



FACULTY OF LAW
University of Lund

Anna Pahlsson

Internet Gambling

and Marketing Law in Sweden

Master Thesis
20 points

Supervisor:
Professor Michael Bogdan

Marketing Law

Semester:
Fall 2002

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Purpose and Main Questions	5
1.2 Delimitation	6
1.3 Methodology	6
2 GAMBLING	8
2.1 Rules and Regulations	8
2.1.1 The Lotteries Act	9
2.1.2 Definition of lotteries	9
2.1.3 Online betting	9
2.1.4 Prohibited acts	10
2.1.5 Penal provisions	10
2.1.6 Appeals	11
2.2 The National Gaming Board	11
2.3 The Legal Operators on The Swedish Market	12
2.3.1 AB Svenska Spel – www.svenskaspel.se	13
2.3.2 ATG – www.atg.se	14
2.3.3 Folkrorelserna and Folkspel	15
3 MARKETING	16
3.1 Swedish Rules and Regulations	16
3.1.1 The Swedish Marketing Practices Act	17
3.1.2 The Lotteries Act	18
3.1.3 The Distance Selling Act	19
3.1.4 The Electronic Commerce Act	19
3.2 European Marketing Law	19
3.2.1 Cross-border marketing	20
3.2.2 Mutual recognition	21
3.2.3 The Directive on the protection of consumers in respect of distance contracts	21
3.2.4 Directive on electronic commerce	22
4 MARKETING INTERNET GAMBLING ACTIVITIES	23

4.1	Jurisdiction	23
4.1.1	Targeting	24
4.1.2	Country of origin regulation	25
4.2	Different Types of Media Used in Connection With Gambling	25
4.2.1	Mobile systems and Digital TV	25
4.2.2	The Internet/Web sites	26
4.2.3	Links	26
4.2.4	TV	27
4.2.5	Outdoor advertising	28
4.2.6	Sponsoring	28
4.2.7	Domain names	29
4.2.8	Printed press	30
5	BETTING COMPANIES ON THE INTERNET	32
5.1	Foreign Betting Companies	32
5.1.1	Unibet	33
5.1.2	Ladbrokes	34
5.1.3	Expekt	34
6	EC LAW	35
6.1	Monopolies	35
6.1.1	The Swedish gambling monopoly	36
6.1.2	Permitted monopolies	38
6.2	The Gambelli Case	38
6.2.1	Non-discrimination	39
6.2.2	Proportionality	40
7	CASE LAW	42
7.1	The National Gaming Board's Cases	42
7.1.1	The National Gaming Board vs. Haninge Innebandy	42
7.1.2	The National Gaming Board vs. AIK Hockey	43
7.1.3	The National Gaming Board vs. GAIS	44
7.2	Decision in The Swedish Ice-hockey League's Competition Board	45
7.2.1	The Swedish Ice-hockey League's Competition Board vs. Hammarby Hockey	45
7.3	The Chancellor of Justice in Sweden	46
7.3.1	The Chancellor of Justice vs. Dagens Industri	46
7.4	Decisions from The County Administrative Court in Södermanlands Län	47
7.4.1	Anders Bergsten vs. The National Gaming Board	48
7.4.2	GAIS vs. The National Gaming Board	48
7.4.3	AIK Hockey AB vs. The National Gaming Board	48
7.5	Decisions from The Administrative Court of Appeal in Stockholm	49
7.5.1	Anders Bergsten vs. The National Gaming Board	49
8	CONCLUSIONS	51

BIBLIOGRAPHY	54
Books, Articles etc.	54
Laws and Directives	55
Preparatory Legislative Material	56
Links	56
TABLE OF CASES	57
Swedish Cases	57
The National Gaming Board	57
The County Administrative Court in Södermanlands Län	57
The Swedish Ice-hockey League's Competition Board	57
The Eskilstuna City Court	57
The Administrative Court of Appeal in Stockholm	58
Göta Court of Appeal	58
The Swedish Marketing Court	58
European Cases	59
The ECJ	59

Summary

Cross-border commerce involves problems not only in respect of Private Law but also within the field of Marketing Law. During the end of the year 2002 and during the year 2003, several messages by foreign betting companies could be seen in the Swedish press. Some had the message that the gambling monopoly should be stopped; others were more of the “traditional” marketing character. *The National Gaming Board* in Sweden has ruled some of them as **statements influencing public opinion** and therefore in the scope of *the freedom of the press*. That means, the campaigns are not regarded as commercial advertising and are not breaking any laws.

Pre-conditions for the applicability of the *Marketing Practices Act*¹ (MPA) for legal steps to be taken concerning advertising are that the representation is of a **commercial nature**, meaning that the message is intended to promote a commercial transaction, and that it concerns the tradesman’s goods or services.² Other messages, concerning occurrences in society or statements influencing public opinion, which are included in advertising, fall outside the scope of the *MPA* and are otherwise regarded as coming into conflict with the freedom of speech and freedom of the press.³ Sweden has a strong constitutional protection of freedom of speech and of the press.

It is a fundamental principle in the Swedish lottery legislation, that private profit interests must not rule the lottery market. The market shall be reserved for the public or the use of the public. Consequently, Sweden has a gambling monopoly. In addition, there is a prohibition in *The Swedish Lotteries Act*⁴ against promoting participation in lotteries arranged outside Sweden. This prohibition makes foreign betting companies create their ads like statements influencing public opinion or send their TV-commercials on channels transmitting from other countries, in order to circumvent the prohibition.

The Swedish Government has established, that section 38 in *The Lotteries Act* is compatible with *EC Law*⁵ and Swedish courts have in previous cases found, that section 38 in *The Lotteries Act* is in full conformity with *EC Law*.⁶ Recently, a preliminary ruling was given from *The European Court of*

¹ SFS 1995:450, *The Marketing Practices Act*.

² Prop. 1994/95:123, *Ny Marknadsföringslag*, p. 164.

³ *Ibid.*, p. 163.

⁴ SFS 1994:1000, *The Lotteries Act*, section 38.

⁵ Prop. 1998/99:29, *Kriminalisering av främjande av deltagande i lotterier som anordnats utom landet*, p. 10 et seq.

⁶ In these judgements it has been settled that section 38 in the *Lotteries Act* is in conformity with articles 12, 49 and 50 *EC* or any other regulation in *EC Law*, The Administrative Court of Appeal in Stockholm’s judgement September 12 2001 (case no 810-2000), three judgements by Göta Court of Appeal October 9 2001 (case B 864-99, B 241-00 and B 715-00).

*Justice (ECJ)*⁷ that might lead to changes of the Swedish monopoly situation. The *ECJ* ruling, together with its consequences for Sweden, will be discussed in Chapter 6.

⁷ C-243/01, *Tribunale di Ascoli Piuno vs. Piergiorgio Gambelli and Others*, November 6 2003.

Preface

When I started this Master Thesis, *The National Gaming Board* dealt with some cases about foreign betting companies logos and Internet addresses printed on different football- and ice-hockey teams' outfits. There was a large debate in the media about foreign betting companies challenging the Swedish gambling monopoly.

It was clear that it was illegal, in commercial operations or otherwise, for the purpose of profit, to promote participation of foreign betting companies services. But what was included in "promoting" and "commercial operations or otherwise" and was the Swedish gambling monopoly in the scope of EC Competition Law?

I found the questions quite interesting and there were no guiding legal judgements from a higher court. However, I found a case in the *ECJ* about the Italian gambling monopoly, but it had been going on for a couple of years, as the cases usually do, and it was not clear when the preliminary ruling would come. I followed the case and suddenly the ruling came in November. Then it was time for me to finish this Master Thesis before a final judgement comes in a Swedish court interpreting this *ECJ* ruling.

Again, there is a large debate in the media about the Swedish gambling monopoly. The foreign betting companies interpret the *ECJ* ruling in their favour and bring actions against *The National Gaming Board* and vice versa. This Master Thesis contains my interpretation of the *ECJ* judgement and its consequences on the Swedish gambling market.

It is with great pleasure that I finally complete this work. Special gratitude goes to my supervisor, Professor Michael Bogdan, whose comments enabled me to fine-tune this Master Thesis. My colleagues, Advokat Lars-Erik Ström and Advokat Magnus Friberg, also take credits for adding rich insights and valuable discussions on this subject.

I would like to thank my fiancé, Lars Peder Lauridsen, whose support, encouragement and critical comments made me finally finish this Master Thesis. I would also like to express my gratitude to my family and friends who have endured this work for a long time.

Last but not least, I am greatly indebted to my parents, Kerstin and Lars-Olle Pålsson, who, I suspect, have a difficult time believing that I finally graduate from The Faculty of Law, University of Lund.

Malmö, January 6 2004

Anna Pålsson

Abbreviations

EC	The EC Treaty
ECJ	The European Court of Justice
MPA	The Marketing Practices Act

Gambling on the Internet often mean gambling using the Internet, mobile phone or interactive television. The term “Internet gambling” in the title and elsewhere in this Master Thesis includes *betting*⁸, *gaming*⁹ and *lotteries*¹⁰. When ***betting on the Internet***, the typical situation is that companies receive entries on the Internet, but the event or draw happens offline, in difference to ***gaming on the Internet***, which mean gaming services conducted purely online, including virtual casinos and electronic gaming machines.

⁸ Making a contract in which each party agrees to forfeit to the other an amount to be determined on the outcome of an event. This covers on-course and off-course betting, bookmaking and pools competitions.

⁹ The playing of a “game of chance”, for winnings in money or money’s worth, cover casino gaming, bingo and gaming machines.

¹⁰ A distribution of prizes by lot or chance in return for a contribution.

1 Introduction

An average Saturday, the turnover on the Swedish gambling market is about SEK 275 millions¹¹. There are three competitors on the Swedish gambling market: the dominant *Svenska Spel*, *ATG* and *Folkrörelsernas*'¹² *lotteries and bingo games*. In the year 2002, the Swedish population's turnover on gambling was about SEK 35.8 billion, illegal gambling not included.¹³ One part of the money goes back to the gamblers, one part to sports and a large part of the money goes to the Swedish State.

Outside of Sweden, there are a great number of betting companies that also want to secure a part of the continuously growing stakes. With more or less creative methods¹⁴, they try to circumvent *The Swedish Lotteries Act*, which prohibits promotion in Sweden of lotteries arranged outside the country¹⁵. Thus, foreign betting companies want to become gambling providers on the Swedish market.¹⁶ The Internet has opened new possibilities to gambling providers. According to information in the press, the Malta based company *Unibet* has about 75 000 registered Swedish customers, London based *Expekt* about 50 000 and the world's largest betting-company, London based *Ladbrokes*, about 20 000.¹⁷

1.1 Purpose and Main Questions

The question is how these foreign gambling providers can legally promote their sites in Sweden so that the Swedish population becomes aware of their existence? Are some marketing medias legal and others not? Is the gambling monopoly now to be considered illegal, in light of the *Gambelli Case*¹⁸? In frequent advertisement campaigns, one of the companies requests the Swedish Parliament to abolish the Swedish gambling monopoly.¹⁹

Consequently, this Master Thesis discusses the nature of Internet gambling and analyses various types of marketing. The next Chapter examines gambling, while the third Chapter examines marketing, the fourth Chapter examines the marketing of Internet gambling focusing on differences

¹¹ Sydsvenskan, *ledaren*, October 12 2002.

¹² "Folkrörelserna" is difficult to translate into English. It means political or non-profit organisations.

¹³ <<http://www.lotteriinsp.se/nyheter/2003-08-28/Regeringsrapport-ll-2003-bilaga.pdf>>.

¹⁴ See the *case law* in Chapter 7.

¹⁵ *Supra* note 4.

¹⁶ One can perhaps dare to say that they already are a part of the Swedish market, as the foreign betting companies' turnover in Sweden is about SEK 2.5 billion/year, according to an article in *Internet World*, November 14 2003.

¹⁷ However, none of the companies want to confirm this information for competition reasons.

¹⁸ *Supra* note 7.

¹⁹ See examples of the campaign in the *case law* in Chapter 7.

between different media. The fifth Chapter examines betting companies on the Internet, especially the three largest mentioned above. The sixth Chapter examines the gambling monopoly in respect of EC rules. In Chapter seven, *case law* is discussed, and the eighth Chapter concludes this thesis.

1.2 Delimitation

There are a number of legal questions involving gambling on the Internet. Legal problems arise when a Swedish consumer places a bet on a foreign Internet web page. The **choice of law** to be applied to the contract, **which country's court** should determine the dispute, and whether a judgement from one country's court is capable of **enforcement in another country**, are the main questions to be answered.

In Sweden, international instruments applicable to all EU Member States regulate these issues. The most central conventions contain special provisions for the protection of the consumer. However, these instruments were prepared at a time before the existence of the Internet. Consequently, the terms used are not adjusted to the Internet environment.²⁰

Other interesting questions relate to *Tax Law*. A recent preliminary ruling from the *ECJ*²¹ opened up further to foreign betting companies' gambling sites. According to this judgement, the gambler **only has to pay taxes once** for all gambling winnings. This leads to speculations if Internet gambling will be larger than both the Swedish success *Bingo Lotto* and *V75* within a couple of years.

In order to limit this Master Thesis, the above questions will not be discussed any further.

1.3 Methodology

My method has been searching for and reading relevant cases. I have also searched for literature dealing with classical principles applicable to my questions. Although Internet gambling uses new techniques, the old

²⁰ For further discussion of this problem, read Professor Michael Bogdan's article "*Kan en Internethemsida utgöra ett driftställe vid bedömningen av svensk domsrätt och tillämplig lag?*" SvJT 1998 p. 825 and Graham J H Smith "*Internet Law and Regulation*" p. 338 et seq.

²¹ C-42/02, *Ålands förvaltningsdomstol vs. Diana Elisabeth Lindman*, November 13 2003, the so-called *Lindman Case*, is about a woman from Åland who won SEK 1 million on a lottery ticket bought in Sweden. Finland wanted a part of the winning tax, just like the Swedish State wants taxes on winnings from gambling on foreign betting companies' Internet sites. Prior to this judgement, the double taxes have been a way to *protect the national betting companies*, but according to this *ECJ* ruling, gambling winnings shall only be taxed in the country where the betting company is **established**. Other effects this new ruling might have are, that foreign betting companies do not want to establish themselves in Sweden and adjust to Swedish Law.

principles and regulations apply; the question is only to what extent. In addition, I have followed the gambling monopoly debate in the media.

2 Gambling

It is a fundamental principle in Swedish lottery legislation, that private profit interests must not rule the lottery market. The market shall be reserved for the public or the use of the public. Consequently, a gambling monopoly exists in Sweden. In addition, there is a prohibition in *The Swedish Lotteries Act* against promoting unlawfully arranged lotteries and participation in lotteries arranged outside Sweden.

In a consumer-protection perspective, there are a number of special difficulties inherent to Internet gambling. Such difficulties could be how to verify that a computer-generated event (such as a slot machine or casino game) is fair, how to ensure secure payment arrangements, whether the personal details given to a reputable entity will use them purely for the purposes intended, and how to prevent underage gambling. Finally, preventing people from becoming addicted to gambling is also a goal set forth by the Government.

2.1 Rules and Regulations

As a consequence of Sweden's membership in the European Union²², *EC Law* is applicable in Sweden. When it comes to lotteries and gambling, there are no particular European regulations, however, the common rules in the *EC Treaty* are applicable.

The articles in the *EC Treaty*, which are of importance to cross-border gambling, are e.g. the articles concerning **free movement of goods and services** and **free establishment**. The articles state that there shall be no restrictions for members in a Member State to freely establish or supply goods and services in other Member States' Territory.

The articles concerning **distorted competition** are also of great importance. Keeping the construction of the Swedish gambling market in mind, the articles regulating State Monopolies and similar, are of special interest.²³ According to these articles, an adjustment of the monopolies must be done so that their business is run in accordance with the articles of the *EC Treaty*. However, it should also be mentioned, that the *EC Treaty* by no means shall interfere in the Member States' Property Regulation.

Thus, in the *Gambelli Case*, the *ECJ* had to answer to the question whether national provisions, reserving gambling activities for the State and its licensees, constitute a restriction on the freedom of establishment, the freedom to provide services and the freedom to receive and benefit from

²² On January 1 1995, Sweden became a Member State of the European Union.

²³ Cf. Chapter 6.

services offered by a supplier. In my opinion, this case will have an important effect on the Swedish gambling market, cf. Chapter 6.

It should be recognized, that the prohibition against promoting participation in unlawful lotteries, is necessary. The prohibition against arranging lotteries without permission would otherwise be inefficient. According to the Swedish Government, it is reasonable that corresponding rules regarding promotion should be accepted, if the Swedish regulation for arranging lotteries is accepted from an *EC Law* point of view.²⁴

2.1.1 The Lotteries Act²⁵

The Lotteries Act shall apply to lotteries arranged for the general public.²⁶ Unless this Act provides otherwise, lotteries shall only be arranged after a permit has been obtained.²⁷

2.1.2 Definition of lotteries

The definition of lotteries can be found in section 3 in *The Lotteries Act*. It reads as follows:

“Lottery shall in this Act mean an activity where one or more participants may, with or without a stake, obtain prizes of a higher value than that which each and every one of the other participants may obtain.

Lottery shall include

- 1. drawing of lots, guessing, betting and similar procedures,*
- 2. amusements at fairs and amusement parks,*
- 3. bingo games, gaming machines, roulette games, dice games, card games, chain letter games or similar games.*

When assessing whether an activity constitutes a lottery, the general nature of the activity shall be taken into account and not only the greater or lesser degree of chance present in the individual case. Prizes (winnings) shall in this Act also refer to continuation of the game.”

2.1.3 Online betting

Online betting are those lotteries covered by section 21a in *The Lotteries Act*:

“Lotteries arranged in connexion with radio or television transmissions or otherwise communicated by electromagnetic waves shall be deemed true lotteries. This shall however not apply to betting in connexion with horse

²⁴ SOU 2000:50, *Från tombola till Internet – översyn av lotterilagstiftningen*, p. 12.

²⁵ *Supra* note 4.

²⁶ Section 1.

²⁷ Section 9.

... racing or to betting in connexion with sports competitions that are conducted in more than one municipality. Nor shall it apply to chain letter games or similar games.”

Those lotteries are today foremost distributed via the Internet, interactive digital-TV and mobile telephony.

Online betting is not different in nature from other traditional gambling methods, and could be seen as just another way of delivering a service. In Sweden, online betting is permitted in the same way as traditional methods of gambling, i.e. the State has a monopoly in order to regulate and prevent dangers.

2.1.4 Prohibited acts²⁸

“It is not permitted, in commercial operations or otherwise, for the purpose of profit to

- 1. promote participation in unlawful lotteries arranged within the country or in lotteries arranged outside the country, or*
- 2. without the consent of the arranger sell lottery tickets, receive stakes or pass on prizes in lawful lotteries.”*

The Government has stated section 38 in *The Lotteries Act* as compatible with *EC Law*.²⁹ The Swedish courts have found, that section 38 in *The Lotteries Act* is in full conformity with *EC Law*.³⁰ However, this might change after the ruling in the *Gambelli Case*, cf. Chapter 6.

2.1.5 Penal provisions³¹

“A fine or a maximum of six months’ imprisonment may be imposed on persons who intentionally or by gross negligence

- 1. unlawfully arrange a lottery, or*
- 2. unlawfully possess a cash machine, token machine, goods gaming machine or skill machine.*

A fine or a maximum of six months’ imprisonment may also be imposed on persons who, in the course of business or otherwise, for the purpose of profit intentionally promote participation in gaming arranged outside the country, if the promotion particularly relates to participation from Sweden.

There shall be no convictions for trivial offences.

²⁸ Section 38.

²⁹ *Supra* note 5, p. 12.

³⁰ *Supra* note 6.

³¹ Section 54.

Two years' imprisonment may be imposed if the offence is serious."

2.1.6 Appeals³²

"Appeals against decisions by a municipal committee, a county administrative board or The National Gaming Board under this Act lie to a general administrative court.

Leave is required for appeals to an administrative court of appeal."

2.2 The National Gaming Board

The National Gaming Board is the central administrative authority that handles questions on lotteries and gambling.³³ The Board is also central supervisory authority over The Lotteries Act, with the responsibility that the Act, and directions issued pursuant to the Act, shall be complied with.³⁴ The Board may issue orders and prohibitions required for compliance with The Lotteries Act.³⁵

During the end of the year 2002 and during the year 2003, several cases ruled by *The National Gaming Board*, have regarded the application of the promotion prohibition in section 38 in *The Lotteries Act*. Especially the promotion of lotteries arranged outside Sweden, cf. Chapter 7.

As *The National Gaming Board* has filed a complaint to the police against the Swedish tabloids *Expressen* and *Aftonbladet*, for publishing foreign betting companies' advertisements the weekend after the ruling in the *Gambelli Case*, the Swedish Courts now have to decide if it is legal for foreign betting companies to advertise in Sweden, cf. Chapter 6.³⁶

The Board also filed a complaint to the police against the newspapers *Uppsala Nya Tidning* and *Nerikes Allehanda* for publishing a foreign betting company's, *Unibet*, advertisements on November 13 2003. These

³² Section 59.

³³ SFS 1994:1452, *The Regulation with instructions for The National Gaming Board*, section 1.

³⁴ *Ibid.*, section 3.

³⁵ Section 52 of *The Lotteries Act*.

³⁶ The foreign betting companies also want an answer to this question. On November 28 2003, *Unibet* filed a complaint with the Eskilstuna City Court against *The National Gaming Board* (Case T 2417-03). On December 11 2003, *Ladbrokes* filed a complaint with the European Commission against the Swedish and Finnish State for breach of EU's fundamental principles. In order to get a fast decision, *Ladbrokes* chose not to file a complaint with a National court, but to go straight to the European Commission. If the Commission finds in favour of *Ladbrokes*, it will leave a "formal notification" to the Swedish Government that *The Lotteries Act* should be changed. If nothing happens, the Swedish Government will receive a "statement". If the question is still unanswered after that, it will go to the *ECJ* for a final judgement.

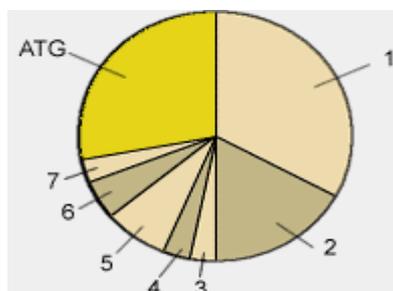
ads contained the starting list to a horse race and *Unibet's* winner- and placing odds on respective horse. The newspaper *Östgöta Corren* in Linköping also published the ad but has not yet been reported, as *The Gaming Board* is probably not aware of the publication.

The Gaming Board interprets the *Gambelli Case* as an additional confirmation of the Government's possibility to regulate the gambling market. *The Board* only finds that the ruling equates the conception "services" with "the right of establishment" and that countries under certain circumstances may restrict *the freedom of establishment* just like countries may for services. Consequently, according to *The Gaming Board*, the *ECJ* has expanded the right (for states) to have regulated systems and the judgement does not change the Swedish regulation. According to *EC Law*, Member States may have exceptions (from *the freedom of establishment*) for lotteries.

2.3 The Legal Operators on The Swedish Market

In Sweden, the turnover on gambling is about SEK 35 billion/year, gambling on international gambling sites not included.

The market shares of the legal operators are as follows:



1 Svenska Spel. 2 Svenska Spel's value machines. 3 Casino Cosmopol. 4 Restaurant casinos. 5 Folkrörelserna. 6 Bingo. 7 Other associations' lotteries.³⁷

In the Swedish lottery legislation, it is a fundamental principle, that private profit interests must not rule the lottery market - this shall be reserved for the public or the use of the public.³⁸ The lottery market is at the moment divided by three leading actors, as described below.

Commercial profitable interests are allowed only to a very limited extent. That is the case for certain automatic games, restaurant casinos – i.e. roulette games, dice games and card games – and fairs' - and carnival amusements. Consequently, the gaming- and lottery business is reserved

³⁷ www.atg.se

³⁸ *Supra* note 27, p. 10.

principally for the State and *Folkrörelserna*. In practice, this is a monopoly situation.

Folkrörelsernas' conditions to arrange games are well defined by *The Lotteries Act*. The rules basically state, that only Swedish non-profit organisations with the purpose to support public utility within Sweden, may arrange certain types of lotteries, e.g. so-called true lotteries and bingo-games. Consequently, *The Lotteries Act* makes a distinction between Swedish and foreign subjects.

As the Government made some changes in *The Lotteries Act*³⁹, there is also a new Swedish player on the market. This means, that *AB Svenska Spel* gets a domestic challenger on the Internet. *The National Gaming Board* gave the company *Spero Online*⁴⁰ permission to run gambling on the Internet⁴¹. On their site, they offer scratch tickets and Casino lotto. The winnings can be as much as SEK 3 millions, and drawings are made in real time.

Behind this new challenger, *Spero Online*, are the *A-lotterierna*, *IOGT-NTO* and the Ålandish betting company *PAF*. According to *PAF's* managing director, the company will not settle with just scratch tickets. The interest for gambling on the Internet is growing rapidly and, consequently, also the supply of different gambling forms from many international betting companies.⁴²

2.3.1 AB Svenska Spel – www.svenskaspel.se⁴³



In the year 2002, *AB Svenska Spel's* profit was SEK 4.2 billion. This is a record for the betting company and makes *Svenska Spel* to one of Sweden's most profitable companies. One reason to its success is that the Swedish people likes to gamble. Sweden is the sixth most gambling country in the world. It is difficult to find other companies with such high return - 50% of

³⁹ Prop. 2001/02:153 "Loterier över Internet m.m."

⁴⁰ With the web site Sperospel.se.

⁴¹ In June 2003, *Spero Online* became the first company outside the Swedish gambling monopoly that was granted a gambling license. On November 17 2003 they started their public advertising campaign.

⁴² Interview with *PAF's* CEO in *Internet World*, November 14 2003.

⁴³ *Svenska Spel* is dominant on the Swedish gambling market. Their turnover for the year 2002 was SEK 17.9 billion, which is equivalent to 46% of the Swedish gambling market. According to the information on their web site, *AB Svenska Spel* has 18 different gambling products in its assortment. The products are divided into the categories *games of skill* (sport games and dog racing), *games of luck* (number games and lottery tickets), *restaurant games* (Jack Vegas, Miss Vegas) and *casino business*. The greatest product is the value automatic machine Jack Vegas and Miss Vegas, which almost had a turnover of SEK 6 billion during 2002. The greatest product within the games of skill is Oddset, which during 2002 had a turnover of SEK 1.7 billion. Lotto is the greatest game among the number games, with a turnover for 2002 of SEK 2.1 billion.

the revenue is returned to the gamblers. Abroad, this number is significantly higher⁴⁴. As no competition exists, the percentage rate of the revenue that is returned can be kept at a favourable low level in terms of profitability.⁴⁵

Despite the gambling monopoly, *Svenska Spel* has barely 20 % of the Internet gambling market. Today, their gambling representatives constitute 96% of *Svenska Spel*'s turnover, while the Internet constitutes the rest. How large market share *Svenska Spel* wants to obtain on the Internet market is kept a secret.⁴⁶

2.3.2 ATG – www.atg.se⁴⁷



ATG's part of the Swedish gambling market is about 28% and the company's turnover is about SEK 10.2 billion per year.⁴⁸ Their most famous product is V75, which is the largest game in Sweden. Gambling on horses is possible, through 2 000 gambling representatives, on trot- and gallop tracks and on the Internet.

⁴⁴ Some foreign betting companies claim they give 90% of the revenue back to the gamblers.

⁴⁵ SVT's TV-show "Uppdrag Granskning", March 25 2003.

⁴⁶ Interview with *Svenska Spel*'s Mathias Hedlund in *Dagens Media*, October 3 2003.

⁴⁷ According to the information on their web site, ATG was founded in 1974 as a consequence of general crises in the middle of the 1970s in the trot- and gallop sport and the horse-business. By the development of the game, economic measures have been created that contribute to the development of the sport. This creates work, not at least on the country-side. An agreement, between the owners of ATG (STC and SG) and the State, regulates ATG's business. The State also elects half of the members in ATG's board, plus the chairman of the board. ATG shall promote the trot- and gallop sport within the country can be run so that the long-term conditions for the development of the sport and the geographical spread can be safe. ATG's business idea is to "give the people a richer spare time with high quality trot- and gallop sport as a foundation" and to, in a responsible way, make betting on horses easily available. ATG's strategical goal is "gambling in world class, sport in world class, confidence in world class and staff and organisation in world class." They shall be a "leading gambling company with an attractive and appreciated working place". ATG wants to be considered as the "good company and the horse sport's best friend". They decide in consultancy with the organisers of the sport about the number of competition days with gambling, dates, which gambling forms that may occur and the distribution of the trot- and gallop sport's part of the turnover, which remains when the gamblers and the Government have got their shares.

⁴⁸ www.atg.se.

2.3.3 Folkrörelserna and Folkspel⁴⁹



As mentioned above, it is difficult to translate *Folkrörelserna* into English. *Folkrörelserna* are political or non-profit organisations with different goals.

Folkspel is a group of companies including the non-profit organisation *Folkspel*, *Folkrörelserna*'s collaboration body for gaming and lottery issues, and the 100% owned subsidiary *Folkspel i Sverige AB*. The non-profit organisation has about seventy *Folkrörelser* as members, including athletic organisations, disability organisations, social- and humanitarian organisations and others. The non-profit organisation has a license from *The National Gaming Board*, to run different games and lotteries, mainly the very popular TV-show *Bingolotto*.

⁴⁹ www.folkspel.se.

3 MARKETING

During the end of the year 2002 and during the year 2003, several messages by foreign betting companies could be seen in the Swedish press. Some had the message, that the gambling monopoly in Sweden should be stopped; others were more of the “traditional” marketing character. *The National Gaming Board* has ruled some of them as statements influencing public opinion, and therefore in the scope of *the freedom of press*⁵⁰. That means, that they are not regarded as commercial advertising, and are not breaking any laws.

Cross-border commerce involves problems not only in respect of Private Law but also within the field of Marketing Law. Marketing Law includes both national law and *EC Law*. Many companies wish to exploit their free movement rights, including marketing, across national borders. Therefore, it is important to know, when a national rule (concerning marketing practices) might be too strict, and thereby infringe Community Law.⁵¹

Marketing Law is a part of Public Law, which means the part of the legislation that regulates the relation between the public and natural persons.⁵²

3.1 Swedish Rules and Regulations

There are a number of rules to keep in mind when marketing gambling. Some of the Swedish rules are based on directives, others are autonomous.

Questions about “mixed advertising” belong to the most difficult questions to judge within the press law area.⁵³ In the preparatory legislative material to *The Marketing Practices Act*, it is said, that the courts in doubtful cases

⁵⁰ Cf. the *case law* in chapter 7.

⁵¹ The national judge must shut his eyes to the national law as *EC Law* takes precedence over conflicting national law - including national constitutional provisions, according to the so called *principle of supremacy* or *primacy* from the case *Costa vs. ENEL*, C-6/64.

⁵² However, there are some Private Law features in *The Marketing Practices Act*, like e.g. the rules about natural persons' right to damages in sections 29-30.

⁵³ Warnling-Nerep, *En orientering i tryckfrihet & yttrandefrihet*, Stockholm, 2003, 2nd ed, p. 70. In MD 1998:12, *Swedish Match Sverige AB vs. the Consumer Ombudsman, Swedish Match* had woven in information about snuff manufacturing in its advertisements for snuff. The question was whether the advertising contained statements influencing public opinion or news supplying features, with the consequence that the text in its entirety would be judged according to *The Regulation of the freedom of the press*. The Marketing Court, however, ruled the ad as marketing of tobacco product. *The Regulation of the freedom of the press* was not applicable but the *MPA*. *Swedish Match* appealed but The Supreme Court rejected the appeal, NJA 2001 p. 319: The prohibition against tobacco advertising would lose all practical significance, if it could be circumvented by the fact that the marketing is supplemented with some facts. See also MD 2002:18, *Sveriges Spannmålsodlare AB vs. Kooperativa Förbundet*, where *KF* was convicted for features in a TV-commercial.

must give *the constitutional rights* precedence, and rule the presentation as protected by *the regulations of the freedom of the press and speech*.

Pre-conditions for the applicability of the *MPA*, for legal steps to be taken concerning advertising are, that the representation is of a commercial nature. This means, that the message is intended to promote a commercial transaction and, that it concerns the tradesman's goods or services. Other messages, concerning occurrences in society or statements influencing public opinion, that are included in advertising, fall outside the scope of the *MPA*, and are otherwise regarded as coming into conflict with *the freedom of speech and freedom of the press*. Sweden has a strong constitutional protection of *freedom of speech and of the press*. This is clearly observed in the practice of the courts.

The Swedish Lotteries Act prohibits promotion of participation in lotteries arranged outside Sweden. Consequently, there are special rules about the marketing of lotteries in *The Lotteries Act* that concern certain aspects of the marketing. However, *The Marketing Practices Act* is applicable - even when a special act regulating the area exists.

3.1.1 The Swedish Marketing Practices Act⁵⁴

The Marketing Practices Act is applicable in *all fields of economic life*. Thus, there are no sectors being excluded. In the terms of the Act, it applies when a tradesman advertises, or is seeking to acquire products, as part of his business.⁵⁵ The term "*products*" includes all types of goods, services, real property, job opportunities and other utilities,⁵⁶ i.e., the term is *all comprising*. The Act gives no definitions of "consumer", "business", "tradesman" or similar. Consequently, these terms should be understood in a wide sense.

The geographical scope of the Act is not stated in the statutory text. The Act is aiming at advertising and other marketing practices *directed towards a Swedish public*, i.e. consumers and tradesmen within Sweden. In certain areas, primarily TV-advertising, EU Directives referring to the law of the broadcasting country might modify the scope of the Act, as *EC Law* precedes national law.⁵⁷

The Marketing Practices Act contains a general clause prohibiting improper marketing practices⁵⁸. The terms used in the general clause are interpreted broadly. The term "*marketing*" means advertising and other measures taken in the course of business intended to promote sales and availability of products. Thus, all means of communication are included. Sales arguments

⁵⁴ *Supra* note 1.

⁵⁵ Sec. 2.1 *MPA*.

⁵⁶ Sec. 3.1 *MPA*.

⁵⁷ See section 4.2.4 below.

⁵⁸ Sec. 4 *MPA*.

put forward to individual consumers, e.g. in a shop or when selling over the Internet, are included.

There are no limitations of the *MPA*'s applicability when it comes to marketing in different media. Thus, the *MPA* is also applicable to marketing on the Internet.⁵⁹ The fact, that the Internet does not transmit information - the user is active in its searching - does not lead to another conclusion.⁶⁰ Consequently, it is rather obvious that marketing on the Internet does not enjoy some kind of immunity towards interventions according to the *MPA*. The fact that the Internet user "clicks" forward among the different sites does not change the fact, that the company behind the web page, which by placing its message on the Internet, is marketing its product in its business. However, in the case of cross-border marketing, the question of what relation to the Swedish market is required arises, to Swedish jurisdiction and Swedish Marketing Law be applicable.

In a case from the year 2000⁶¹, The Marketing Court touches upon certain parts of these problems. The marketing in this case was in the Swedish language, the prices were in Swedish currency and the marketed equipment was intended for Swedish TV-channels. The Court therefore found it obvious that the marketing was *directed to* consumers on the Swedish market. Consequently, there were no obstacles against applying the *MPA* to the marketing.

3.1.2 The Lotteries Act⁶²

As mentioned, there is a prohibition against promoting foreign betting companies in Sweden.⁶³ The Swedish Government has stated section 38 in *The Lotteries Act* as compatible with *EC Law*.⁶⁴ The Swedish courts have found, that section 38 in *The Lotteries Act* is in full conformity with *EC Law*.⁶⁵ This opinion might, however, change as a consequence of the *ECJ* ruling in the *Gambelli Case*, c.f. Chapter 6.

⁵⁹ MD 2000:8, *The Consumer Ombudsman vs. Bodion AB*.

⁶⁰ MD 2000:19, *STOP vs. Elinge Electronica Lda and L.E.*

⁶¹ MD 2000:19, in which a non-profit organisation - *STOP* - with the purpose of protecting coded TV-services, wanted to prohibit a Portuguese company which on its web page, in Swedish *directed to* Swedish consumers, marketed cable-decoders. Such decoders are prohibited in Sweden and that means, according to The Marketing Court's previous judgements, that the marketing is improper according to the Swedish *MPA*. One fundamental principle is, when a marketing measure is against another Act, it is also against *good marketing practices* in the *MPA*. According to another principle, the marketing is improper, if it is against other Acts.

⁶² *Supra* note 4.

⁶³ Sec. 38 in *The Lotteries Act*.

⁶⁴ *Supra* note 5, p. 12.

⁶⁵ *Supra* note 6.

3.1.3 The Distance Selling Act⁶⁶

The Distance Selling Act entered into force June 1 2000 and replaced *The Home Selling Act*. The Act is an implementation of *The Distance Selling Directive*⁶⁷.

There is an exception for *gaming and lottery services*, which means that the right of withdrawal is not applicable to these services⁶⁸. However, the information obligation in the Act is applicable. The Act contains rules about what information must be given to the consumer in the marketing. The Act is applicable to agreements made over the Internet. Consequently, this Act is one of the Acts that gambling sites must follow, e.g. in their contract with the consumers. *The Distance Selling Act* also contains a protection for the consumer against unfair law clauses.

3.1.4 The Electronic Commerce Act⁶⁹

One might think that his Act would solve a lot of questions regarding gambling, but the Act is not applicable to gaming and lottery services, see section 1, paragraph 6.

3.2 European Marketing Law

The European Union has not issued uniform European Marketing Law. Instead there are directives regulating e.g. comparative advertising, special products like pharmaceuticals and a number of EU-regulations. But besides the harmonized areas, the Member States' marketing laws are far from uniform.

Marketing and advertising are recognised as an essential corollary to the free movement of goods and services. Without advertising it would be extremely difficult for a manufacturer located in one Member State to penetrate the market of another Member State. But Member States are not prevented from regulating and restricting advertising on a national basis. On the contrary, Article 30 *EC*, supplemented by the *case law* on "mandatory requirements", provide sample scope for Member States to subject advertising to reasonable restrictions.

According to *EC Law*, interventions against direct or indirect trade restrictions, which are against the free movement of goods and services between the Member States, are possible. Article 28 *EC* prohibits quantitative restrictions on imports and Article 29 *EC* prohibits the

⁶⁶ SFS 2000:274, *Lag om konsumentskydd vid distansavtal och hemförsäljningsavtal*.

⁶⁷ Directive 97/7/EC on the protection of consumers in respect of distance contracts.

⁶⁸ Section 14, p. 6.

⁶⁹ SFS 2002:562, *Lag om elektronisk handel och andra informationssamhällets tjänster*.

corresponding for restrictions on exports. The prohibition comprehends every measure originating from public authority - regardless its nature -, e.g. decisions from The Swedish Marketing Court. Article 30 EC admits exceptions, if the prohibitions or restrictions are justified on grounds of e.g. public morality, public policy or public security, the protection of health and the life of humans.⁷⁰ Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Questions about trade restrictions can arise also within Marketing Law. In the *Keck Case*⁷¹, the *ECJ* drew the guidelines. After this judgement, the *ECJ* differs national **product-related** regulations: requirements to be met by such goods, such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging, from national legislation of **selling arrangements**. Legislation about selling arrangements comprehends rules about when, where and how goods may be sold. The prohibition in Article 28 EC comprehends this category **only** when it can be shown that the national legislation has *discriminating effects* to other Member States. Consequently, national restrictions in Marketing Law are permitted as long as they affect goods from different Member States equally.⁷²

3.2.1 Cross-border marketing

The European Commission has been active in initiating enforcement action in respect of marketing and selling controls on the Common Market, especially regarding cross-border advertising, direct mail, satellite television and the Internet.

National law can be very different from one Member State to another. It can be difficult to decide which Member State's law applies.

The country of origin (the Member State where the marketing company has a permanent operation place) has the duty to intervene against marketing, which has an **effect** on another country (*country of destination*). However, if the marketing is illegal only according to *the country of destination's* national law and the measure is not illegal according to one of the directives listed in the attachment to the Directive 98/27/EC on injunctions for the protection of consumers' interests, *the country of origin* has no duty to intervene.⁷³

⁷⁰ Advertising restrictions can be justified on consumer protection grounds in regard to the free movement of goods. Legislation, which restricts or even prohibits such commercial practices for that reason is therefore capable of contributing to consumer protection and fair-trading.

⁷¹ Joined Cases C-267 and 268/91, *The Tribunal de Grande Instance, Strasbourg, vs. Bernard Keck and Daniel Mithouard*.

⁷² *Praktisk Marknadsrätt*, Norstedts Juridik AB, Stockholm 2002 7th ed., p. 665.

⁷³ *Ibid.*, p. 667.

The country of destination has to require measures against the marketing company from the *country of origin* to be taken, before *the country of destination* can take measures itself.

Companies should be careful with their cross-border marketing as the marketing can be used when determining the choice of law in a consumer conflict. If a company aims its marketing towards consumers in a special country, *The Purchase Law* of that country will apply even if the case is brought before a court in another country. In other words, if e.g. an English tradesman's advertising aims at Swedish consumers, *Swedish Purchase Law* will apply even if the case is brought before a court in England.⁷⁴

3.2.2 Mutual recognition

The principle of mutual recognition means, that when Member States make and apply technical norms and trade regulation, they cannot assume a national perspective only. Goods fulfilling the demands of the own Member State's implemented legislation must be *mutually recognised* in other Member States. This means, that the free movement of goods and services is realised without harmonised legislation within all areas.⁷⁵

3.2.3 The Directive on the protection of consumers in respect of distance contracts⁷⁶

The Swedish Marketing Practices Act is applicable to marketing which aims at distance contracts, e.g. marketing on the Internet. This means, that the tradesman must leave such information that is of special importance from a consumer's point of view. Special rules about information duty can also be found in other legislation applicable to distance contracts, e.g. *The Price Information Act*⁷⁷. There is also of course legislation applicable to both distance contracts and otherwise, e.g. *The Consumer Purchase Act*⁷⁸ and *The Consumer Services Act*⁷⁹.

Distance contracts mean contracts concluded without the simultaneous physical presence of the consumer and the supplier (not "face to face"), e.g. through the Internet. The thought behind this Directive is that consumers in one Member State shall have access to goods and services from another Member State on the same conditions as the consumers in that Member State.

⁷⁴ Ibid., p. 667.

⁷⁵ Ibid., p. 664.

⁷⁶ *Supra* note 66, (amended by Directive 2002/65/EC concerning the distance marketing of consumer financial services).

⁷⁷ SFS 1991:601, Prisinformationslag.

⁷⁸ SFS 1990:932, Konsumentköplag.

⁷⁹ SFS 1985:716, Konsumenttjänstlag.

The Directive contains different forms of distance communication like addressed/unsolicited printed matters, catalogues, fax or through the Internet. The consumer shall be provided with information⁸⁰ in a clear and comprehensible manner in any way appropriate to the means of distance communication used⁸¹. The consumer must receive written confirmation of the information⁸² and has a right to withdrawal for a period of at least seven working days without giving any reasons⁸³. Thus, gaming and lottery services are excluded from this right, article 6, section 3.

National Law can deviate from the Directive because a Directive is only binding as to the result. By leaving the choice of form of implementation to the Member States, the resulting national law can differ.

3.2.4 Directive on electronic commerce⁸⁴

Especially the Internet brings up the problem of cross-border-activity. Therefore harmonization was necessary and the Community came up with *the Directive on e-commerce*.

This Directive contains rules for marketing and sales through e-mail, search-services, Internet newspapers and financial services if it takes place online.

The law applicable is always the law of the *country of origin*, irrespective of the addressee of the marketing. Legal questions not covered by the directive shall be examined according to the Marketing Law of that country to which the marketing has the **closest connection**.

There is exclusion in Article 1 (5) b of gambling activities from the scope of application of this directive that covers games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value.

The Directive is implemented in Sweden⁸⁵ and according to the Swedish Act, it is not applicable to gambling⁸⁶.

⁸⁰ Cf. the detailed list in Art. 4 No.1.

⁸¹ Art.4 Nr.2.

⁸² Art.5.

⁸³ Art.6.

⁸⁴ Directive 2000/31/EC of June 8 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁸⁵ *Supra* note 68.

⁸⁶ Section 1, p. 6.

4 MARKETING INTERNET GAMBLING ACTIVITIES

Internet gambling is the most rapid growing market in gambling-Sweden. In the year 2003, the Swedish Internet gambling turnover was expected to increase from SEK 2 billion to SEK 2.8 billion – and most of the money disappears from Sweden. The foreign betting companies' turnover is barely SEK 1.6 billion. As a comparison it can be mentioned that the popular TV-show *Bingolotto's* turnover for 2003 was expected to be about SEK 2 billion.⁸⁷

Internet gambling presents substantially new challenges to governments and regulatory agencies. Existing approaches to betting, lotteries and gaming are limited by the nature of Internet technology, and the international nature of the activity. My conclusion reached is that prohibition is an ineffective alternative, and that licensing of gambling services providers is the appropriate approach.

4.1 Jurisdiction

Besides *Private International Law* and other questions, the boundless character of the Internet has arisen problems within *the International Public Law*. Marketing Law is a part of the Public Law.

Swedish marketing rules are considered to be applicable to marketing that has “**effect**” on the Swedish market, even if the marketing *originates* from another country. This means that the rules apply according to the so-called *country of effect principle*.⁸⁸ When it comes to the Internet, this principle may be difficult to apply, a web page can have “effects” in all countries in the world. Instead, it is perhaps more relevant to talk about “**targeting**”.

According to the fundamental principle of *EC Law*, *the principle about free movement for goods and services*, a Member State may not, as a principal rule, use its own legislation to restrict marketing from other Member States, if the marketing is legal in that State. Thus, from a preliminary ruling from the *ECJ*⁸⁹ in a Swedish Marketing Court case⁹⁰, which attracted attention, the conclusion can be drawn, that a Member State (in areas which are not harmonized), in certain cases has the right to intervene with support of its

⁸⁷ TT, 13 November 2003.

⁸⁸ The application of the *country of effect principle* cannot be read in the legislation, but is founded on statements in the preparatory legislative material and in *case law* from The Marketing Court, see e.g. prop. 1970:57 p. 92 et seq. and prop. 1992/93:75 p. 34 et seq.

⁸⁹ The joint cases C-34/95, *Konsumentombudsmannen vs. De Agostini*, C35/95 and C-36/95, *Konsumentombudsmannen vs. TV-Shop I Sverige AB*.

⁹⁰ MD 1998:17, *Konsumentombudsmannen vs. De Agostini*.

National law against marketing which originates from another Member State. Under the assumption, however, that the intervention fulfils certain conditions, for instance, is non-discriminating and in reasonable proportion to the infringement.

4.1.1 Targeting⁹¹

Some regulators have attempted to mitigate the impossibility of the current situation by issuing statements about their *enforcement* policy, stating that in practice they will not take action against an advertisement unless it is *targeted* at customers in their jurisdiction.

The Swedish Marketing Court applies the *principle of effect*, as mentioned above, but does also apply *targeting* in its reason for Swedish law to be applicable.

When using e.g. direct mail, it should not be very difficult to decide if the marketing is directed to the Swedish market or not. In other cases, such as web sites, one can use languages, currency and other national features as factors to determine the *targeting*. The question if the marketing is directed to the Swedish market can be answered from a general judgement of the circumstances in the specific case.⁹² Further circumstances, which make the marketing directed to Sweden, can be found in The Nordic Consumer Ombudsmen's joint position on trade and marketing on the Internet and other similar communication systems, December 1998, and in the cases MD 1989:6⁹³ and 1998:17⁹⁴ from The Marketing Court.

To use *language* as a factor to determine jurisdiction can be justified with reasons such as a company is making the communication in a language that is understood almost exclusively by residents of the recipient country, e.g. Swedish. *Payment currency* can also be taken in consideration and the way of presentations, including economic and tax information, can be relevant when deciding which country's law should apply. A web site that stresses the buyer's ability to avoid Swedish income taxes would, according to the targeting doctrine, be deemed as directed at Swedish residents or taxpayers.

⁹¹ This approach grants jurisdiction to those jurisdictions whose residents are targeted by the supplier. Targeting may be justified on grounds that the supplier is seeking customers in that jurisdiction. Consequently, the supplier is aware of the nationality of its customers and should not complain if its courts claim jurisdiction over the supplier's activities. The targeting approach has similarities to the US "minimum contacts" doctrine, see "Internet Law – text and materials" p. 196.

⁹² SOU 1999:106, *Konsumenter och IT – en utredning om datorer, handel och marknadsföring*, p. 126.

⁹³ MD 1989:6, *Konsumentombudsmannen vs. SAS*.

⁹⁴ *Supra* note 89.

4.1.2 Country of origin regulation

The principles of *country of origin* regulation are simple. Activities of a tradesman, which is established and regulated in one state (country of origin), may be carried out in another (country of destination), without any requirement for prior authorisation from, or supervision by the appropriate regulatory body in the country of destination.

Article 1(2) of *The ICC Guidelines on Advertising and Marketing on the Internet* contains a country of origin rule.⁹⁵

The country of origin principle is found in the E-Commerce Directive. However, in Article 1 (5) b, there is an exclusion of gambling activities from the scope of application of the Directive.

4.2 Different Types of Media Used in Connection With Gambling

Are there any differences in advertising in different media? While Swedish law is applicable to outdoor advertising and sms, some advertising in TV3 and Kanal5 follows *the country of origin* regulation. Does this lead to the conclusion that foreign betting companies may advertise in some media while advertising in other media will suffer from interventions from *The National Gaming Board*?

4.2.1 Mobile systems and Digital TV⁹⁶

UMTS, or the third generation mobile systems (3G), as the technique also is called, is one of the new techniques that have been discussed the most in media during recent years. The extension is rapidly growing and one mobile operator in Sweden opened its first net for subscribers during the Spring 2003.

Using Digital TV, technology will allow customers to watch e.g. a live sporting event, access player information and place a bet at the same time.

Online betting are those lotteries covered by section 21a in *The Lotteries Act*:

”Lotteries arranged in connexion with radio or television transmissions or otherwise communicated by electromagnetic waves shall be deemed true lotteries. This shall however not apply to betting in connexion with horse racing or to betting in

⁹⁵ See <http://www.iccwbo.org/home/statements_rules/rules/1998/internet_guidelines.asp>.

⁹⁶ Other legislation to consider when using mobile systems and Digital TV in marketing, is the Directive 2002/58/EC, concerning the processing of personal data and the protection of privacy and electronic communications.

connexion with sports competitions that are conducted in more than one municipality. Nor shall it apply to chain letter games or similar games.”

Those lotteries are today foremost distributed via the Internet, interactive digital-TV and mobile telephony. Consequently, the promotion prohibition in section 38 in *The Lotteries Act* applies to mobile systems and digital TV.

4.2.2 The Internet/Web sites

Internet advertising encompasses not only banners or pop-up ads, but also the web site itself, as corporate web sites often contain information, which advertises and promotes the particular company and its goods and services.

According to a judgement by The Swedish Marketing Court⁹⁷, corresponding responsibility, which is applicable to newspapers and magazines that have advertisements, shall apply to Internet web sites. Consequently, by disposing space for advertisements of illegal products on their web sites, tradesmen assist in the marketing.⁹⁸

The fact that a website is accessible throughout the world does not mean at the same time that the advertiser wants to do business all over the world. But should retailers utilising the Internet as a medium to promote their products be put in a more favourable position than the ones that utilise traditional media for promotion?

In a judgement from The Swedish Marketing Court⁹⁹, it is evident, that the Court finds foreign companies' marketing on the Internet in the scope of Swedish jurisdiction, and the Swedish *MPA* is applicable when the marketing is *directed* to consumers on the Swedish market¹⁰⁰.

4.2.3 Links

Links, taking one from one content provider to the next, seem to raise some questions. Normally, the company behind the banner or popup should be responsible for the marketing. However, according to the *MPA*'s rules of

⁹⁷ MD 2003:27, *Com Hem AB, SENDA i Sverige AB and ViaSat AB vs. Flashback Media Group AB and J.A.*

⁹⁸ In the *preparatory legislative material* to the prior *MPA* (Prop. 1970:57 p. 77), it is said, that the question whether a prohibition shall be ruled or not, is not affected by the fact that the tradesman acted with malice or negligence. The fact that an action was taken by mistake, does not lead to that a motion for prohibition shall be dismissed. However, reasonable consideration is taken to the possibilities the tradesman had to affect the action in question (MD 1983:7, *Konsumentombudsmannen vs. Extra Film AB*).

⁹⁹ MD 2000:19, *STOP – Scandinavian TV Organisation against Piracy – Sweden vs. Elinge Electronica Lda and L.E.*

¹⁰⁰ Bogdan Michael, "Gränsöverskridande marknadsföring via Internet", SvJT 1998, p 623.

assistance, others, which act on the company's behalf and those who essentially contribute to the marketing, are also responsible, sections 14, 15 and 17. Regarding banners and popups, this would normally mean the web sites' owner. However, the rules of assistance would also mean, that production companies, Internet consultants etc., that produces web sites, may be hold responsible. Also portals should have a responsibility corresponding to e.g. newspapers' for such pages that are under their control.¹⁰¹

4.2.4 TV

The TV-Directive¹⁰² contains framework rules for cross-border TV broadcasting via satellite. Each Member State shall ensure that all television transmissions comply with their law, if the broadcaster is established in that Member State (the transmitting state)¹⁰³. Thus, *a television broadcaster* comes under the jurisdiction of the Member State in which it is **established**. However, this principle does not apply to an *advertiser* who transmits its TV-commercial directed to consumer in one Member State (the receiving state), through a broadcaster in another Member State. As a result, betting companies cannot circumvent Swedish legislation, by using an English broadcaster, e.g. TV3 when transmitting their advertising to Swedish consumers.

The receiving state can also intervene against the advertiser if the state supports its competence by using other legislation than The TV-Directive (e.g. misleading advertising in the TV-Shop Case¹⁰⁴), because other directives have to be observed as well. However, the intervention must not lead to discrimination.

A service has to be mentioned in the TV-Directive, which e.g. tobacco- and alcohol advertising is. Otherwise the marketing is out of the Directive's scope. If the marketing is out of the Directive's scope, the authority of the receiving country may intervene against the advertiser. Gaming and lottery services are not mentioned in the TV-Directive. Consequently, *The National Gaming Board* may intervene against e.g. Ladbrokes, Unibet and Expekt.¹⁰⁵

¹⁰¹ Carlén-Wendels Thomas, *Nätjuridik Lag och rätt på Internet*, 2000 p. 188 and 208. Compare *The BBS-Act* (SFS 1998:112, *Lag om ansvar för elektroniska anslagstavlor*), by which the person, who supplies a service for electronic supplying of messages, is imposed a responsibility to remove messages with a certain criminal content, e.g. persecution of minorities.

¹⁰² Directive 89/552/EEC (amended by Directive 97/36/EC), *on certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities*.

¹⁰³ Art.2 Nr.1.

¹⁰⁴ *Supra* note 88.

¹⁰⁵ In the *TV-Shop Case*, the TV-Directive's applicability was decided. The judgement does not support TV-commercials for gaming and lottery services, as misleading advertising is also not mentioned in the Directive, and it was therefore possible for the receiving Member State to intervene against the advertiser.

Since December 1 1996 the *MPA* is explicitly applicable to satellite transmissions from Sweden, that can be received in another country within the EES-area¹⁰⁶. This means that the law of the transmitting country is stated in the *MPA*.

The Swedish Supreme Court determined June 5 2003, that the transmissions in TV3 and Kanal5 are not in the scope of the Swedish *freedom of speech*. The production company *Strix* wanted the freedom of speech to be applicable to their show. Their argument was founded on the fact that the show was produced in Sweden for a Swedish audience. The Court, however, ruled that the right of decision was exercised from England, from where TV3's transmits. Therefore, the show is out of the scope of the Swedish constitutional protection and, consequently, there was no hinder to try a calumny-case in Sweden.

4.2.5 Outdoor advertising

The advertisements that have been seen so far, e.g. *Unibet's* "Stop the gambling monopoly"- campaign, *The Gaming Board* has judged as messages influencing public opinion and therefore in the scope of *the freedom of the press*. That means, that the information is not regarded as advertising and is not breaking any laws. However, the *MPA* is otherwise applicable to outdoor advertising.

Around Christmas 2003, a company that owns outdoor advertising space, *JC Decaux*, made the decision to allow advertisements for foreign betting companies. *The Gaming Board* will probably bring actions against the company, as we now can see outdoor advertising for *Ladbrokes*.

4.2.6 Sponsoring

Sponsoring may only promote the company's name or reputation.

The sponsoring of Radio- and TV-shows is regarded as "other advertising" in *The Radio and TV Act*¹⁰⁷. The rules permit sponsoring only in the beginning and the end of a programme, and regulate which programs may be sponsored. Sponsoring is regarded as advertising in The TV-Directive and the same rules apply, see the section above. *Expekt.com* sponsored the TV-show *Fraiser* on Kanal5 and *The Agency* on TV3. The other two foreign betting companies have also sponsored TV-shows on those channels.¹⁰⁸

¹⁰⁶ Sec. 2 par. 2.

¹⁰⁷ SFS 1996:844, *Radio- och TV-lag*.

¹⁰⁸ During the year 2002, there was a debate in the media regarding sponsoring on TV. Svenska Spel, which is a very large advertising buyer, wanted the TV-channels to only allow sponsoring from them and not the foreign betting companies. Otherwise Svenska Spel would run their campaigns elsewhere and the TV-channels would loose a lot of

The Press' Text advertising committee has written new recommendations for editorial sponsoring co-operations. Lately, there have been attachments in magazines and articles that are written "in co-operation with" a company. The committee regards "in co-operation with" as a very unclear wording and wrote new guidelines for how sponsoring co-operations in *the printed press* should be presented. "In co-operation with" can mean that the company has bought advertisements, financed a part of the edition or contributed with products that can be disposed in lotteries. The co-operation can also have another meaning. It must, according to the committee, be clearer to the reader what the wording means. A statement from the committee does not lead to other actions than bad publicity.

Foreign betting companies have sponsored Swedish athletic associations within e.g. ice hockey and football. This has resulted in the betting companies logotypes printed on match equipment. According to *The National Gaming Board*, public exposure of a foreign betting company's logotype is prohibited promoting according to section 38 in *The Lotteries Act*.

4.2.7 Domain names

The technical function of a domain name is very simple. It is no more than a label for an IP address. For the user, however, the domain name has additional functions. Domain names are normally chosen in part to be memorable. Domain names are also usually chosen to have a semantic association with operator of the server. The most common choice is the name of the organisation. Alternatively, the name may be chosen to describe the activities of the organisation, for example, the domain name *marketlaw.se* is registered to Advokatfirman Konsultbyrå för Marknadsrätt AB, a law firm specialised in Marketing Law.

Advertisements appearing in the media often include a domain name address, along with other means of identification and communication, such as the corporate name, trademark and telephone numbers. The domain name, because of its purpose of being easy to remember and to identify, often carries an additional significance that is connected with the name or mark of a business or its product or services.

Domain names can be a very valuable form of marketing. Recently, the company Boss Media sold their domain name *casino.com* for an amount of USD 5,5 million.¹⁰⁹

money. This was, however, never proven, and such behaviour would, in my opinion, raise the questions about abuse of dominant position.

¹⁰⁹ www.bossmedia.se, October 24 2003.

The fact that the web site in the case MD 2000:19, www.elinge.se, had a Swedish national designation (.se as a ccTLD) was not the determining factor for the judgement.

The Swedish Financial Supervisory Authority has in one case involving a foreign betting company, requested comments from *The Gaming Board*. A betting company had applied for the opening of a bank account in a Swedish bank. When applying, the bank was informed, that the account was to be used for supplying bets in gambling, which the company provided over the Internet. The bank decided that the betting company could not open an account for the said purpose, as the bank then risked breaking the promotion prohibition in *The Lotteries Act*¹¹⁰.

The betting company reported the bank to *The Financial Supervisory Authority*, which requested comments from *The Gaming Board*. *The Gaming Board* answered, that according to *The Lotteries Act*, providing a service, e.g. a bank service, with provision of stakes and winnings, might be regarded as promoting. *The Gaming Board* then finds the providing of a bank account as such a prohibited action, when the provider **in before hand has knowledge** about the fact, that the service will be used for e.g. providing stakes or winnings in, an outside the country, arranged lottery. Consequently, *The Gaming Board* agrees with the bank's judgement. At the providing of the services, the bank may be guilty of breaching *The Lotteries Act*.¹¹¹

4.2.8 Printed press

There is a Marketing Court judgement¹¹² regarding the question about a newspaper's responsibility when taking a finished advertisement in print. The Court found the newspaper's examination of the advertisements is of great importance when upholding the *MPA*'s demand of good marketing practices. Newspapers must take a certain responsibility for printed advertisements, even in those cases when the newspaper has not taken an active part in the advertisements' design. Furthermore, the Court found, that it can be demanded that a newspaper does not take advertisements for products, which according to law, must not be sold, possessed or used.

110 Sec. 38.

111 This decision leads to other consequences. What if e.g. NIC-SE approves a domain name registration for the name "casino.se" on a foreign betting company's behalf? Is NIC-SE then breaking *The Lotteries Act*? As NIC-SE no longer pre-examines the domain name applications (see the new rules, which entered into force in April 2003 at http://www.nic.se/english/allmannavillkor_eng.shtml), above mentioned arguments lead to my conclusion, that NIC-SE cannot be guilty of breaking *The Lotteries Act*.

The American authorities have taken another approach to domain names. If the domain name leads to a web site, which runs criminal activities, they confiscate the domain name and direct it to their own web site. This approach has been used in cases where the domain name leads to a web site, which markets/sells e.g. counterfeited products or illegal drugs.

112 MD 1995:2, *Verdandi vs. Stefan Bengtsson and Tidningen Aftonbladet AB*.

During the weekend November 8-9 2003, the tabloids *Aftonbladet* and *Expressen* had advertisements for foreign betting companies. This resulted in *The Gaming Board* filed a complaint to the police November 10 2003 for breach of *The Lotteries Act*.

5 BETTING COMPANIES ON THE INTERNET

Besides the foreign betting companies below, there are of course also the Swedish companies mentioned above.

The three largest foreign betting companies' turnover in Sweden is together about SEK 1 billion/year¹¹³ - money, which the tax authority, *Folkrörelserna* and the State, never see.

The Swedish State got in the year 2002, about SEK 3 billion from *Svenska Spel*¹¹⁴ and gambling is an important source of income for *Folkrörelserna*. But the official explanation to all government regulation of the gambling market is, that it is necessary from a public health perspective.

5.1 Foreign Betting Companies

As Internet gambling is an international activity, jurisdictional problems arise. The lawful behaviour of licensed providers within the jurisdiction does not ensure appropriate behaviour by providers outside the jurisdiction, but they are still accessible to the jurisdiction's population.

I can understand the Swedish Government's concern about protecting the Swedish people. That is their defence for keeping the gambling monopoly. Another critical concern is the confidence that amounts due to consumers will be paid out. Internet gambling operators generally offer credits to credit card accounts and bank transfers, but the consumer protection that exists in the context of conventional gambling is, in many cases, not available to the Internet gambler.

A further issue is the lack of information provided to consumers in relation to foreign currency translations and taxation. Few Internet gambling providers directly advise that foreign currency translation, and associated costs, arise if the service is paid for using a foreign credit card account. Some sites warn that players should account for their receipts, where revenue from gambling, is part of the person's taxable income.

AB Svenska Spel's monopoly situation is threatened. Foreign betting companies offer different gambling activities on their Internet sites. They are on the Swedish market without a license from *The Gaming Board*. They are popular because they give high odds. From the turnover, 93% goes back to the gamblers, compared to *Svenska Spel* who gives 50% back.¹¹⁵

¹¹³ SVT's TV-show "Uppdrag granskning", March 25 2003.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

However, another judgement from the *ECJ*, the so-called *Lindman Case*, might make the foreign betting companies change their minds about establishing in Sweden, as they then have to adjust to Swedish laws.

5.1.1 Unibet¹¹⁶



In 1997, Swedes in the UK originally established Unibet. Unibet is a Malta based¹¹⁷ company that is licensed and regulated by laws in the UK and in Malta. The company is registered on Malta because of its low tax on winnings and because in Sweden there is a prohibition against private gambling companies. According to their web page, their total turnover worldwide for 2002 was more than 100 million GBP. They have more than 200 000 clients in more than 100 countries and is the biggest privately owned operator on the Nordic market.¹¹⁸

The winnings that they pay their gamblers are secret. The winnings are taxable, but *The Swedish Tax Authority* has difficulties in controlling the winnings, as that implies, that the winner itself files the winnings. This does not seem to occur very frequently.

The result is that millions of Swedish crowns disappear to the tax-heaven Malta. In the year 2002, *Unibet's* turnover was SEK 1.4 billion and on the Swedish Market the turnover was about SEK 600 millions, of which about SEK 550 millions went back to the gamblers.¹¹⁹

They have customers in over 100 countries, each country with different tax laws and rules. It is impossible to give legal advice to the customers how to pay taxes for their winnings, therefore the customers are demanded to seek their applicable rules.

¹¹⁶ www.unibet.com, The Core Business of *Unibet* is to run an online betting operation, targeting a worldwide borderless growth market; offering competitive odds on major, as well as local sport events. The Mission Statement of *Unibet* is to be one of three major operators in a number of European countries. One of the main objectives of *Unibet* is, at all times, to offer competitive odds combined with an excellent service package and the highest degree of security. *Unibet* offers, on average, more than 500 different events each day and about 100 000 transactions are handled each day.

¹¹⁷ Registered on March 28 2000 under the laws of Malta, Registration No. C 26127.

¹¹⁸ www.unibet.com.

¹¹⁹ *Supra* note 112.

5.1.2 Ladbrokes¹²⁰



Another player on the Swedish gambling market is the British company *Ladbrokes*, one of the largest betting companies in the world. Their latest success is poker games on the Internet, which has a turnover about SEK 15 millions/day. At the head office in England are several Swedes, but *Ladbrokes* now also has an office in Stockholm.¹²¹

Because of the ruling in the *Gambelli Case*, *Ladbrokes* are now planning a large advertising campaign in the major medias. *Ladbrokes* has previously sponsored Kanal5's TV-show "Big Brother" and ZTV's "Letterman". The channels are broadcasted from London. But *Ladbrokes* now mean, that it is legal to advertise in Swedish media. According to the *ECJ*, monopolies are in breach of the rules about free establishment. However, at the same time, it is justifying gambling monopolies under certain circumstances.

5.1.3 Expekt¹²²



Expekt.com had a marketing campaign "against the Swedish gambling monopoly" that was an influence to public opinion. They advertised in papers and on the Internet during the world championship of ice hockey, during which period the visitors increased on the betting company's web site with about 25 percent¹²³.

As *Expekt.com* is a foreign betting company, they may not advertise their services. Therefore, *Expekt.com* wish to illuminate the Swedish people about the monopoly situation on the gambling market. It is their way of bringing out their political message and, at the same, time tell about their existence.

¹²⁰ www.ladbrokes.com.

¹²¹ *Supra* note 112.

¹²² www.expekt.com, a Swedish company with Swedish owners.

¹²³ According to their marketing director Tina Gustafsson.

6 EC LAW

Is the Swedish gambling monopoly illegal? Since the *ECJ* ruling in the *Gambelli Case*, everybody is waiting for the answer to that question. Some foreign betting companies already think the answer to that question is yes. They have started advertising campaigns in Sweden, but some medias are not quite as sure of the answer and want to be careful and wait for the question to be settled by a Swedish Court. Some tabloids, on the other hand, were not as careful and had advertisements for foreign betting companies only two days after the *ECJ* ruling.

However, it is not a question that can be given an easy answer. The *ECJ* left some of the questions unanswered and up to the national Courts to decide. This results in an uncertainty on the market. In my opinion, the national Courts will have difficulties in deciding such a political matter.

The Gaming Board has already filed a complaint with the police against the tabloids *Expressen* and *Aftonbladet*. Consequently, Sweden might have a ruling from the Courts during the first quarter of 2004.

6.1 Monopolies

Governments cannot go too far in protecting their citizens. So, where is the limit? States have got used to the extensive taxes they make of gambling. It is understandable that they want to continue securing this money and not share it with foreign betting companies that do not pay taxes in their country.

Normally, for a monopoly or other obstacles to *the freedom to provide services* to be accepted, it would probably be assumed that they are legitimate because of **imperative reasons**, *justified on grounds of public interests*, contributing to the realisation of the intended purpose and do not go beyond what is necessary to gain this purpose. Thus, from *case law*, it is evident, that Member States have quite a large scope, when deciding which business' areas shall be run as State monopolies.

Purposes, given by Member States to justify restrictions or monopolies on the gaming and lottery market, have in the *case law*, mainly been **public interests**, the effort to limit the abuse of people's gaming desire, to avoid the risks for crime and fraud in connection with lotteries and only allow these to collect funds for charity or commonweal. These purposes, that according to the *ECJ* shall be taken into consideration in all, and that concerns the consumer protection and the protection of the order in the society, have been considered to belong to those purposes, which constitute imperative reasons, justified on grounds of public interests.

The *ECJ* has also established that national authorities shall be given “enough space of optional judgements” when establishing how wide protection shall be secured regarding gaming and lotteries.

This argument is used to declare the Swedish gambling monopoly consistent with the *EC Law*. The Swedish, Finnish- and Italian systems have in common that they exclude economic interests - both the domestic and the foreign - from the games.¹²⁴ Does this mean that there is no discrimination of nationality? One must, however, also consider whether or not, **in practice**, the conditions for running betting operations can be more easily satisfied by domestic than by foreign operators. If so, those conditions are thus *discriminatory*.

6.1.1 The Swedish gambling monopoly

A fundamental principle in the Swedish lottery legislation is, that private profit interests must not rule the lottery market. At the moment, the lottery market is divided on three leading actors, namely the by the State owned *AB Svenska Spel*, the by the State and horse sport organisations co-owned *AB Trav och Galopp (ATG)* and *Folkrörelserna*, which are *non-profit organisations* with the purpose to support public utility within the country. Commercial profitable interests are allowed only to a very limited extent.¹²⁵ Consequently, the gaming- and lottery business is, principally, reserved for the State and *non-profit organisations*. In practice, this is a **monopoly situation**.

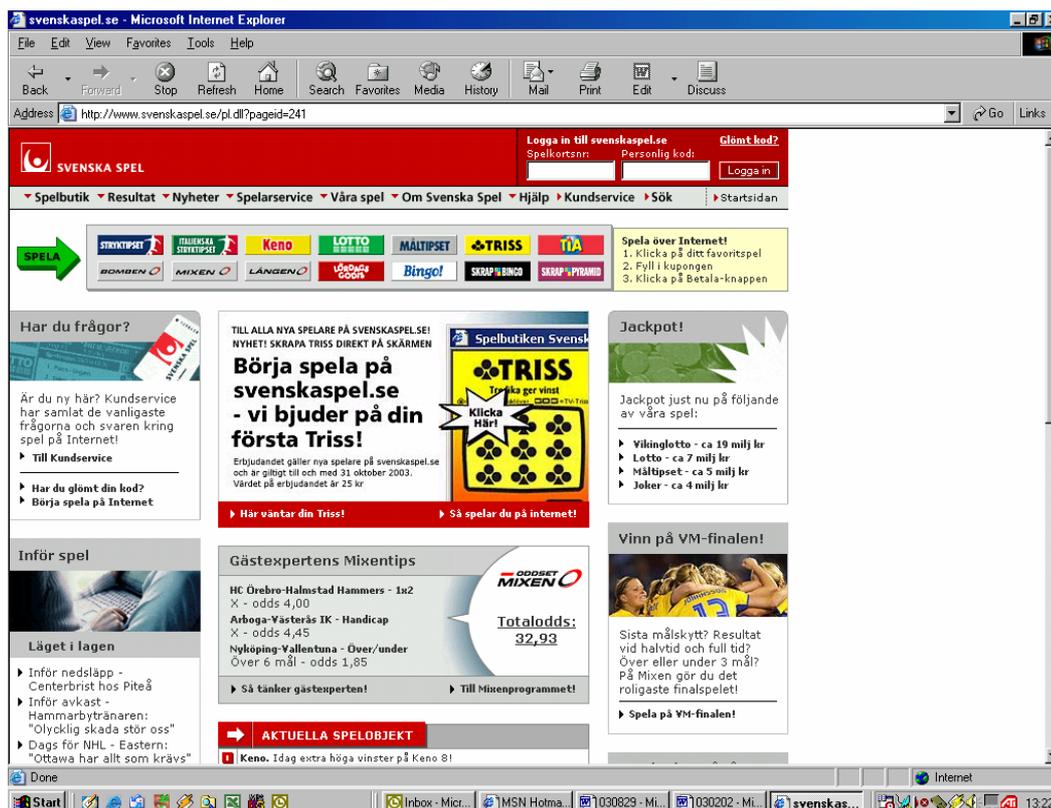
Non-profit organisations' conditions to arrange games and lotteries are clear from *The Lotteries Act*. The rules basically mean, that only Swedish *non-profit organisations*, with the purpose to support public utility within Sweden, and that fulfil certain other demands, may arrange certain types of lotteries. Consequently, *The Lotteries Act* makes a distinction between Swedish and foreign subjects.

Furthermore, according to *The Lotteries Act* it is not permitted, in commercial operations or otherwise, for the purpose of profit, to promote participation in unlawful lotteries arranged outside Sweden.

In Sweden, Internet gambling was supposed to be just an alternative way to fill in the gambling coupons, provide information services and to monitor the bets. But recently *AB Svenska Spel* also started with new products e.g. scratch tickets.

¹²⁴ The three systems also have in common, that the exclusive or special rights operators have the same purpose, i.e. the consumer protection and the protection of order in society.

¹²⁵ That is the case in certain automatic games, restaurant casinos – i.e. roulette games, dice games and card games – and fairs' - and carnival amusements.



To increase the gambling on the Internet, *Svenska Spel* started a marketing campaign in October 2003 that read, "If you try gambling on *Svenskaspel.se* you get a scratch ticket (Trisslott) for free".¹²⁶

Including its sponsoring, *Svenska Spel* is Sweden's fourth largest advertising buyer. *Svenska Spel's* CEO contends that they are careful with their advertising and never advertise casinos or games of luck like Jack Vegas. But in connection with the opening of the new casino in Stockholm, *Svenska Spel* had a full-page advertisement in the newspapers. However, this was, according to their CEO, not marketing, they only wanted to notify their existence. *Svenska Spel* was not advertising the games – it was only information about which games the casino supplied.¹²⁷

This is, from a legal perspective, an interesting development, as the Swedish justification to keep its state monopoly on gambling is the *protection of public health*, and as "instant" scratch-cards, fruit machines etc. have been criticised for their "heart stopper" (i.e. near-winning) effects. In studies, these "heart stoppers" and messages such as "Bad luck, try again" appear to have the potential to encourage addictive behaviour. On the other hand, research also suggests that providers who take advantages of the changes in consumer behaviour will be successful, while those that do not suffer falling profits.

¹²⁶ This campaign ran in outdoor advertising, papers, on the Internet and via direct marketing.

¹²⁷ *Supra* note 112.

6.1.2 Permitted monopolies

When deciding whether a gambling monopoly is against *EC Law*, one has to remember the rules about **free establishment**¹²⁸. It is permitted to have rules, which *discriminate nationals of Member States*, if they are justified with *public policy, public security or public health*.¹²⁹ There is also a prohibition against **restrictions of freedom to provide services** within the Community.¹³⁰

Furthermore, **quantitative restrictions** on imports and exports and all measures having equivalent effect are to be prohibited between Member States.¹³¹ Member States shall adjust any State monopolies of a commercial character so as to ensure, that no discrimination regarding the conditions under which goods are procured and marketed, exists between nationals of Member States.¹³² The provisions of this Article shall apply to anybody through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

The *ECJ* has tried two cases that are of interest regarding the judgement if the Swedish regulation is consistent with the *EC Law*. One case¹³³ was about the Finnish automatic gaming monopoly. The other case¹³⁴ was about the Italian regulation, according to which betting is reserved two non-profitable associations. The Court ruled neither the Finnish, nor the Italian regulations in this matter, as violating *EC Law*. Thus after the *Gambelli Case*, this might change.

6.2 The Gambelli Case

In this case, the *ECJ* had to answer to the question whether national provisions reserving gambling activities for the State and its licensees constitute a restriction on the freedom of establishment, the freedom to provide services and the freedom to receive and benefit from services

¹²⁸ Especially Articles 43 and 48 section 2 *EC*.

¹²⁹ According to Article 46.1 *EC*.

¹³⁰ Article 49 section 1 *EC*.

¹³¹ Articles 28 and 29 *EC*.

¹³² Article 31 *EC*.

¹³³ C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd vs. Kihlakunnansyöttäjä and the Finnish State*.

¹³⁴ C-67/98, *Questore di Verona vs. Diego Zenatti*.

offered by a supplier. As regards the possibility on justifying such provisions, the Court stated that they may be justified if they are **necessary for consumer protection** and for the preservation of the social order taking account of moral, religious and cultural factors and of the moral and financial consequences for individuals and society.

Furthermore, the *main aim* of such restrictions must reflect an overriding reason of general interest, such as reducing gaming opportunities (This means that the procurement of finances for public funds, on the other hand, cannot constitute justification.). Thus, the restrictions must not go beyond what is **necessary** to attain that objective and must be applied in a non-discriminatory manner.

6.2.1 Non-discrimination

The *ECJ ruling* in the *Gambelli Case* means, that a national authority has a possibility to limit the possibility to - or even prohibit – gambling, without violating Article 49 *EC* about free movement of services. However, provided that the restricting measures are non-discriminatory.

It is for the **national court** to consider whether the principle of *non-discrimination* has been complied with, and whether **in practice** the national requirements for running betting operations can be more easily satisfied by domestic than by foreign operators. If so, those requirements are discriminatory.

A prohibition against all advertising directed to consumers, makes the market entrance more difficult for services from other Member States, than for domestic services. The consumers are, naturally, more acquainted with the domestic services. The promotion prohibition may be regarded as a significant restriction to foreign betting companies' possibilities to enter the Swedish gambling market. Is the promotion prohibition against the thoughts about a common market and does the prohibition complicate an open competition between Swedish and foreign providers? According to the *ECJ case law*, trade restrictions exists, even if the national measure in question does not cause any harm to the consumer or if the damage is only potential.¹³⁵

However, this discussion has never, as far as I know, been judged by the *ECJ*. A similar discussion was thus brought up in the cases C-35/95 and C-36/95¹³⁶ but was never taken into consideration by the Court.

¹³⁵ Oliver Peter, *Free movement of Goods in the European Community*, Sweet & Maxwell 1996, p. 79.

¹³⁶ In these cases it was argued, that TV-shopping is a business completely dependent on media and advertising. In another case, C-34/95, the *Commission* established, that an advertising prohibition limited to one specific type of advertising (TV-commercials), consequently, provides for alternative marketing methods. TV-commercials are an important and powerful marketing method, but it was not proved, that the market entrance

6.2.2 Proportionality

The principle of proportion is a balance of interests between public and private interests. This is one of the fundamental principles in *EC Law*. It means that different demands are balanced, between goals and means, and between opposite interests, which the legal system demands. Normally, when using this principle in a judgement, it should be regarded whether the restriction in question actually serves the aims, which might justify it, and whether the restrictions it imposes are **disproportionate** in the light of those objectives¹³⁷. From this principle follows, that Swedish Courts will have to answer to the question, whether the purpose (the protection of health) can be reached by measures less comprehensive, than a general prohibition against promoting foreign lotteries?

In the *Gambelli Case*, the *ECJ* answered to the question about the proportionality of the Italian legislation in regard to *the freedom of establishment*. The *ECJ* found, that even if the objective of a Member State's authorities is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies (quoted on regulated markets of other Member States) from obtaining licences to organise sporting bets - especially where there are other means of checking the accounts and activities of such companies - *may be* considered as a measure which goes beyond what is necessary to combat fraud.

Finally, the national court has to consider whether **criminal penalties** applied to intermediaries, who facilitate the provision of services by a bookmaker established in a Member State (other than that in which those services are offered), constitute restrictions that *go beyond what is necessary* to combat fraud.¹³⁸ In my opinion, Sweden has to change the penalty for promoting illegal gambling from prison to fines.

In the *Gambelli Case* the *ECJ's* answer to that question is: "National legislation which prohibits on pain of criminal penalties¹³⁹ the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a **restriction** on *the freedom of establishment* and *the freedom to provide services* provided for in Articles 43 and 49 *EC* respectively. It is for the national court to determine whether

would be restricted or seriously blocked in lack of this method. However, if one presumes, that this prohibition against TV-commercials constitutes a "selling arrangement" in the meaning, which is referred to in the *Keck* judgement, it is necessary to investigate if the two conditions stated in that judgement are fulfilled.

¹³⁷ In other words, whether the advantage, which the public will gain by the restriction, is in reasonable proportion to the damage that the restriction causes the private interest.

¹³⁸ Lotteries are a service in the scope of *The EC Treaty*. A promotion prohibition, which is criminalized, is therefore comprehended by EC Law, despite the fact that criminalization lies outside the European Union's area of competence.

¹³⁹ *The Swedish Lotteries Act* section 54 must, in my opinion, be regarded as such national legislation.

such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it¹⁴⁰, and whether the restrictions it imposes are disproportionate in the light of those objectives¹⁴¹.”

¹⁴⁰ In my opinion, it is difficult for the Swedish Government to justify its aims of protection (public health) when *AB Svenska Spel* at the same time is expanding its marketing campaigns and introduces new products on its web site. A very good example is the company's new advertising campaign, with a promotional offer where you get a free scratch ticket (Trisslott) if you sign up for Internet gambling. *Svenska Spel* also want a larger market share, see above where *Svenska Spel* in an interview tells about its future plans. Consequently, in the light of the *ECJ* judgement in the *Gambelli Case*, where the Court stated “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 for betting in order to justify measures such as those at issue in the main proceedings”. My conclusion reached is, that the Swedish Government cannot use the public order concerns argument to justify its measures restricting the free movement of services.

¹⁴¹ The Swedish Marketing Court had to determine this in a prior case. The difference was that the prior case regarded alcohol marketing in printed press, the *Gourmet Case*.

7 Case Law

In Sweden there are a number of different cases about the marketing of Internet gambling. After the *Gambelli Case*, many cases are waiting for a decision by a Court.

The foreign betting companies' sponsoring of Swedish athletic associations within e.g. ice hockey and football, which started during 2002, has continued.

7.1 The National Gaming Board's Cases

As mentioned, *The National Gaming Board* is the central administrative authority that handles questions on lotteries and gambling. *The Gaming Board* may issue orders and prohibitions required for compliance with *The Lotteries Act*.

7.1.1 The National Gaming Board vs. Haninge Innebandy

Case No 615/2002, October 24 2002

The Gaming Board observed that the web site www.haningeudden.nu contained advertisements, so-called banners, from the foreign betting company *Sportingbet*. If one clicked on the banners, a new window opened with the welcome page to *Sportingbet's* gambling site in Swedish, in which Internet gambling activities with betting is possible.

According to section 3 in *The Lotteries Act*, betting activities constitutes lottery. *Sportingbet* does not have a permission to arrange betting activities in Sweden. *Sportingbet* is arranging betting activities outside the country.

According to section 38 in *The Lotteries Act*, it is not permitted, in commercial operations or otherwise, for the purpose of profit to promote participation in lotteries arranged outside the country. The meaning of the words "or otherwise" is that the business direct or indirect aims at profit¹⁴². Promotion can be e.g. advertisements or other spreading of messages about the lottery¹⁴³.

Haninge Innebandy objected that the club was not arranging gambling or promotion of this, it was giving one of its sponsors a banner on the club's web site for a sponsor contribution, and that the club is run with non-profitable purposes.

¹⁴² Prop. 1993/94:182, "Ny Lotterilag", p. 51.

¹⁴³ Prop. 1998/99:29, "Kriminalisering av främjande av deltagande i lotterier som anordnas utom landet" p. 9.

The Gaming Board found *Haninge Innebandy* to promote participation in lotteries arranged outside the country in violation of section 38 in *The Lotteries Act*.

According to section 52 of *The Lotteries Act*, *The Gaming Board* may issue orders and prohibitions. *Haninge Innebandy* was ordered to, no later than two weeks after *Haninge* was informed of this decision, cease with advertisements for the foreign betting company *Sportingbet* that *Haninge* had on its web site www.haningeudden.nu. This order was not appealed.

