

ON LAW AND POLITICS OF THE SWEDISH GAMBLING MONOPOLY

By Ola Wiklund

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 private groups 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 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 includes 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.

Gambling services can consequently be offered cross border to Swedish customers without violating Swedish law. Also, the room for maneuver 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 channeling-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 can't 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.

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

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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 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 sale 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 evi-

dence 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 middle men 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 Administrative 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, and so on. No specific restrictions

on gambling marketing applicable to the State-owned companies exist.¹

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 (Sw. 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



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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 (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. The *Rosengren* case was about the Swedish regulations for private importation of alcoholic beverages, namely, the regulations which 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 their 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 prin-

ciple 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 the state retail monopolist 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% 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

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¹ 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.

² 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 the invoked grounds for justifications: public health and public order. No proportionality-test was performed by the CJEU.

³ The freedoms legal base 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).

first responders to slip and fall incidents:

- Offer assistance – immediately call for medical attention, police, and other first-responders, as appropriate.
- Gather documentation – prepare a comprehensive incident report, including witness statements and contact information, and a statement from the injured party.
- Secure video surveillance footage and/or take photographs of the scene and the claimant (if they allow you).
- Report the incident to risk management, legal and the insurance carrier.
- Follow-up with claimants within 24 hours. Let them know of your concern, and find out if they sought medical attention. Also have a corporate representative contact them within a few days, and maintain records of all contact (and outcomes). If the area of the fall is defective, make sure building operations and risk management are aware of the hazard so that it can be repaired as soon as possible.
- Preserve evidence, i.e. a mat, floor tile, etc. DO NOT conceal evidence. It can result in additional damages from a separate cause of action for spoliation of evidence.
- Monitor for and keep record of social media postings by the claimant/plaintiff.

Slip and falls may still happen, so what's next?

Even with the best of intentions, and with industry leading policies and procedures, proper vigilance and pro-active maintenance and repair, slip and fall accidents will still occur. For property owners in the casino or hospitality industries, it is crucial to develop world class legal protocols designed to limit liability and manage slip and falls when they do happen.

All strategies begin with an initial assessment or audit. Establishing benchmarks through measurement and then implementing constant monitoring followed up by auditing those results will create a culture of safety that will produce measureable cost savings. This culture of safety may involve creating custom models designed to address specific concerns or more broad applications to address systemic problems.

In the final analysis, creating a culture of safety will produce a significant reduction in litigation costs. Even though slip and falls may be a cost of doing business in a highly profitable and visible industry such as gaming, the safety of guests, staff and other visitors does not have to take a back seat to profit. ♣



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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 easily 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, very few restrictions exist for foreign private operators to offer and market gaming services to Swedish customers.²

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, the incoherent and unsystematic Swedish gambling monopoly is not likely to survive. Compared to the alcohol monopoly, the gambling monopoly could be characterized as the horror cabinet of 'Madame Tussauds'.

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 regards to the virtual flood of legal marketing channels available to Swedish customers. In this environment, it's 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 can't 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 ♣