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The Swedish Monopoly on Gambling

How to address the shifting reality of the Swedish gambling market

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Contents

Summary

Gambling and the national gambling markets has so far not been harmonised through any Community law regulation or directive. Instead gambling is covered by the general principles of Community provisions for the free movement of services article 49, and the closely connected article 43 regulating the freedom of establishment. This has been established through the case law of the ECJ.

The Member States of the Community have intended to keep the control over the national gambling markets. By reference to the moral, religious or cultural aspects of gambling, and hence the harmful effects gambling may have on individuals and the society in whole, certain restrictions to the general principles of the Community has been considered legitimate. Community law emphasise the proportionality of the aims of the national regulatory regimes.

The Swedish regulatory regime could be considered as a highly controversial attempt to regulate the Swedish gambling market. Public owned companies are entitled to the exclusive rights of operating the market. The Swedish monopolies on retail of alcohol, pharmaceuticals and gambling have all been, or are currently, up to examination by the Community institutions.

As of the development of cases from the ECJ, concerning national restrictions on gambling, it is possible to state several conclusions. Even though the initial cases were rather tolerable towards national restrictions to free movement of services, it almost felt like the Member States through *Schindler*, *Läärä* and *Zanetti* were given free manoeuvre to regulate gambling and gaming, the Court clearly framed the conditions or requirements for the national restrictions in order not to be consistent with the Treaty. In later cases these conditions have been even more emphasised.

The United Kingdom and the Netherlands constitutes two interesting examples of how different Member States have chosen to regulate their gambling and gaming market. Even though both States have public interests governing their regulatory regimes, they have chosen different forms than the Swedish example for their gambling regulations. The UK is a good example of a Member State with long tradition in betting and gambling but with a rather open market competition. The regulatory system of Netherlands in turn has chosen both to be quite restricting in some areas and more liberal in others.

The Swedish monopoly is currently under intense examination. The monopoly are challenged both in national Courts as by the Commission. A review by the ECJ will probably be reality in not a too long time phase.

The enforced competition through internet and mobile communication is met by means of more marketing and new gambling forms by the Swedish gambling monopolies. This approach of encountering the shifting reality of the gambling market is problematic in a Community law perspective. The approach does probably not express a legitimate aim of general interest, as required by the ECJ.

The gambling market has been developing in a furious way during the last 10 years, a period corresponding to the Swedish membership to the European Union. The new communication technology has decreased the measures to uphold national borders, for good and for bad. The gambling monopoly in Sweden is active in a shifting reality, where it has to adjust not only to a shifting market but also to a legal reality other than ten years ago.

Preface

As a law student, I have always been interested as to how legal cultures and legal orders interact. Traditionally, legal orders are restricted to the national borders of their home country. However, as the European Union have changed this reality, the legal orders of Europe are no more limited to national borders. As the topic of my thesis illustrates this shifting reality, I have really enjoyed working with this thesis, examining the compatibility of the Swedish monopoly on gambling with Community law. This shifting reality is for me a fascinating topic, which I truly wish to continue to explore in the future.

The work with this thesis has been incredibly intense and interesting. I wish to thank my supervisor, Jörgen Hettne, for helping me with ideas, comments and contacts, which have contributed a lot to the final result of this thesis. At the same time I wish to express my deep gratitude to all my fellow students in the Master programme. This year has been incredible, and I really think I have learned as much from all my new friends as I have done from the courses. The support I have received has been incomparable. For example would this thesis not have been achieved without the dynamic effects of the Sparta workshops.

Finally, I wish to thank my family for all the support and encouragement that I have always received. This support has definitely been my inspiring force for the last ten years.

The thesis marks the conclusion of both my year as a student of the Master of European Affairs programme, and my time as a student in Lund. My thoughts go wandering back to last summer, and the European Championship in Portugal. In the game between Sweden and Italy, a young player called *Zlatan Ibrahimovic* scored an amazing goal, which started an incredible football carrier. Today, one year later, *Zlatan* is Italian champion with Juventus, and even though I do not expect to play for Juventus in the future, the incredible goal of last summer was fearless and daring, and in that sense it has inspired me in many ways. At the same time as my time as a student is ending with this thesis, I hope and believe that this ending is the beginning of something else.

Emanuel Allroth
Lund the 31st of May, 2005

Abbreviations

Bet	Betänkande (Parliamentary report)
CMR	Common Market Review
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
ERT	Europarättslig Tidskrift
EU	European Union
LL	Lotterilagen
Prop	Proposition (Government bill)

1 Introduction

1.1 Background

As perhaps the most essential part of the whole European integration project called the European Union, the four freedoms for goods, service, persons and capital constitutes the common European internal market. The four freedoms together with the freedom of establishment and the Community competition law have created a European internal market prescribed to non-discrimination and free competition.

Gambling and the national gambling markets has not so far been harmonised through any Community law regulation or directive. Instead gambling is covered by the general principles of Community provisions for the free movement of services, as found in article 49, and the closely connected article 43 regulating the freedom of establishment. This has been established through the case law of the ECJ.[1]

The Community concept of gambling and gaming includes most forms of gambling. Gaming machines and betting are covered by the service concept, since the ECJ have established that activities which consists of operating gaming machines (slot machines) and taking bets constitutes an economic activity, which relates to the free provisions of services. In *Läärä* the Court came to the decision that even if the provisions of the Treaty relating to the free movement of goods may be applicable to slot machines, which constitute goods capable of being imported or exported, the fact that an imported item is intended for the supply of a service does not in itself mean that it falls outside the rules regarding freedom of movement. [2]

However, the Community Member States have attempted to keep the control over the national gambling markets. By reference to the moral, religious or cultural aspects of gambling, and hence the harmful effects gambling may have on individuals and the society in whole, certain restrictions to the general principles of the Community has been considered legitimate (these will be more thoroughly examined in chapter 2.3). In this context, Community law emphasise the proportionality of the aims of the national regulatory regimes.

As a member to the European Union, Sweden has tried to harmonise its market and market regulations. However, Sweden has during its first 10

[1] Case C-275/92, *HM Customs and* Excise v. *Schindler* [1994] ECR 1039, para. 19.
[2] Case C-124/1997, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäjä (Jyväskylä) and Suomen Valtio* [1999] ECR I-6067, para. 24. See the opinion of Advocate General La Pergola of March 1999 in *Läärä* and the opinion of Advocate General Fennelly of 20 may 1999 in *Zenatti* for a comprehensive discussion. See chapter 2.6 for further discussion.

years as a member to the European Union fiercely fighted to keep some of its regulated restrictions to the common internal market. The Swedish monopolies on retail of alcohol, pharmaceuticals and gambling have all been, or are currently, up to examination by the Community institutions.

The Swedish legislation could be considered as a highly controversial attempt to regulate the Swedish gambling market. Public owned companies are entitled the exclusive rights of operating the market. The aims of these companies are questionised from many directions, especially from potential competitors.

As the unique status of the European Union makes the Community law in some areas negotiable, the fight for the Swedish monopolies has been clearly politicised. Nevertheless, as longer as Sweden stays member to the Union, as harder it becomes to keep its arguments for Sweden's exceptions to the general principles of Community law. However, the European Court of Justice (ECJ) has not dismissed the idea of objective justifications for the Member States to restrict the internal market concerning gambling.

1.2 Purpose

The purpose of this thesis is to examine the compatibility of the Swedish monopoly on gambling in relation to the Community law. In order to examine this I will scrutinise the relevant Community provisions and principles, emphasising the free movement of services and the legitimate restrictions to the same. I will also try to find a development in the Community law by looking on relevant case law and use other Member States to exemplify alternative solutions.

1.3 Method and Material

In this thesis I have used the traditional legal method of legal dogmatics and described, examined and interpreted legislation, principles, cases and doctrine. Nevertheless, as the field of study of this thesis is complex, and not solely limited to legal concerns, in addition to the legal concerns, political as well as economical conditions has been given attention.

By systematically examine cases and other Member States' regulatory regimes, I have compared how national regulatory regimes are standing in relation to Community law. The basis for this analysis is that an examination and comparison of different jurisdictions both problemize and widen the description, and hence hopefully generate solutions for the writer as well as the reader.

Even though my general conclusion is put forward in the final chapter, the ongoing description of the topic in this thesis is mixed with analysis in addition to personal comments in order to have a comprehensive discussion

throughout the work. However, my intention has been to be clear where the descriptive elements have ended and my personal reflections have started.

The materials I have chosen to examine have mainly been English versions. My belief is that this has not been a problem in examining the issue of the topic, since the main problems of the topic lies in the interpretation of common concept and principles, such as proportionality. Moreover, the limitation of this work has not made any alternative methods possible.

1.4 Delimitations

This thesis does not specifically examine competition concerns, as regulated in Article 86 EC. Neither will the rules concerning public purchasing be addressed. In examining the legitimate objective justifications to the free movement of services, my focus has been on the principle of proportionality, as the Swedish regulatory regim is most often challenged on the basis of its proportionality. By focusing on the principle of proportionality, other related and important principles obviously obtain less attention. Nevertheless, this thesis does not claim to have a full coverage of the cases or problems concerning gambling, instead the selection of cases and problems are chosen in order to achieve my purpose of this thesis.

By looking at the monopoly market in a wide perspective, including all kinds of gambling and gaming under a common concept of gambling, I have tried not to let the extensive list of various gambling and gaming forms complicate the current field of study. This approach has been confirmed by the ECJ case law, as seen in chapter 2.6 and 3.

