR I-6067
- Case C-67/98 Zenatti [1999] ECR I-7289
- Case C-58/98 Corsten [2000] ECR I-7919
- Case C-268/99 Jany and Others [2001] ECR I-8615
- Case C-243/01 Gambelli and Others [2003] ECR I-13031
- Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa
- Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, Markus Stoß v Wetteraukreis
- C-258/08, Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator
- Case C-46/08, Carmen Media Group Ltd v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein