The Present Market
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 days, the marketing budget of the state-controlled gaming services offered by Svenska Spel and ATG 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 (well over 90 percent), 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 in the world.

Gambling companies licensed or authorized elsewhere within the EU can 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 exterritorial 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 and other commercial marketing co-operations could be carried out without risk of sanctions, if structured properly. The only remains of the public monopoly is the marginalized and circumvented marketing prohibition. Hence, globalization, market practice, internet penetration and political passivity have made the current legal regime obsolete and created a fairly liberal market for online gaming in Sweden. However, this situation might be over. For the third time the Swedish government have taken the initiative to regulate the market.

Introduction Of Licenses
For the first time in 20 years there seems to be a broad political consensus to regulate the market by introducing a licensing system for predominantly online gaming. The Inquiry on the Re-regulation of the Swedish gaming market (SOU 2017:30) published its comprehensive report on March 31.
The proposed licensing regime covers a broad spectrum of gambling products: online casino, online betting, online poker and online bingo. Land based sports betting and land based horse-race betting will also be included in the licensing regime. Lotteries and land based slot machines will remain monopolized. There will be a 18% tax on the net gambling revenue. No payout ceiling on wins is recommended.

A license will allow private online gambling companies, Svenska Spel’s and ATG to operate on the competitive section of the market. It is proposed that ATG no longer have a monopoly on horse race betting. This will open up for competition from other operators that offer horse race betting. Like other gambling companies, ATG will have access to the competitive gambling sector on the same conditions and become a licensee like others.

Svenska Spel’s exclusive rights will cover token gaming machines and land based casinos in designated premises – Casino Cosmopol. The company will also have to continue to compete with the public interest associations with respect to online and land based lotteries. According to the Inquiry’s proposal, the future competitive section (Svenska Spel K) will get licenses that will cover online and land based sports betting, online casino, online poker and online bingo.

The Inquiry’s proposal will include horse race betting in the licensing system and in the competitive section. This means that ATG will become an operator like any other private gambling operator. These gambling companies may enter into agreements with the harness and horse racing organizations that own the courses and other infrastructure. It is proposed that the Government withdraw from its involvement in ATG and equestrian sport in the form it has hitherto had.

The Inquiry proposes a tax rate of 18 per cent on gambling in the competitive sector. The tax rate is to be calculated on net gambling revenue, i.e. the company’s profit after paid winnings. The Inquiry hopes that through a tax rate of 18 per cent and a regulation that does not entail an excessive administrative burden, at least 90 per cent of the competitive market will be channeled into regulation.

The Inquiry proposes that in principle all gambling companies pay a license and supervision fee. The fees are based on the companies’ turnover and the number of games involved. The license fees in the competitive area vary from SEK 60,000 to SEK 700,000 and the annual supervision fees in the same area are between SEK 30,000 and SEK 1 million.

All gains from wins that stem from unlicensed operators will be taxed as income. The Inquiry thinks that this will deter consumers to gamble on unlicensed sites.

An effective system of sanctions is a prerequisite for the sought channeling effect. A number of criminal offences are introduced. A party that intentionally or through gross negligence provides (in Sweden), arranges (in Sweden) or otherwise facilitates (in Sweden) participation in gambling for a person resident or permanently staying here without a license when this is required under the Gambling Act shall be sentenced for unlawful gambling activities to a fine or imprisonment of at most six months. If the crime is gross, the penalty is imprisonment of at least six months and at most six years.

For the promotion of illegal gambling, i.e. a breach of the promotion ban, the Inquiry believes that the range of punishment should be significantly raised in relation to what is applicable today. It is proposed that the range of punishment be the same as for the principal offence, i.e. from fines or imprisonment of at most two years or, if the crime is gross, imprisonment of at least six months and at most six years.

If a gambling company that has a
Swedish gambling license violates the Gambling Act, regulations or conditions issued by virtue of the Act, a sanction charge shall be imposed in the first instance. This can vary between SEK 5,000 and SEK 50 million. The sanction charge may not exceed ten per cent of the company’s turnover in Sweden.

It is furthermore proposed that internet service providers be required to display a warning message when a visitor attempts to play on illegal sites. The message shall inform the visitor that the game provider does not have a license in Sweden and is not under Swedish supervision.

The Inquiry does not propose the blocking of electronic communication to sites offering games that are not legal in Sweden. However, it is proposed that the blocking of payment transactions between illegal gambling companies and players should be considered. For reasons of competition, this should be introduced simultaneously by all concerned parties or payment transfer providers. The provision of payment transfers to and from unlicensed operators will be criminalized with a range of punishment from fines or imprisonment of at most six months.

A new crime classification will be introduced, the offence of cheating at gambling (match-fixing and other types of manipulation of the outcome of a game). The offence shall be able to be imposed with a prison sentence of at most two years. If the offence has been committed intentionally and has been conducted systematically or on a major scale or has otherwise been of a particularly dangerous nature, it is classed as gross, resulting in imprisonment of at most six months and at most six years.

Apart from these sanctions the Inquiry introduces a number of additional burdens on operators: most notable are marketing restrictions and a wide arsenal of player responsibility provisions to be complied with.

Analysis

The Inquiry is rather brash when it comes to the stated financial purpose of the proposed bill and highlights that cross-border gambling companies represent a market share of approximately 23 per cent and their market share is increasing and that the fifteen online gambling companies publicly listed in Sweden represent a market value of SEK 69 billion (SEK 11 billion in 2011). The Inquiry wants to bring some of these profits to the state-purse:

“This reflects the large profits made by these companies and the market’s even greater expectations. Few online companies have as great profit margins as the online gambling companies. In 2016, the net turnover of the online gambling companies un-regulated in Sweden was SEK 5.1 billion. The motive of central government to re-regulate the gambling market is to gain control over this part of the market through regulating and licensing. This involves issues regarding taxes, gambling responsibility and consumer protection.”

To ensure that a large share of these revenues end up in the state purse the Inquiry uses war rhetoric to underline the purpose of the proposed legislation:

“The proposed re-regulation mobilizes a large part of central government’s combined arsenal of legal, economic and administrative measures in order to take control of the gambling market and of conditions in which the old Act has become increasingly unmodern.”

The Act is a product of political pressure to quickly produce new legislation for the purpose of transferring private profits to the state purse. This has inflated the pressure on the Inquiry. In volume the Report amounts to one of the biggest bureaucratization of a market in modern time. One could question whether this bulk of new legislation really reflects the demands of the market.

In the case of Framework laws such as the new Gambling Act, constitutional requirements of predictability and legality is neglected when timing is vital for political gains. This reflects the Governments fear of losing timing. After three dropped balls the market’s confidence in the politicians is at an all-time low. If the political momentum is lost the bill is likely to fall.

The result of the Framework law might well be a discrepancy between what is considered politically necessary and, on the other hand, what is feasible in terms of available resources. The proposed vast criminalization and sanction arsenal would require that huge new resources are transferred to police, prosecutors and the courts. And without proper enforcement against unlicensed operators the licensing regime amounts to a high risk project for the licensees. Moreover, large new burdens regarding player responsibility, marketing and administrative liabilities are laid on the licensee. But the greatest risk for the operators come with the chosen legislative vehicle.

A Framework Law has to be filled out and completed through regulations by the government and the administrative authorities such as the new Gaming board (Spelmyndigheten), or by court practice. In the Act we find a number of indeterminate and vague objectives to be achieved, and the general principles to be respected in the enforcement of the law. These vague provisions must be filled with the standards of more tangible impact if they are to be meaningful. When you leave this wide discretion to the courts and authorities it creates legal uncertainty and sharply divergent court practice.

The father of the Report, Häkan Hallsted, label this flexibility.

A prevailing fear is that the state controlled companies will use the time lapse between the publication of the Inquiry’s proposal and its coming into force to abuse their dominant position on the market. ATG is already trying to
hurt competitors through abuse of its dominant position on the horse racing-market. Moreover, since Sweden hasn’t recovered from the hang-over of the vast privatizations of the 1990s the politicians might be reluctant to privatize Svenska Spel (K). In the mean time Svenska Spel is likely to use its acquired political leverage to further abuse its dominant position in a similar way as has been the case in France and Denmark. 

Last but not least, if the Swedish government fails to negotiate a tax exemption with the EU Commission for the vaguely defined non-profit sector according to the EU-state aid rules the proposal is likely to fall. The reason is that the ruling Social Democratic Party is mainly funded by an entity of the sector.

Hence, for the market actors that seek foreseeability, legality and predictable business conditions the Inquiry’s proposal presently seems rather fragile. The operators and service providers of the market should prepare for a bumpy road ahead.

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