The focus of my thesis has been on the issues I have considered most important. I have chosen this focus since I consider it to be the most interesting and describing approach in order to apprehend the problems of national regulatory regimes on gambling in the best way.

1.5 Definitions

I have chosen the concept of regulatory regimes or networks in trying to catch the national set of regulations for controlling gambling.

By using the words as gambling, gaming and lottery I have tried to facilitate the vast concept of different forms of gambling. There is huge field of technicality in different forms of gambling, which I have intended not to go to deep into, with the aim of facilitating for the reader.

1.6 Disposition

The thesis is divided into seven main chapters, chapter 1-7. In chapter one the background and structure of the thesis is outlined.

In the second chapter, the concept of the general principle of free movement of services is scrutinised. Systematically, the scope and legitimate restrictions to the general principle are analysed. The free movement of services is also compared with the connecting concepts of freedom of establishment and free movement of goods.

In the third chapter, relevant case law from the ECJ are described and examined. The five selected cases are meant to describe both the essential problems but also a stipulated development. At the end of this chapter I present my conclusions drawn from the selection of cases.

In chapter four, the Swedish regulatory regime and current gambling market are briefly scrutinised. Because of the structure of the thesis, comparisons and cases are dealt with in later chapters. The focus has been to describe the problems in relation to the purpose of the thesis.

In the fifth chapter, the United Kingdom and the Netherlands are chosen to give an alternative perspective on how Member States to the European Union have framed their regulatory regimes concerning gambling and gaming.

The sixth chapter provides an analysis of the recent developments concerning the Swedish monopoly on gambling. The case *Wermdö Krog*, recently given by the Swedish Administrative Supreme Court, is examined and the *formal notice* given to the Swedish government by the Commission is presented.

2 Free movement of services

This chapter will try to examine the general principles of free movement of services and the exceptions given to this concept in a gambling context.

In addition to goods, persons and capital the free movement of services and the closely linked freedom of establishment constitutes the four freedoms of the internal market. The central principles governing the legal framework for free movement of services and freedom of establishment are laid down in the EC Treaty[3] and developed through ECJ case law.[4]

The rules on the freedom to provide services have direct effect and became directly applicable at the end of the transitional period.[5] The absence of a relevant Directive for a specific service has often constituted an obstacle to the unrestricted provision of services. This is because, in the absence of harmonising Directives, Member States have often been able to justify restrictions on the free movement of services.[6]

Services are a wide and diverse category of economic activities. The EC Treaty has a separate chapter on services, consisting of Articles 49-55 EC. Services are defined negatively as not being covered by the Treaty rules concerning the free movement of goods, persons and capital. The negative definition of services implies that they are a residual category and that Articles 49-55 are only relevant if no other Treaty provisions apply.[7] Correspondingly, the Court has held, in for example *Gebhard*,[8] that the Treaty chapters on the free movement of workers, the right of establishment, and services are mutually exclusive and that the provisions relating to services can be applied if the right of establishment is not applicable.

While the Treaty provisions governing the free movement of services are residual, it is often difficult, in contexts such as gambling and gaming machines (see chapter 2.5 for the difficulties in defining gambling and especially gaming machines) or telecommunications, to separate the issues concerning goods from those concerning services.[9]

However, as seen in the case-law from the ECJ on gambling and gaming machines, the Court has recognised that in the event of transactions involving both movement of goods and services the rules concerning

[3] Treaty on the European Community, Last consolidated version, Official Journal C 325, 24.12.2002.
[4] Craig & de Burcá, *EU Law*, p. 765
[5] Established by Case 33/74, *Van Binsberger* v. *Bestuur van de Bedrijfsvvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[6] Francoise Blum, *State monopolies under EC law*, p. 132.
[7] Jukka Snell, *Goods and Services in EC Law*, p. 6.
[8] Case C-55/94, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paras. 20 and 22.
[9] Craig & de Burcá p. 765.

services are relevant if the supply of goods is not an end in itself but is incidental to the provision of services.[10]

Articles 49 to 55 EC on the free movement of Services require the removal of restrictions on the provision of services between Member states, whenever a cross-border element is present. This element can result from the fact that the provider is not established in the State where the services are supplied, or that the recipient has travelled to receive services in a Member State other than that in which he or she is established.[11] A movement of services within the scope of Articles 49-50 may also occur without the provider or the recipient moving, e.g., where the provision of the service takes place by telecommunication.[12]

Although the principle of non-discrimination in Article 12 EC is an important aspect of the free movement of services and the freedom of establishment in that a non-national who is established in a Member State should in principle be treated in the same way as a national, and an non-established provider or recipient of services should be treated in the same way as a provider or recipient established in the Member State, the ECJ has gone further to declare that even non-discriminatory obstacles may be prohibited by the Treaty provisions.[13]

In addition to the Treaty-based exceptions to freedom of movement on grounds of public policy, security, and health, the ECJ has acknowledged a range of public-interest justifications which Member States may invoke to restrict these freedoms.[14]

2.1 The scope of free movements of services established by Article 49

The basic principles of the free movement of services have, as most often in Community law, been developed by the case law of ECJ. To distinguish services from freedom of establishment one has to look at the nature of the economic or professional activity. For the provisions of services, the temporary nature of the activity is to be determined by reference to its "periodicity, continuity and regularity",[15] and providers of services will not necessarily be deemed to be "established" simply by virtue of the fact that

[10] Case C-275/92, *Her Majesty's Customs and Exercise* v. *Gerhard Schindler and Jörg Schindler* [1994] ECR I-1039, para. 22.
[11] Craig & de Burcá, p. 765.
[12] See Case C-384/93 *Alpine Investments* [1995] ECR I-1141.
[13] Craig & de Burcá, p. 766.
[14] In chapter 3, the case law concerning gambling will be examined together with the public-interest justifications.
[15] See Case C-55/94, *Gebhard* [1995] ECR I-4165, para. 27. Where a person or company establishes in a Member State to provide services to recipients there for an *indefinite* period, this does not fall within the Treaty provisions on freedom to provide services: Case C-70/90, *Sodemare* v. *Regione Lombárdia* {1997] ECR I-3395.

they equip themselves with some form of infrastructure in the host Member State.[16] In the proposed directive from 2002 to consolidate existing legislation on recognition of professional qualifications, the Commission suggested a further concretization of the case law to distinguish service provision from establishment, and hence proposed adopting a notional sixteen-week period to that effect.[17]

In the past, it was suggested that Article 49 was more obviously concerned with promoting the mobility of the services themselves and with setting up a single market, in a comparison with the free movement of goods, rather that merely with the principle of non-discrimination on grounds of nationality which seemed to be the key underlying Articles 43 and 39 on workers and establishment.[18] However, in more recent years a robust approach to the right of establishment has also been adopted, with less emphasis on discrimination and more on liberalisation.[19]

The balance between eliminating discrimination and ensuring mobility, of equal treatment versus the creation of a single market, can be seen throughout the discussion on free movement of services and freedom of establishment. This theme is highly relevant, since it is clear that the extension of the Treaty rules to cover genuinely non-discriminatory restrictions reaches far into sensitive areas of national policy. This is especially seen in the case law on sensitive issues such as gambling, abortion, heath care, and regulation of broadcasting.[20]

In articles 45 and 46 EC are exceptions for the so called "official authority" and for public policy, security, and heath derogations given. By article 55 EC these exceptions to the freedom of establishment are also made applicable for services. These exemptions are currently regulated by the provisions of the old Directive 64/221[21], which is one of the legislative measures which will be abolished and incorporated into a new umbrella directive on free movement and residence of EU citizens, if the Commission's proposal is adopted. Nevertheless, the service issues of the internal market are suffering from being more political sensitive than for example goods, and therefore are a directive still lacking. The will to harmonise the service sector is depending on how foremost the Council, but also the other EU and Member State institutions, will be able to agree on common provisions.

[16] Craig & de Burcá, p. 767.
[17] COM (2002) 119, Art. 5 of the draft directive.
[18] Craig & de Burcá p. 768.
[19] See e.g., Cases C-212/97, *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 and C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[20] Craig & de Burcá p. 768.
[21] Directive 64/221 on the free movement of workers [1963-4] OJ Special Edition 117.

2.2 Requirements of Article 49

In order for an economic activity to meet the requirements of free movement of services community law sets out three requirements:

1) The need for an inter-state element
2) The freedom to receive services
3) The economic nature of the services: Remuneration

2.2.1 The need for an inter state-element

Concerning the need for an inter-state element, this requirement has by the ECJ been interpreted in a rather wide perspective. The inter-state element can for example be fulfilled by the hypothetical situation of an athlete competing in another Member State than he/she is established in.[22]Hence it could be said that even if the inter-state element is not fully defined by the ECJ it is clear that the court is focusing on the mobility and availability of the service rather than the persons who is involved.[23]

2.2.2 The freedom to receive services

Article 49 expressly refers to the freedom to provide services, and article 50 to the rights of the provider of services, and does not mention the recipient of the services. Nevertheless, the position of a recipient of services who resides in or travels to another Member State is protected by article 1 of Directive 64/221, which regulates the public-policy, security, and health derogation's provided for in the Treaty. In article 1 (b) of Directive 73/148 it is also stated that abolition of restrictions on the movement and residence of "*nationals wishing to go to another Member State as recipients of services*" is required by all Member States.

Among several ECJ cases, the *Cowan* case confirmed the right to receive services in another Member State than the home state. In Cowan, the ECJ held that the refusal of French authorities, under the French criminal compensation scheme, to compensate a British tourist who had been attacked while in Paris was a restriction within the meaning of article 49.[24]

2.2.3 The economic nature of the services: Remuneration

A service must be provided for remuneration in order to fall within the article 49. In addition, the ECJ has established that the remunerated services do not lose their economic return either because of an "*element of chance*"

[22] Cases C-51/96 & C-191/97, *Deliége* v. *Ligue Francophone de Judi et Disciplines Assocciées* ASBL [2000] ECR I-2549.
[23] Craig & de Burcá p. 805.
[24] Case 186/87, *Cowan* v. *Le Trésor Public* [1989] ECR 195.

inherent in the return, which includes many cases of gambling, or because of the recreational or sporting nature of the services.[25]

An interesting question when defining the scope of the concept of free movement of services is if an activity that are considered illegal in some Member State but not in others could constitute a service, which is for example the case with gambling.[26] The ECJ has come to the conclusion that a Member State may restrict services it considers illegal or immoral if the restriction is justified.[27] Nevertheless it could constitute a service.

Notwithstanding the above mentioned, it is still not fully clear how far a Member States restriction may reach. It is still not fully examined by the ECJ if a Member State may restrict its citizens from the access of services in other Member States where those services are not restricted.[28] The question of justified restrictions and the proportionality of such restrictions are of immediate interest in the case of gambling.

2.3 Justified restrictions to the free movement of services

By article 56 EC the three grounds of exception, for public policy, security, and health found in article 46 are made applicable to the free movement of services. These exceptions are regulated by secondary legislation.[29] These exceptions are however not the only exceptions applicable to free movement of services. Through the case law of the ECJ, an objective justification test has been developed, which is similar to the *Cassis de Dijon* "rule of reason" on the free movement of goods context.[30]

The concept of objective justification test or imperative requirements where a necessity in order to meet the Member State concerns of the danger of an uncontrolled market of services. Initially pronounced in the *Van Binsberger*[31] case, the objective justification test where confirmed and

[25] See case C-275/92, *HM Customs and* Excise v. *Schindler* [1994] ECR 1039.
[26] See case law concerning gambling in chapter 4.
[27] See case 15/78, *Société Générale Alsacienne de Banque SA* v. *Koestler* [1978] ECR 1971, in which the refusal by Germany to allow a French bank which had provided services for a German national, including a stock-exchange transaction which was treated as an illegal wagering contract in Germany but not in France, to recover from that client was not contrary to article 49 if the same refusal would apply to banks established in Germany.
[28] In a highly interesting case, C-159/90, *SPUC* v. *Grogan* [1991] ECR 4685, regarding the right of one Member State to restrict the access of information for abortion, which was illegal, the AG considered the restriction to be disproportionate.
[29] See Directive 64/221.
[30] See case 120/78, *Rewe-Xentrale AG* v. *Bundesmonoplovertwaltung für Branntwein* [1979] ECR 649.
[31] Case 33/74, *Van Binsberger* v. *Bestuur van de Bedrijfsvvereniging voor de Metaalnijverheid* [1974] ECR 1299.

spelled out in the *Gebhard*[32] case, which however was a case in the context of freedom of establishment.

2.3.1 Objective justification test

The objective justification test, developed by the ECJ, sets several conditions for when a restriction on the freedom of services will be compatible with article 49 EC.

Firstly, the restriction needs to be adopted in pursuance of a *legitimate public interest*. This legitimate public interest may however not to be incompatible with Community aims. It is not considered a legitimate public interest if the restriction pursues an economic aim. Thus, the aim of protecting a particular economic sector within the Member State was not held to be legitimate,[33] while the maintenance of the financial balance of the social-security system was a legitimate aim.[34] In *Finalarte*[35] the ECJ ruled that the aim of a measure is to be determined "objectively" by the national court, even though the ECJ as the authoritative interpreter of the Treaty has the ultimate position of pronouncing on the legitimacy of the aim.

Secondly, the restriction must be *non-discriminatory*. The restriction must be one which is equally applicable to persons established within the state, and equally applied without discrimination.

Thirdly, the imposed restriction must be *proportionate* to the need to observe the legitimate rules in question. In a proportionality test the court examines if the rule is "suitable" or "appropriate" in achieving the aim, and if that aim could not be achieved by other, less restrictive means.[36]

2.4 Principle of proportionality

The principle of proportionality permeates the whole Community law system. The principle decides the level of competence or authority the Community has in certain areas, it sets the limits on the burden put on individuals by the Community law and it regulates to what extent Member States may uphold restrictions to internal market. The deciding factor is if the measure is proportionate to its aim.

[32] Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocatie e Procuratori di Milano* [1995] ECR I-4165.
[33] Case C-398/95, *SETTG* v. *Ypourgos Ergasias* [1997] ECR I3091, see also Case C-49/98, *Finalarte Sociedad ConstruCao Civil* v. *Urlaubs- und Lohnaugleichskasse der Bauwirtschaft* [2001] ECR I-7831.
[34] Case C-158/96, *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931.
[35] Case C-49/98, *Finalarte*.
[36] See Craig & de Burcá p. 816.

In the case of services, and particularly concerning gambling, the proportionality required for the Community administrative law is of great interest.[37] Restrictive measures as national regulatory regimes for gambling are judged by the proportionality of the restriction in relation to its aim.

The Community law does not consist of any written administrative law. Instead the ECJ has developed general principles of administrative law to guidance its practise.[38] These principles are such as good administration, Right of defence, motivation, principle of foreseeability (legal certainty) and access to justice (effective judicial protection). In several cases[39] the Court has emphasised the importance of these principles in all situations when a Member State utilise the possibilities for restrictions to the internal market.[40]

In *Van Binsbergen* the court stated that even if the specific nature of the particular services (the case concerned the Dutch national regulations, requiring that legal advisers in Dutch courts had there residence in the Netherlands) could justify restrictions to the free movement of services when the regulation have as its purpose the application of professional rules justified by general interests. However, the Court maintained that the public interest in the proper administration of justice could be ensured by requiring an address for service to be maintained within the state rather than a residence there.[41] This statement is a good example of how the ECJ have stressed the proportionality of national regulations. In the Webb case the ECJ ruled that the freedom to provide services:

May be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of its Establishment. [42]

In determining the proportionality and legitimacy of a restriction, a crucial factor is whether the provider is subject to similar regulation in the Member State in which that person is established. If the requirement duplicates a condition already satisfied, it imposes a double burden on the provider of

[37] See Jörgen Hettne, *EU, monopolen och försvaret av den rådande ordningen*, ERT 1/2005, p. 589-608.
[38] Ibid. P. 595.
[39] See cases C-367/98, *Commission of the European Communities v Portuguese Republic*, [2002] ECR I-4731; C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, [2003] ECR I-4509; C-24/00, *Commission of the European Communities v French Republic*, [2004] ECR I-0000.
[40] Jörgen Hettne, *EU, monopolen och försvaret av den rådande ordningen*, ERT 1/2005, p. 595.
[41] Case 33/74, *Van Binsberger*, para. 16
[42] Case 279/80, *Criminal proceedings against John Alfred Webb*, [1981] ECR 3305, para. 17.

the service, and therefore it cannot be justified.[43] In this way national rules may not discriminate, the obligation imposed needs to be equally applied to both nationals and non-nationals.

In this context, it is possible to read out a developing interest of the Court for a more harmonised legislation or procedural among the Member States. The issues is highly politicised, as seen with the work with the proposed new service directive,[44] but the Court clearly wishes to see a service sector in which only a "home state control/review" would be needed.[45]

Another condition which is further developing as a strong interest of the justification test, is the requirement that the restrictive measure should respect the fundamental rights which are part of Community law and a condition for its legality.[46] As fundamental rights are gaining a stronger position in both Community material and procedural law, as seen for example in the draft for a Treaty for a Constitution for the European Union[47] and the procedural rules in the proposed new directive on services,[48] fundamental rights and fundamental principles must be respected by the Member States when derogating from Community law. When using an exception, Member States must respect general principles such as:

- Right of defence
- Motivation
- Good administration
- Principle of foreseeability (legal certainty)
- Access to justice (Effective judicial protection)

These conditions for good administration will form a strong foundation for the developing Community law even if the proposed service directive is not passed. Since the mentioned principles are conditions for general principles such as the rule of law, such conditions will provide an essential basis upon which Community law legitimises the role of the European Union as a supra-state institution.

Finally, it should be stated that even if the proportionality test in principle is for the national courts to apply to the restriction on the facts in each case, the ECJ has frequently indicated, both through its role in preliminary ruling procedure as of infringement procedure, which requirements it considers disproportionate.

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[43] Craig & de Burcá p. 817.
[44] COM (2001) 257 [2001] OJ C270/150.
[45] See cases as C-279/80, *Webb*, C-113/89, *Rush Portuguesa* v. *Office National d'Immigration* [1990] ECR I-1417, C-43/93, *Raymond Vander Elst* v. *Office des Migrations Internationales* [1994] ECR I3803.
[46] See *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759, para. 34, and case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279.
[47] See Draft Treaty Establishing a Constitution for Europe, CONV 850/03.
[48] See COM (2001) 257 [2001] OJ C270/150.

In the recent case *Omega* the Court gave an example of the extension of the proportionality test.

2.4.1 The *Omega* case

In *Omega*,[49] the ECJ were requested by the Bundesverwaltungsgericht (the German Federal Administrative Court) to give a preliminary ruling concerning the interpretation of Articles 49 to 55 EC and Articles 28 to 30. Omega was a German company which had been operating an installation of a laser sport establishment, called Laserdrome. Omega got its equipment from a British supplier, *Pulsar Advanced Games Systems Ltd*. However, the Bonn police authority issued an order against Omega, prohibiting the company from facilitating or allowing games in its establishment with the object of firing on human targets, using a laser beam or other technical devices, thereby playing at killing people.

The order was issued under powers conferred by the Ordnungsbehördengesetz Nordrhein-Westfalen (Law governing the North Rhine-Westphalia Police authorities), which provides that the police authorities may take measures necessary to avert a risk to public order or safety in an individual case. According to the prohibition order the games constituted a danger to public order, since the acts simulated homicide and the trivialisation of violence thereby engendered were contrary to fundamental values prevailing in public opinion.

Omega first objected the decision to the local district authority and, after the dismissal of the same authority, appealed up to the Bundesverwaltungsgericht, arguing, among numerous other pleas, that the contested order infringed Community law, particularly the freedom to provide services under Article 49 EC, since it's laserdrome' had to use equipment and technology supplied by the British company Pulsar.

In its questions to the ECJ, the Bundesverwaltungsgericht stated that human dignity is a constitutional principle which may be infringed by the fictitious acts of violence for the purposes of a game. In addition, the German Court considered the contested order to be an infringement of the freedom to provide services under Article 49. This since the British company was prevented to provide services to its German customer, whereas it supplies comparable services in the Member States where it is established.[50]

By referring to the judgements in the *Läärä*, *Zanetti* and *Schindler* cases the German Court queried on the proportionality of the contested German measures as a restriction to the free movement to provide services, and if it

[49] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin derBundesstadt Bonn*, [2004] ECR I-0000.
[50] Ibid. para. 13.

were immaterial for the purposes of assessing the need for and the proportionality of those measure that another Member State may have taken different protection measures.[51]

The ECJ started its argumentation by establishing its jurisdiction to give a ruling since the questions involve the interpretation of Community law. The Court continued by stating that in this case the aspects of the free movement to provide services prevails over that of the free movement of goods, since the latter aspect were secondary in relation to the other, referring to the *Schindler* case.[52]

In answer to the question of the legitimate interest of the German measure, the Court stipulated that the respect of human dignity were part of the fundamental rights constituting part of the Community legal order. In addition the Court established:

"*However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures*.[53]

(…)*Although, in paragraph 60 of Schindler, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity*.[54]

On the contrary, as is apparent from well-established case law subsequent to Schindler, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see, to that effect, Läärä, paragraph 36; Zenatti, paragraph 34, Case C-6/01 Anomar and Others [2003] ECR I-0000, paragraph 80)".[55]

Thus, the Court concluded that the measure was a justified restriction to the obligations imposed by Community law. This since the contested order did not go beyond what is necessary in order to attain the object of the national authority when prohibiting only the variant of the laser game, the object of which is to fire on human targets and thus play at killing' people .[56]

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[51] Ibid. para. 14.
[52] Ibid. para. 26 and 27. Since the case essentially concerned the equipment for the laser game, both the provisions for free movement of services as goods were discussed.
[53] Ibid. para. 36.
[54] Ibid. para. 37.
[55] Ibid. para. 38.
[56] Ibid. para. 39.

2.5 Freedom of establishment

To distinguish the free movement of services from the freedom of establishment the decisive factor is the time period for which the economic activity is carried out. If the economic activity is carried out for a temporary period in a Member State in which either the provider or the recipient of the service is not established it is covered by article 49 EC as a service. By contrast an economic activity from a fixed base in a Member State for an indefinite period would be covered by article 43 EC as a right of establishment.

The temporary nature of activities distinguishes services from establishment. In *Gebhard* the Court held that the temporary nature of activities is determined in the light of the duration, regularity, periodicity or continuity of the activity.

2.5.1 The *Gebhard* case

Gebhard[57] concerned a German national against whom disciplinary proceedings were brought by the Milan Bar Council for pursuing a professional activity as a lawyer in Italy on a permanent basis, in chambers set up by himself and using the title *avvocati*, although he had not been admitted as a member of the Milan Bar and his training, qualifications, and experience had not formally been recognised in Italy. [58] After establishing that in the absence of Community rules, Member States may justifably subject the pursuit of self-employed activities to *bona fide* rules relating to organisation, ethics, qualifications, titles, etc. The ECJ continuously stated:

"*It follows, however, from the Court's case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it*".[59]

The test under the free movement to provide services and freedom of establishment is essentially the same, but "*potential practical difference*" cannot be excluded, since "*a service provide may only be subjected to national restrictions, imposed in the general interest, in so far as that interest is not safeguarded by the rules applied in his State of establishment*".[60]

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[57] Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocatie e Procuratori di Milano* [1995] ECR I-4165.
[58] Craig & de Burcá, p. 785.
[59] Case C-55/94, *Gebhard*, para. 37.
[60] Opinion of A.G. Fennelly of 20 May 1999 in *Zenatti*, para. 21.

2.6 Free movement of goods

The definition of the exact scope of the different Treaty freedoms is often a hard case, at least "in theory", since the Court seems not to have too much difficulties in practise. The cases seen in chapter 3 of this thesis clearly demonstrates that the Court is inclined to favour the application of the rules on services in situations which taken from another point of view, could also have led to the application of the rules on establishment or goods. This "primacy" of the services-test is in line with previous case law.[61] The cases presented in this thesis concerning gambling all seems to be a logical result of the "accessorium sequitur principale" principle, according to which the subordinate activity (accessory) follows the regime of the main activity.[62]

In reading *Läärä* together with *Schindler*, in can be concluded that gaming machines are to be considered as imported or exported for the sole purpose of providing gambling services.[63] Hence, the ECJ have in its case law stated in the case of gambling and gaming, the freedom to provide services prevails over that of the free movement of goods.

The clearest difference between goods (Article 30 EC) and services (Article 46 EC) is that the former provides for many more grounds of justification that the latter. The derogation's to the free movement of services seem to be more directly connected to the exercise of state sovereignty, as they touch upon core areas of state competence, while the exceptions to the free movement of goods cover a much wider area and are connected to the regulation of commercial relations.[64]

[61] See e.g. Case C-3/95, *Reisebüro Broede*, [1996] ECR I-6529.
[62] See in particular *Schindler*.
[63] *Schindler*. para. 22 and *Läärä*, para. 15.
[64] Jukka Snell, p. 175.

3 ECJ case law concerning gambling

3.1 The *Schindler* case

The first fundamental case from the ECJ concerning the gambling market was *Schindler* from 1994.[65] The case concerned the importation of lottery advertisement and tickets from Germany to the United Kingdom. In the UK these kind of lottery was forbidden by law. However, the two German Schindler brothers marketed the German lotteries threw mail to UK citizens. This mail marketing were stopped and seized by the British customs, whereupon the Schindler brothers questioned the British law in a British court. The British Court turned to the ECJ for a preliminary ruling.

The ECJ established that the lottery conducted in the case should be classified as a service under article 49 EC.[66] Although lottery was rather strictly regulated in UK, the Court pointed out that it was not totally prohibited.

The Court continued to state that the British law were an obstacle to the free movement of services. Nevertheless, the ECJ did not consider the rules as discriminating since the rules applied to all providers of the forbidden lottery activities.[67]

The really interesting assessment by the Court was however when it considered the justifying objectives for the British restriction of the free movement of services. In the Court's opinion the 1993 British Act, establishing the national lottery, *"pursued the following objectives: to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes."*[68]

It continued to declare that this was considerations to justify restrictions. This since:

"*First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit,*

[65] Case C-275/92, *Her Majesty's Customs and Exercise* v. *Gerhard Schindler and Jörg Schindler* [1994] ECR I-1039.
[66] Ibid. para. 37.
[67] Ibid. para. 48.
[68] Ibid. para. 57.

the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture."[69]

Thus, the Court came to the conclusion that the British authorities concerns of social policy and of the prevention of fraud, were justified objections for its restrictions and consequently did not the British regulations infringe the article 49 of the EC Treaty.

3.2 The *Läärä* case

The *Läärä* and *Zenatti* cases has been claimed to clarify the outcome of *Schindler*.[70] As the Court in *Schindler* not really engage itself to a proportionality test in its examination, it took a stronger position in the following two cases.

In *Läärä*,[71] a Finnish law was challenged which provided that the games of chance may only be organised with the authorisation of the administrative authorities, and for the purpose of collecting funds for charity or for non-profit activity provided for by law. The law, in turn, provided that the authorities may grant a public body the authorisation to operate slot machines, considered games of chance, in return of remuneration. However, only one public body, the RAY, had been granted the license for the operation of slot machines. Läärä, who was chief executive officer of a Finnish company entrusted by an English company with the exclusive right to operate slot machines in Finland, were brought to criminal proceedings for running the machines without proper authorisation.

The Court started its argumentation by stating that the present case should be considered a service similar to the lottery in the *Schindler* case, and therefore the conditions were equally applicable. Games consisting of the use, in return for a money payment, of a slot machine must be regarded as gambling, which is comparable to the lotteries. However, the actual slot

[69] Ibid. para. 60.
[70] See G. Straetmans *Case law comments concerning Läärä and Zanetti*, CMR 37, 2000, 991-1005.
[71] Case C-124/1997, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäjä (Jyväskylä) and Suomen Valtio* [1999] ECR I-6067.

machines were not considered part of the service's concept but instead constituted goods, covered by article 28 EC.[72]

Just as in the *Schindler* case the Court found that the aim of the Finnish law where to *"limit the exploitation of the human passion for gambling"* and to avoid the risks of crime and fraud.[73]

One of the main differences in *Schindler* from *Läärä* and *Zanetti* is that in the former the national regulations prohibited lottery while in the latter two cases the restricting rules were granting an exclusive operating right to licensed public bodies. However, this did not in the view of the Court prevent that there was a real public interest in restricting gambling.

Both in *Läärä* and *Zanetti* the Court addressed the arguments that rather than granting an exclusive operating right to licensed public bodies, it would have been preferable in order to achieve the pursued objectives, to adopt regulations imposing the necessary code of conduct on the operators concerned. Although this assessment remains, in the view of the Court, within the power of the Member State, the Court surprisingly made it subject to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.[74]

In *Läärä*, the Court considered the grant of exclusive rights to a single public body a *"measure which, given the risk of crime and fraud, is certainly more effective in ensuring that the strict limits are set out to the lucrative nature of such activities"*.[75] The fact that the State controls the activities of the monopolist, which is also required to pay to the State the amount of the net distributable proceeds, was by the Court considered to strengthen the proportionality of the legislation concerned.[76]

In summarising the assessment of the Court, it came to the conclusion that the Finnish law constituted a restriction to the free movement of services, but it were not disproportionate to the aim of the restriction.

Just one month after the *Läärä* judgment the Court sharpened it argumentation and showed a more stringent view in the *Zanneti* case.

3.3 The *Zanetti* case

The *Zanetti*[77] case concerned Mr Zanetti, an Italian national who operated a centre for the exchange of information on bets and acts as an intermediary in

[72] Ibid, para. 30.
[73] Ibid. para. 32.
[74] Ibid. para. 39.
[75] Ibid. para. 41.
[76] G. Straetmans *Case law comments concerning Läärä and Zanetti*, CMR 37, 2000, 991-1005.
[77] Case C-67/98, *Questore di Verona* v. *Diego Zenatti* [1999] ECR I-7289.

Italy for a British company specialising in taking bets. Zanetti passed on bets placed by Italian clients to the British company and in return he received photocopies from the British company which he transmitted to his Italian clients. The public prosecutor of Verona ordered Zanetti to cease this activity since the Italian law required an authorisation which Zanetti did not possess or where entitled to according to Italian law. As an exception to a general prohibition, Italian law permits the organisation of betting on sporting events, where the taking of bets is a precondition for the competition to take place, but only two organisations have been granted the special right to take such bets in Italy. Zanetti challenged the decision in an Italian court which turned to the ECJ for a preliminary ruling.

Just as in *Läärä* the Court considered the gambling activity that Zanetti operated to constitute a service on equal considerations as in *Schindler*.[78] Even so, the Court found two major differences from *Schindler*.

Firstly, the Italian law did not stipulate a total prohibition as the British did for its type of lotteries. The Italian legislation reserved to certain bodies the right to organise betting in certain circumstances.

Secondly, the Court stated that the circumstances in the case may fall within the scope of the freedom of establishment. Since the question from the Italian Court where limited to the free movement of services, the court however did not feel that it was appropriate to consider other provision of the Treaty than those regulating services.

On the crucial question concerning the proportionality of the Italian law, the Court stated that it did consider the granting of exclusive rights to certain bodies, and by that canalizing gambling to a lesser public, as a measure which fall within the public interest objectives:

"*the Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.*" [79]

The answer from the ECJ to the Italian court emphasised the requirements of national laws in restricting free movement of services. Even if it is not irrelevant that lottery and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.[80]

[78] Ibid. para. 19.
[79] Ibid. Para. 37.
[80] Ibid. para. 36.

The ECJ nevertheless declared that it is for the national court to verify whether, having regard to the specific rules' governing its application, the 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.

3.4 The *Anomar* case

The *Anomar*[81] *case* was initially brought by an applicant in Portugal who wished to challenge the Portuguese gambling legislations compatibility with Community law. The Portuguese legislation provisions on gambling provided a monopoly on the operation of gambling to the State and could only be exercised by undertakings incorporated as public limited companies, to which the Government granted the relevant license by way of an administrative contract. Licensed gambling was only permitted at authorised casinos and where the Portuguese law prescribed.

The Portuguese Court who requested a preliminary ruling stated several questions, to which the most interesting was whether the Portuguese legislation was proportionate to its public interest motivation and if the fact that organising and exercising gambling in other Member States, compromising less restrictive legislation than the Portuguese, would be enough to consider the latter one incompatible with the Treaty.

Even though the case referred extensively to the former cases in the field, it can be argued that it emphasised certain issues more strongly than before. Concerning the possibility of the national legislation to be justified by reasons of public interest, the ECJ stated that the national legislation was a restriction of the free movement of services even though it was not discriminating between nationals or non-nationals since it was applicable without distinction.[82]

Since the case mainly concerned the exclusive rights of gambling machines, the Court referred to its motivation in *Läärä* where it did not considered the restriction of the national legislation disproportionate to its aim.[83] It underlined this argumentation by confirming that by only giving exclusive rights the Portuguese law strengthen its aims.

In concern to the argument that other Member States' legislations was less restrictive and that therefore the Portuguese legislation could not be justified

[81] Case C-6/01, *Associacão Nacional de Operador de Máquinas Recreativas (Anomar) and others* v. *Estado português* [2003] ECR I-8621.
[82] Ibid. para. 63 and 68.
[83] Ibid. Para. 74.

by social-economic interest or reasons of morality or public order, the Court answered that it was up to the national authorities, in the context of the aim, to evaluate the necessity of restricting this activity.[84] The different systems of public protection chosen in different Member States did not affect the proportionality test. The proportionality of the national provisions was only to be evaluated in the light of the aim of those provisions.[85]

Even though the outcome of *Anomar* did not differ much from previous cases, it can be argued that it ones again clarified and stringent the proportionality requirements for national provisions restricting the free movement of services.

3.5 The *Gambelli* case

The judgment given by the ECJ in the *Gambelli*[86] case can be said to be a continuation of what the Court stated in *Zanetti*.

The facts of the case where similar to the facts of *Zanetti*. Mr Gambelli was part of a network of Italian agencies linked by internet to the British bookmaker Stanley International Betting Ltd in the UK. Stanley had a British license for booking and betting activity both in the UK and abroad. The Italian law prohibited this kind of activity. Instead, as mentioned above, the law gave an exclusive right on sporting bets to a public Italian organisation, CONI, who by this maintained a monopoly in sporting bets.

The court initially established that the betting constituted a service and that the Italian law was a restriction to the free movement of services.[87]

The Court continued by evaluating if the restriction were justified for reasons of overriding general interest. It referred to the judgment of *Zanetti* where it was established that financing of social activities, through the incomes of arranging gambling, must only constitute an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[88]

The Court then very clearly stringent its view on Member State's financial benefits on gambling monopolies:

"*In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and 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*

[84] Ibid. Para. 80.
[85] Ibid. Para. 80.
[86] Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and others*, [2001] ECR I-0000
[87] Ibid. para. 59.
[88] Ibid. para. 62.

for that betting in order to justify measures such as those at issue in the main proceedings."[89]

As in previous cases, the Court did not go further than this since it was a preliminary ruling, but recognized that it was for the national court to determine whether the Italian legislation actually served the aim which might justify it, and whether the restrictions it imposed would be disproportionate in the light of those aims.

3.6 Case law analysis

From the above cases it is possible to state several conclusions. Even though the initial cases were rather tolerable towards the national restrictions, it almost felt like the Member States through *Schindler*, *Läärä* and *Zanetti* were given free manoeuvre to regulate gambling and gaming, the Court clearly set a rack of conditions or requirements for the national regulations in order not to be consistent with the Treaty. In the later cases these conditions have been even more emphasised.

Firstly, it can be said that gambling or lotteries is an economic activity, meaning a particular service for remuneration and the intention to make a cash profit. The Court have taken a rather broad approach in establishing that most activities, including gambling machines, are falling under the provision of services in the Treaty.[90]

Secondly, restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection, prevention of crime, protection of public morality, and restriction of demand on gambling.[91] However, restrictions based on these grounds must be suitable for achieving those objections, inasmuch as they serve to limit betting activities in a consistent and systematic manner.

Thirdly, national provisions must not be discriminating between nationals and non-nationals. Restrictions to the free movement of services must in any event be applied without discrimination. The non-discriminating is an essential part of the Community law to which the fundamental principles of free movement of services is resting on. The question of potential discrimination is always addressed initially in the cases concerning restrictions to the free movement of services.[92]

Fourthly, the ECJ have applied the public interest condition with greater and greater emphasise on the *real* aim of the national regulations. In doing so,

[89] Ibid. para. 69.
[90] See *Schindler*, para. 60, and *Läärä*, para. 25.
[91] See *Schindler*, para. 58, *Läärä*, para. 33, etc.
[92] See *Schindler*, para. 43, *Läärä*. para. 28, *Gambelli*, para. 65.

the Court have rejected reasons as financial benefits financing social activities.[93] These reasons may only be an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[94]

Fifthly, the limited authorisation of gambling on the special or exclusive rights granted or assigned to certain bodies, falls in within the ambit of the public interest objective.[95] As limited authorisation may have several positive effects such as the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, the ECJ has considered exclusive rights as consistent with the aims of the national legislations. Important to add is that this assessment has been done under the individual circumstances and conditions of each case.

[93] See Cases *Zanetti*, para. 36, *Gambelli*, para. 62.
[94] See Gambelli, para. 62.
[95] See Cases *Zanetti*, para. 35, *Anomar*, para. 74, *Gambelli*, para 64.

4 The Swedish law on gambling

The Swedish law on gambling, *Lotterilagen* (LL),[96] establish the Swedish system for gambling. The aim for the Swedish legislation on gambling is to have a fair and secure gambling market where social protective interest is prioritised.[97] The general principle of the legislation is that gambling and lottery only may be organised by license and that all licenses shall be under the supervision of governmental authority. This authority is carried out by *Lotteriinspektionen*.[98]

The law is applicable to gambling organised and realized in Sweden. Hence, a foreign operator who offers its gambling services from abroad is not covered by the Swedish law. However, since the gambling market of today is characterised by cross-border activity through modern technology such as telecommunication, the law has tried to address this problem.[99] Regarding this issue, LL states that it shall be prohibited to promote prohibited or foreign organised gambling for the purpose of making money.[100] This prohibition is criminalised.[101]

In practise, the system for gambling in Sweden constitutes a monopoly. Thus, the law establish that only certain authorities (*Lotteriinspektionen* or *Länsstyrelsen* depending on the location) can authorise license for the organisation of gambling or lottery, and these authorities, in practise, has only given licenses to a very few operators.

LL includes most forms of gambling.[102] All kind of "commercial" lottery or gambling requires license, which in turn requires that the applicant is a Swedish juridical person or non-profit organisation and that the applicant has as its primary aim to endorse public interest.[103] However, by means of § 45 LL, the government has the possibility to grant special licenses for the organisation and operation of gambling. In these cases the licenses are regulated by the special terms and conditions of each license agreement.[104] In practice this has meant that the public own company *AB Svenska Spel* is the exclusive licensee for organising gambling in Sweden.[105]

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[96] Lotterilag (1994:1000), issued 1994-06-09, (revised through law 2004:1066).
[97] See preparatory works Prop. 1993/94:182, bet. 1993/94:KrU32, rskr. 1993/94:415.
[98] See this delegation in § 41 of Lotterilag (1994:1000).
[99] See preparatory work *Från tombola till Internet – översyn av lotterilagen* (SOU 2000:50).
[100] Lotterilag (1994:1000), § 38.
[101] Ibid. § 54 (2).
[102] Ibid. § 3.
[103] Ibid. § 15.
[104] Ulf Berlitz, *Nationella spelmonopolet i ljuset av Gambellimålet*, ERT 3/2004, p. 451-461.
[105] The two main operators on the Swedish gambling market, *AB Svenska Spel* and *AB Trav och Galopp* (ATG)(for betting on horse races) have both got their licenses by § 45 *Lotterilag* (1994:1000).

4.1 The Swedish gambling market

The Swedish gambling market has during the last years experienced a great expansion. According to *Lotteriinspektionen* was the approximately turn over of the regulated Swedish gambling market worth 36, 5 billion SEK.[106] While the total "nettogambling" (meaning the average amount of disposable income that is put in gambling) has been steady, the "bruttogambling" (meaning the total amount of gambling) has increased by 10 %.[107] The expansion on the regulated Swedish gambling market is probably explained by the introduction of new gambling forms, news and marketing.

The impact of new gambling forms such as internetgambling, -poker and mobile phones in gambling, is suggest to be the main reasons for the increasing amount of gambling.[108] Since the new gambling forms are not covered by the Swedish gambling regulations, if operated from abroad, there is nothing hindering foreign operators to compete with the Swedish monopolist in these gambling forms. This obviously toughens the competition for the Swedish monopolists. Two ways of challenging this competition for the monopolists like *Svenska Spel* and *ATG*, has been to expand its marketing and develop new gambling forms.[109] However, the Swedish companies need to be granted a license in order to exploit a new gambling form.

Another way of competing with foreign operators would be to increase the distribution of the profits to the participants.[110] In comparison, the public Swedish gambling operators repay a low share of the profits. In the existing law, LL, the share of the profits is regulated in order to "*secure that an adequate share of the stakes are repaid as winnings and that it benefits the proper interests*".[111] However, as seen above, the rules of LL do not regulate those cases where the government has granted a special license according to § 45 LL, as in the cases of *Svenska Spel* and *ATG*. In an interim

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[106] Official statistics found on http://www.lotteriinsp.se/upload/laddahem/Statistik/Samtliga%20statistiktabeller.pdf (last visited 20050518).
[107] Information collected at www.svenska.spel (last visited 20050518).
[108] See *Rent Spel*a publication from *AB Svenska Spel*, www.svenskaspel.se/img/pressen/pdf/rentspel.pdf.
[109] AB *Svenska Spel* spends a large portion of its turnovers on marketing through varies media channels, see statistics at www.svenska.spel. The company is also constantly applying for new licenses in order to exploit and develop new distributions channels through communication technology, including, internet, mobile communication and televisonbroadcastings, see *AB Svenska Spel*'s applications according to §45 LL for new licenses (Ert. Dnr. Fi 2005/1316, Fi 2005/1317, Fi 2005/1318, Fi 2005/1319, Fi 2005/1320).
[110] This question were investigated in the interim report *Vinstandelar* (SOU 2005:21), interim report to the Official Report on Gambling (*Lotteriutredningen*).
[111] *Vinstandelar* (SOU 2005:25), p. 8. (free translation of the author)

report to the Official Report on Gambling (*Lotteriutredningen*)[112] the investigators have recommended not to increase the share of profits. The report concluded that it was not possible to separate the share of profits-issue from the regulated gambling system in general.[113] Thus, the effects on gambling addiction if an increased share of profits were not clear. Continually, the report found that it was uncertain what impact an increase could have on a future investigation of the Swedish legislation's compatibility with Community law.

By the development in modern technology, new forms of gambling have been very successful. Foremost the development in internet-betting, -lottery and -gambling have generated great incomes for the gambling operators. Even though *Svenska Spel* have increased their turnover from internet-gambling from 4 million initially in 1999 to around 500 million in 2004, the public owned company *Svenska Spel* still believes that internet-based gambling will increase several times more in a 5 year period.[114] As examples of great potential gambling forms which are still not developed, or to a lesser amount developed by *Svenska Spel*, mobile-betting and internet poker games are areas which *Svenska Spel* wishes to exploit.[115]

[112] *Lotteriutredningen* was assigned by a decision of the government of May 19 2004 to look over the Swedish legislation concerning gambling. The result shall be published at the latest by December 15 2005.
[113] *Vinstdelar* (SOU 2005:25), p. 23.
[114] Ewa Thibaud, *Det gränslösa spelet* and Janne Sundling *De nya spelen* in *Rent Spel*a publication from *AB Svenska Spel*, www.svenskaspel.se/img/pressen/pdf/rentspel.pdf.
[115] See applications Ert. Dnr. Fi 2005/1316, Fi 2005/1317, Fi 2005/1318, Fi 2005/1319, Fi 2005/1320, and statements given publicly both by Executive director Jesper Kärrbrink, and by the Public Relations Officer Claes Tellman in Ewa Thibaud, *Det gränslösa spelet*, p. 64, in *Rent Spel*a publication from *AB Svenska Spel*, www.svenskaspel.se/img/pressen/pdf/rentspel.pdf.

5 Regulatory regimes covering gambling in other Member States

Since the gambling market is not harmonised on a Community level, each Member State regulate their gambling system. This has meant that the national provisions concerning gambling and gaming is fairly shifting in some areas and more similar in others. As two interesting examples of how different Member States have chosen to regulate their gambling and gaming market I have selected the United Kingdom and the Netherlands.

Even though both States have expressed general interest, such as consumer protection, prevention of crime, protection of public morality, and restriction of demand on gambling as underlying reasons for their regulations, they have chosen different forms than the Swedish example for their gambling regulations. The UK is a good example of a Member State with long tradition in betting and gambling but with a rather open market competition. The Netherlands in turn have chosen both to be quite restricting in some areas and in some concerns more liberal in their regulatory system.

5.1 The United Kingdom

The principle characteristics of the gambling and gaming market in the United Kingdom are that operators are predominantly private as opposed to state-run or public owned. There is a strong tradition of gambling and gaming in the United Kingdom. All British gambling legislation is based on the philosophy of "*providing facilities to meet unstimulated demand*" [116] and the prevention of crime.[117] While controlling the gambling and gaming environment, fiscal legislation has been superimposed to enable tax revenues to be obtained from this market. The legislation is market driven. If it is evident that there has evolved, due to social conditions, a demand, for a gaming activity, then it would be legislated for. However, the government believes controls are required to prevent fraud and excessive gambling. [118]

The principle of controlling an unstimulated market and collecting revenues as simply and efficiently as possible is evident in the current legislation. The legislation is a mixture of both "social" and "fiscal" law.

[116] Rothschilds Royal Commission on Gambling, 1978.
[117] *Gambling in the Single Market – A Study of the Current Legal and Market Situation*, Volume III, Office for Official Publications of the European Communities, 1991, p. 120.
[118] Ibid. p. 120.

All lotteries are, except the National Lottery, regulated by the *Lotteries and Amusement Act* from 1976, and the *Lotteries Regulations* from 1993.[119] According to the 1976 Act, all lotteries are illegal except those stated in the Act. The main purpose of the Act is to guarantee that all lotteries are operated appropriately.[120]

To obtain a license for bookmaking (the most common betting form) an applicant needs to apply to the Local Licensing Authority, which is the Magistrate Court within the relevant jurisdiction.[121] A license is granted if the applicant is deemed suitable in that he has not previously breached the Betting, Gaming and Lotteries Act, is resident or incorporated in the United Kingdom, is considered "fit and proper" and is financially sound.[122]

In United Kingdom *The Gaming Board for Great Britain* and the *Gambling Commission* exercises the supervision of the operators of licenses (excluding bookmaking). Its task is mainly the protection of the young and the vulnerable as the keystone of a liberalised and modernised regulatory framework for gambling.[123] Regulations for this purpose were also introduced in 2004 and are presupposed to be adopted in the summer of 2005.[124] The new legislations entitle online casinos to be located in the UK, after obtaining a license from the *Gambling Commission*. Operators' gaming software will be checked in order to ensure the game is fair and there will be standards aiming at preventing access to the site by children. Inviting, permitting or causing a child to gamble will be a criminal offence resulting in the withdrawal of the license. The Bill explicitly rules out advertising on any media, including online, for operators who are subject to the regulations of an EEA state.[125]

5.2 The Netherlands

The gambling market in the Netherlands are regulated by the law "*Wet wan 10.12.1964 op de kansspelen*" (Law on Gambling and Gaming). This law prohibits operators to organise a game of chance for winnings as well as to participate in such an activity unless the game is licensed.

The philosophy of the Dutch gambling and gaming legislation is to control the human desire to gamble, to fight illegal gambling and gaming and – in

[119] *Från tombola till Internet – översyn av lotterilagstiftningen* (SOU 2000:50), p. 83.
[120] Ibid. p. 83.
[121] *Gambling in the Single Market – A Study of the Current Legal and Market Situation*, Volume III, Office for Official Publications of the European Communities, 1991, p. 123.
[122] Ibid. p. 123.
[123] See the 2004 *Gambling Bill*.
[124] See the 2004 *Gambling Bill*.
[125] See http://www.gamblinglicenses.com/LicencesDatabaseDetail.cfm?Licenses_ID=77&Region=Europe (last visited 20050518).

some cases – to canalise revenues to improve public welfare.[126] The present legal regime is the result of a policy which aims at curbing illegal games by allowing certain games to be played in order to meet the natural demand for gambling.

Based on the Law on Gambling and Games the Ministries of Justice, Economic Affairs and of Welfare, Health and Cultural Affairs can grant a license to an organisation under the certain conditions. For the organisation of "sports predictions" (Toto), of a totalisator (betting on horse races) and the operating of casinos in Holland, the Law stipulates that only one license can be granted for each of theses activities.[127] Hence there is a monopoly situation in these gambling forms, restricting other operators to enter the market. The exclusive operators in each of these activities have close bounds to the government of the Netherlands. The Law on gambling is not applicable if the game of chance is organised within a small private party (selected group) and if the events is non profitable.

Concerning gaming machines, the permit for those machines has to be obtained from the mayor and the city council of the town where the machine is to be set up. The Law on Gambling and Gaming sets the general requirements governing the award and retention of permits for gaming machines.[128] However, the permits are granted on behalf of the Minister of Economic Affairs. A permit can be withdrawn if the information provided is incorrect or if the operation of machines has not been started within one year of the issue of the license. Thus, there does not seem to be any barrier to operating a gaming machine as long as the requirements for obtaining a license are fulfilled.[129]

The Dutch regulation has not prevented illegal gambling. Practically all gambling forms offered legally in the Netherlands suffer from competition from both illegal organisers inside of the Netherlands and from organisers established outside of the Netherlands. This have been explained because of reasons such as the liberal attitude of the government, the difficulties encountered by the law enforcement agencies, and the view that competition from abroad cannot be prevented since this would run contrary to the provision of the EC Treaty on the freedom to provide services.[130]

The choice of method in the Netherlands in order to meet the competition from both illegal organisers and from organisers abroad has been to try to

[126] *Gambling in the Single Market – A Study of the Current Legal and Market Situation*, Volume III, Office for Official Publications of the European Communities, 1991, p. 41.
[127] Ibid. p. 41.
[128] Law on Gambling and Gaming, § 30c.
[129] The main requirements apply to the machines themselves (e.g. the a minimal distribution of the stakes have to be paid back to the players), *Gambling in the Single Market – A Study of the Current Legal and Market Situation*, Volume III, Office for Official Publications of the European Communities, 1991, p. 58.
[130] Ibid. p. 42.

make State-controlled forms of gambling more attractive for Dutch players, reducing the need for them to participate in gambling from abroad.

One difference in the gambling systems of the Netherlands to Sweden, is that the exclusive licensee does not have to be public owned. For example may the exclusive contract to manage horse race betting be given to a private company. The market is still prevented from competitive market entry, since by law only one organisation can operate the horse race betting and therefore new applicants can only be considered after the termination of the existing contract with the operator.

5.2.1 Recent case law from the Netherlands

On 2 June 2004, the Court of Arnhem, in an interlocutory judgement, made explicit reference to *Gambelli,* and held that restrictions imposed to prevent Ladbrokes entering the Dutch market were inconsistent with European Law. Specifically citing the commercial bent of the De Lotto organisation (its € 25m marketing budget) and Holland Casino and their very deliberate attempts to stimulate demand for new gambling products, the Court concluded that the commercial nature of the Dutch gambling market was not compatible with national legislation which placed restrictions on cross-border services.

The decision of the Dutch Court is consistent with *Gambelli* (see above in chapter 3.6), where the Court of Justice had found that if participation in lotteries, games of chance and betting are encouraged by a Member State with the aim of deriving a benefit for itself, that State cannot rely on the need to uphold public order in order to justify restrictive measures.[131]

In a case concerning the legality of online gambling websites the Dutch Supreme Court in a decision on February 21 and 22, 2005, stated:

"*If no specific Internet gambling legislation is adopted, the off-line rules remain applicable to the virtual world. Gambling Web sites are subject to the same regulatory and licensing requirements as the off-line world. What is illegal off-line remains illegal online; it is illegal to offer (Internet) gambling services to consumers resident in a country where a license has not been granted by the appropriate authorities.*"

However, the Dutch Supreme Court continued by stating that no gambling provider may offer services to Dutch residents without a Dutch license, and that (in this case) Ladbrokes has been ordered to implement geolocation systems and other measures to insure that its Web site cannot be accessed by Dutch residents. Several other European gaming companies have legal cases tied up in the Dutch court system, but this ruling from the highest

[131] See Niall O'Connor *European Bettingmarket.com, two steps forward, three steps back…*, http://www.bettingmarket.com/eurolaw.htm (last visited 20050518).

court in the country should serve as an affirmation that the law of the land prohibits foreign operators from offering services in the Netherlands.[132]

[132] See Humprey, Chuck: *Extracts: Internet Gambling Report Sixth Edition*, http://www.gambling-law-us.com/Articles-Notes/internet-gambling-report.htm (last visited 20050518).

6 Recent development concerning the Swedish monopoly on gambling

6.1 The *Wermdö Krog* case

In *Wermdö Krog*[133] the Swedish Supreme Administrative Court (*Regeringsrätten*) gave a decision in a case concerning a restaurant in the Stockholm-area which offered gaming machines operated by an English company. The restaurant had been punished by a fine, which it appealed. To mediate or promote foreign unlicensed gambling or gaming in Sweden is prohibited, as seen above in chapter 4.

The Swedish court initially stated that the Swedish "promotion-prohibition" was a restriction to the free movement of services and the freedom of establishment founded by the EC treaty. Thus, the court went on to the question of whether the restriction could be motivated by imperative requirements. By referring to the EC case law the court observed that the exceptions to the general principles were further going than those given directly in the Treaty.[134]

First, the Court established that there was no scope for requesting a preliminary ruling from the ECJ.[135] The ECJ had already adequately decided upon the issue, according to the Court.

Thereafter the Court asserted, in line with EC case law, that gambling where of a specific condition which enabled further going restrictions. The Member States asserted a wide scope, nevertheless not unlimited, when restricting gambling. The restrictions must be motivated by legitimate public interest. In addition, the restrictions must not be discriminating by nationality or application.

Concerning the proportionality test, the court considered it of lesser importance since, in its view, the EC case law had left a wide scope of discretionary assessment to national courts.[136]

After these initial notes, the court assessed whether the Swedish Law on Gambling were discriminating, if the aim of the law had a character to

[133] *Wermdö Krog*, Decision given by the Swedish Administrative Supreme Court by October 26th 2004, case number 5819-01.
[134] That is so say articles 45, 46 and 55 EC.
[135] *Wermdö Krog*, p. 4.
[136] Ibid. p. 6.

legitimate restrictions and if the state-control of the gambling activity was suitable to secure the fulfilment of the aim of the legislation.

The court did not find the Swedish law discriminating since § 38 prohibit Swedish unlawful gambling as well as foreign unlawful gambling and gaming. It was not either incompatible with the Treaty to reserve the Swedish market to a few exclusive operators.

In the main question, concerning if the real aim of the Swedish legislation was to restrict the harmful effects of gambling or to have beneficial financial incomes to the State, the court stated that the marketing of Swedish gambling companies were encouraging gambling, but it needed additionally to have as a purpose to be of "*financial benefit of the public purse*"[137], which the Court did not find.

Finally, the court found that the Swedish control or review of the activities were less effective, but that did not mean that the legislation had another aim than to "*protect the individual and the society and to direct the surplus to the public and public purposes*".[138]

The court came to the conclusion that the Swedish law on gambling were compatible with Community law.

The judgement of the Swedish Administrative Supreme Court can be criticised by several reasons. Firstly, the Court stipulated that there was no need for further precision on a Community level by the ECJ, and therefore no need for the request of a preliminary ruling. This is questionable since it could be argued that decisions from the ECJ state that there is no general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.[139] However, the reluctance to request preliminary rulings from the ECJ, in the interpretation of Community law, is a general problem of Swedish courts. Surprisingly enough, the sitting president of the Swedish Administrative Supreme Court in *Värmdö Krog* has served for some years as the Swedish judge in Luxembourg (even more surprisingly as a judge in the judging chamber of *Läärä* and *Zanetti*), and therefore it could be objected that at least he would have seen the interest of establishing the ECJ as the authority, thereby allowing Community law to have an effect in Sweden.[140]

Secondly, it can be questionised whether the true aim of the Swedish legislation really is a legitimate public interest. The protection of the public and the individual was prior to the Swedish accession to the European Union not emphasised in the prepatory works or any other legislative piece

[137] Ibid. p. 7 (free translation by the author).
[138] Ibid. p. 8 (free translation by the author).
[139] See cases C-36/02 *Omega* para. 37-38, C-6/01 *Anomar* para. 80, C-124/1997, *Läärä* para. 36, C-67/98, *Zenatti* para. 34.
[140] See Nils Wahl *Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i Wermdö Krog*, ERT 1/2005 p. 124.

of work.[141] Instead the financing of social activities has always been emphasised. This can also be underlined by recent legislative changes, and the actual behaviour of *AB Svenska Spel* in their constant efforts of expansion and increasing profits (see previous chapter 5.1).

6.2 The *formal notice* given by the Commission

In a letter of formal notice to the Swedish government of the 13th of October 2004, the Commission started a formal procedure examining the Swedish legislation on gaming machines.[142] In the letter the Commission stated that they had received information from complainants stating that the gambling in Sweden had generally increased during later years. The Commission continued by saying that they regarded the public owned company *AB Svenska Spel* as being in control of the gambling in Sweden since they had the exclusive right of operating gambling on gaming machines. According to their information *AB Svenska Spel* where at same time expanding there business through aggressive marketing and launching of new games, inter alia internet- and mobiletelephonegames.[143]

In accordance with these facts the Commission considered that the Swedish Law on Gambling where not in compliance with the EC Treaty, article 28, 43 and 49, since the starting point of the Swedish law was the prohibition of import, possession and arrangement of gambling on gaming machines. The restrictions to the internal market that this prohibition constituted was not, in the opinion of the Commission, motivated by any legitimate public interest since the real aim of the Swedish legislation appeared to be financing of social activities.[144] The prohibition of import, possession and operation of gambling and the requirement of a licence to operate gambling on gaming machines was discriminating and prevented foreign gambling operators to establish themselves on the Swedish market.[145]

In addition, the Commission stated that the Swedish law was disproportionate to its purpose, underlying that the ECJ had established that only genuine intention to decrease the gambling possibilities were legitimate reasons for restricting the free movement of providing services and that financing of social activities may only be of incidental beneficial consequence and not the real justification for the restrictive policy adopted.[146]

[141] Ibid. p. 124.
[142] Letter of formal notice 2001/4826 of 19 of October 2004.
[143] Ibid. para. 15.
[144] Ibid, para. 17.
[145] Ibid. para. 20 and 25.
[146] Ibid. para. 26.

In these circumstances, the Commission concluded that *AB Svenska Spel* were encouraging gambling and gaming by the marketing and launching of new games which have increased the gambling and gaming in Sweden. Particularly was this the case concerning gaming machines.[147]

6.2.1 The Swedish answer to the formal notice given by the Commission

The Swedish answer to the letter of formal notice was given on the 15th of December 2004. In this answer Sweden stated that it was not of the same opinion as the Commission. Sweden did not consider its own law to be incompatible with Community law. Thus, Sweden stressed that the Swedish regulatory regime on gambling should be seen in the circumstances of its aim.

Sweden also wished to draw attention to the examination of the Swedish Administrative Supreme Court and its decision in *Wermdö Krog*, where the Court examined the issue, including gaming machines, and had found the Swedish provisions compatible with Community law. The Swedish government stated that it fully adopted the considerations and conclusions of the Court in this case.[148]

The Swedish government continued by stating that it agreed with the assessment of the Commission, in that the legislation in question was a restriction to the free movement of goods and services as well as the freedom of establishment. However, it considered the aims of the legislation, to protect the public, as legitimate reasons for the restrictions.[149]

In answer to the claim by the Commission that the marketing by *AB Svenska Spel* was aggressive and served to increase gambling, Sweden stressed that this approach was in accordance to the concrete competition *AB Svenska Spel* encountered from international operators. The marketing was a mean of trying to canalise the concrete demand for gambling among the Swedish public.[150]

Considering the judgement of *Gambelli*, the Swedish government held that there were a difference in the two national systems since the purpose of the Italian were to protect a group of private Italian businesses. Hence, this was the fact that made the ECJ to questionise the Italian regulatory regime, according to the Swedish Governments interpretation.[151]
In these circumstances, the Swedish government concluded that the Swedish regulatory regime on gambling were not incompatible with Community law.

[147] Ibid. para. 27.
[148] The Swedish Governments answer to the Letter of formal notice of 15 December 2004 (COM SG-Greffe (2004) D/204677, ärendenummer 2001/4826), p. 2.
[149] Ibid. p. 3-4.
[150] Ibid. p. 6.
[151] Ibid. p. 9.

7 Conclusions

As been stated in the previous chapters, the gambling market have been developing in a furious way during the last 10 years, a period corresponding to the Swedish membership to the European Union. The new communication technology has decreased the possible means to uphold national borders, for good and for bad. Since there is no real possibility to uphold the control over the market, it can not be stipulated that there exist a real exclusive monopoly. Instead the position of the exclusive rightholders for operating gambling in Sweden, can be described as a very strong and dominant market position. The conditions for the gambling monopoly in Sweden are shifting. The system has to adjust not only to a shifting market but also to a legal reality other than ten years ago.

The enforced competition through internet and mobile communication has been met by means of increased marketing and launching of new games by the operators of the Swedish gambling monopolies. This approach of encountering the shifting reality is, as been stated earlier in the thesis, problematic in a Community law perspective. The approach does probably not express an aim of general public interest, as required by the ECJ.

The Swedish regulatory regime for gambling is neither specifically clear, in the way Community law requires. The monopolies are granted by the government, at the same time as the monopolies reimburse vast economic incomes for the State.

The problems of an aggressive marketing and the desire of exploiting new gambling forms have been addressed by the Swedish Administrative Supreme Court in *Wermdö Krog*. The judgment is problematic, as the Court actually tries to do the job of the ECJ. In my opinion, it is not a correct assumption that previous case law has settled the issue sufficiently. The national gambling markets and regulatory regimes are determined by their national conditions. Hence, I find it difficult to establish that the assessment under British, Finnish or Italian conditions will be appropriate to address the Swedish conditions of today. As the ECJ have established through case law, the proportionality of a national measure is to be assessed to the moral, religious or cultural considerations of that Member State.

In my opinion, the aim of the Swedish regulatory regime for gambling, could be questionised both by the fact that its operators are acting very competitive, actively marketing its services to new consumer groups as women and younger generations through new communication forms. The contended aim of the Swedish legislation is neither that clear in a retrospective view. Prior to the Swedish accession to the European Union, the protection of the public and the individual was not emphasised in the prepatory works or any other legislative piece of work. However, the benefit in financing of social activities have always been emphasised. This seems a

bit like an after-construction in order to satisfy the Swedish policy on gambling to the requirements of Community law.

Even though the decision in *Gambelli* has not really had the impact on national monopolies it was believed to have, the legal development in the issue sets tougher and tougher requirements on the national restrictions to the general principles of the Community law. The increased requirements of good administration in the Community law will also contribute to a reinforced standard of requirements on national restrictions to the free movement of services.

As the different Swedish monopolies are currently under the scrutiny of the ECJ or Commission for infringement of Community law, it could be stated that the Swedish legislator may have to address its public monopolies differently than today. In doing so, the legislators should be focusing on how to adjust its legislation in accordance with the Community law in a longer perspective, other than the current policy of defending the monopolies by small legislative measures which eventually still restricts the free movement of services, and ultimately will be judged as incompatible with the Community law by the competent authorities.

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