7.1.2 The National Gaming Board vs. AIK Hockey

Case No 611/2002, October 11 2002

The National Gaming Board observed at *AIK Hockey AB's* (AIK) games, that the foreign betting company *Ladbrokes'* logotype was printed on the players' clothes, boards, in the game program and on the big screen. From the *AIK* web page it was also evident that *AIK* had signed a sponsoring agreement for several years with *Ladbrokes*.

Ladbrokes' logotype contains the text "Ladbrokes.com", which is also the domain address to the betting company's web site. *Ladbrokes'* Internet gambling business, including betting, can be found on their web page Ladbrokes.com and is therefore offered globally, e.g. to Sweden. *Ladbrokes'* services over the Internet are "lottery arranged outside the country". *Ladbrokes* does not have a permission to arrange lottery in Sweden.

According to section 38 in *The Lotteries Act*, it is not permitted, in commercial operations or otherwise, for the purpose of profit to promote participation in lotteries arranged outside the country. The meaning of the words "or otherwise" is, that the business directly or indirectly aims at profit¹⁴⁴. Promotion of lotteries arranged outside the country can be e.g. offering or supplying lotteries by supplying the stakes. Promoting can also be spreading of messages about the lottery¹⁴⁵. The examples of what might be promotion in the *preparatory legislative materials* are not exhaustive.

The Gaming Board found public exposure of a foreign betting company's logotype, which is also the domain address to the betting company's Internet page, which supplies gambling over the Internet, constitute promotion of participation in a foreign lottery prohibited in section 38 in *The Lotteries Act*.

According to section 52 of *The Lotteries Act*, *The Gaming Board* may issue orders and prohibitions. *AIK* was ordered to, no later than two weeks after

¹⁴⁴ *Supra* note 141.

¹⁴⁵ *Supra* note 142, p. 8 et seq.

AIK was informed of this decision, cease with all public exposition of the foreign betting company *Ladbrokes*' logotype "Ladbrokes.com".

The case was appealed¹⁴⁶.

7.1.3 The National Gaming Board vs. GAIS

Case No 620/2002, October 16 2002

The National Gaming Board observed the foreign betting company *Ladbrokes*' logotype on *GAIS* clothes. *GAIS* seemed to have a sponsor's agreement with *Ladbrokes*.

Ladbrokes' logotype contains the text "Ladbrokes.com", which is also the domain address to the betting company's web site. *Ladbrokes*' Internet gambling business, including betting, can be found on their Internet page Ladbrokes.com and is therefore offered globally, e.g. to Sweden. *Ladbrokes*' services over the Internet are "lottery arranged outside the country". *Ladbrokes* did not have a permission to arrange lottery in Sweden.

Section 38 in *The Lotteries Act* prohibits, in commercial operations or otherwise, for the purpose of profit to promote participation in lotteries arranged outside the country. The meaning of the words "or otherwise" is, that the business directly or indirectly aims at profit¹⁴⁷.

Examples of "promoting of lotteries arranged outside the country" are e.g. offering or supplying lotteries by supplying the stakes. Promoting can also be spreading of messages about the lottery¹⁴⁸. The examples of what might be promotion in the *preparatory legislative material* are not exhaustive.

The Gaming Board found public exposition of a foreign betting company's logotype, which is also the domain address to the betting company's web page, which supplies gambling over the Internet, constitute promotion of participation in a foreign lottery prohibited in section 38 in *The Lotteries Act*.

According to section 52 of *The Lotteries Act*, *The Gaming Board* may issue orders and prohibitions. *GAIS* was ordered to, no later than two weeks after *GAIS* was informed of this decision, cease with all public exposition of the foreign betting company *Ladbrokes*' logotype "Ladbrokes.com".

The case was appealed¹⁴⁹.

¹⁴⁶ The County Administrative Court in Södermanlands Län, Case no 2607-02, October 30 2002, cf. sec. 7.4.3.

¹⁴⁷ *Supra* note 141.

¹⁴⁸ *Supra* note 142, p. 8 et seq.

¹⁴⁹ The County Administrative Court in Södermanlands Län, Case No. 2670-02, 5 November 2002, cf. sec. 7.4.2.

7.2 Decision in The Swedish Ice-hockey League's Competition Board

These decisions cannot be appealed. If a team is a member of Riksidrottsförbundet, it has to follow Riksidrottsnämnden's rules. According to the rules, there must be no marketing containing political messages.

7.2.1 The Swedish Ice-hockey League's Competition Board vs. Hammarby Hockey

Case No 14-02/02, September 20 2002

Hammarby had just signed a sponsoring agreement with *Unibet*. The *Hammarby team* was supposed to have the trademark *Unibet* and the message "Abolish the gaming monopoly", printed on its clothes.

The sponsoring agreement was very controversial as *Unibet's* competitor *Svenska Spel* is head sponsor for *The Swedish National Hockey Team* and the teams in elitserien (Sweden's major league in ice-hockey).

The Swedish Ice-hockey League reported *Hammarby Hockey* on September 19 2002. The message was considered to be against *The Competition Rules*, Chapter 11, Section 1, Paragraph 2, which reads that political messages must not appear in advertising.

Hammarby Hockey did not consider the message to be political and that it would be against *the freedom of speech* and the possibility of freedom of opinion spreading, which is fundamental in a democratic society, if *Hammarby* was forbidden to use the message.

The Competition Board found the gambling monopoly in Sweden cannot be changed in another way than through a political decision, therefore the message is such a political message, which the rules try to avoid in athletic relations. Such rules cannot be considered as restricting the democratic freedom of opinion and speech.

If *Hammarby* used the message, it would be against *The Competition Rules*.



7.3 The Chancellor of Justice in Sweden

The Chancellor of Justice is a non-political civil servant, appointed by the Government. The period of time for which he is appointed is not limited. Once appointed, he serves any Government. He performs his duties from a strictly legal point of view. As a consequence of *The Chancellor of Justice's* position, it is possible for him to carry out his duties in a completely independent way.

A detailed account of the duties of *The Chancellor of Justice* is set forth in two legal instruments: *The Act concerning the supervision exercised by The Chancellor of Justice*¹⁵⁰ and *The Ordinance concerning the duties of The Chancellor of Justice*¹⁵¹. His duties are, amongst others, to ensure that the limits of *the freedom of the press* and other media are not transgressed and to act as the only public prosecutor in cases regarding offences against *the freedom of the press* and other media.

7.3.1 The Chancellor of Justice vs. Dagens Industri

Decision No 1116-03-30, 2 September 2003

The Chancellor of Justice was handed a case about whether an advertisement supplement fell under *the freedom of the press*. The case was about an advertisement supplement in the shape of a paper with the title *Internet: the gamblers' home game*¹⁵², which was a supplement to the

¹⁵⁰ SFS 1975:1339, *Lag om Justitiekanslerns tillsyn*.

¹⁵¹ SFS 1975:1345, *Förordning med instruktion för Justitiekanslern*.

¹⁵² The author's translation of "Internet: Spelarnas hemmaplan".

newspaper “Dagens Industri” at some occasions in December 2002, and January 2003.

On top of every page in the advertisement supplement it was printed ADVERTISEMENT – ALL OF THIS PAPER CONSTITUTES AN ADVERTISEMENT FROM SPELOMBUDSMANNEN.COM - ADVERTISEMENT¹⁵³. The supplement contained 16 pages with e.g. different articles that presented several betting companies active on the Internet. In the articles there were positive information and positive judgements about the companies in question and their business and the different types of gambling they offer. Every article ended with the company in question’s web address. The supplement also contained articles about the gambling odds and about the Swedish gambling market.

The freedom of the press does not regulate such use of the printed word that has nothing to do with *the freedom of speech*. An intervention against marketing in printed media is possible on other grounds than stated in *The Regulation of the freedom of the press*, if the action is of pronounced commercial nature, i.e. has a commercial purpose¹⁵⁴. In such cases, different measures can be taken according to common law.

The determining factor whether *The Regulation of the freedom of the press* is applicable in this case, which would eliminate the application of *The Lotteries Act*, is whether the marketing supplement can be considered as of pronounced commercial nature.

The advertisement supplement contained articles about betting companies and had a design and content that could only be regarded as marketing. The fact that the supplement contained parts that could be regarded as editorial material and therefore protected by *the freedom of the press* does not mean that the whole supplement should be regarded as editorial material and therefore not have pure commercial purposes. *The Swedish Supreme Court* has in a prior case found that marketing can always be added editorial material.¹⁵⁵ *The Chancellor of Justice* found the supplement not to fall under the rules of *freedom of the press* but under *The Lotteries Act*. The case was returned to The Fourth Chamber of Prosecutors in Stockholm.

7.4 Decisions from The County Administrative Court in Södermanlands Län

The County Administrative Court is the court of first instance in administrative cases. Cases may be appealed to the Administrative Court of

¹⁵³ ANNONS – HELA DENNA TIDNING ÄR EN ANNONS FRÅN SPELOMBUDSMANNEN.COM – ANNONS.

¹⁵⁴ See e.g. NJA 1975 p. 589 and NJA 1999 p. 749.

¹⁵⁵ NJA 2001 p. 319.

Appeal. The final court of appeal in these cases is The Supreme Administrative Court.

7.4.1 Anders Bergsten vs. The National Gaming Board

Case No. 3208-00, January 10 2001

In the appealed decision from *The National Gaming Board*, Anders Bergsten was ordered to stop with the linking on his web site www.travrevyn.com to SSP. The SSP banner was considered as “lottery arranged outside the country”. Bergsten had received compensation for placing the banner on his site.

The Gaming Board ruled Bergsten’s business as “commercial operation” and the placing of the banner was therefore in breach of article 38 in *The Lotteries Act*. Bergsten considered his business as a non-profit business. The Court found the placing of the banner as in breach of Section 38 in *The Lotteries Act*, as Bergsten did receive compensation.

This judgement was appealed.¹⁵⁶

7.4.2 GAIS vs. The National Gaming Board

Case No. 2670-02, November 5 2002

GAIS appealed *The National Gaming Board*’s prohibition. According to GAIS the prohibition did not follow the rules and was also against *the free movement of services* of the *EC Treaty*. GAIS wanted cancellation of *The Gaming Board*’s prohibition, meaning that the prohibition must be pending the Court’s final trial.

The County Administrative Court, which will try the case later, found enough reasons to cancel the prohibition until further notice.

On December 18 2002, the Court cancelled *The Gaming Board*’s decision. The Court’s decision was appealed The Administrative Court of Appeal, which sent the case back to The County Administrative Court. That Court has yet not ruled the case.

7.4.3 AIK Hockey AB vs. The National Gaming Board

Case No. 2607-02, October 30 2002

AIK appealed *The National Gaming Board*’s prohibition. According to AIK, the prohibition did not follow the rules and had no legal justification. AIK wanted cancellation of *The Lottery Inspection*’s prohibition, meaning that the prohibition must be pending the Court’s final trial.

¹⁵⁶ The Administrative Court of Appeal in Stockholm, Case No. 689-2001, October 25 2001, cf. sec. 7.5.1.

The County Administrative Court, which will try the case later, found enough reasons to cancel the prohibition until further notice.

On December 18 2002, the Court cancelled *The National Gaming Board's* decision. The Court's decision was appealed to The Administrative Court of Appeal in Stockholm, which cancelled The County Administrative Court's judgement.¹⁵⁷ Consequently, the case is back in The County Administrative Court, where it has not been ruled yet.

7.5 Decisions from The Administrative Court of Appeal in Stockholm

The Administrative Court of Appeal's judgment can be appealed to The Supreme Administrative Court, which is the final court of appeal in these cases.

7.5.1 Anders Bergsten vs. The National Gaming Board

Case No 689-2001, October 25 2001

The case is an appeal from The County Administrative Court in Södermanlands Län.

On *E-play's* web page, visitors could click on a banner and be connected to *SSP's*, a foreign betting company, domain address and server in England. Consequently, the information was sent directly from England to the visitor's computer, not via *E-play's* web page. Therefore *E-play* did not regard the link to *SSP* as containing any information. According to *E-play*, the link did not encourage or persuade to gambling and it could therefore not be a question about prohibited promotion. The question was, according to Bergsten, if *E-play*, by only informing about a, within the European Union, foreign legal and sanctioned operation, has broken the from an *EC Law* point of view illegal Swedish National law.

The Gaming Board found the banner containing *SSP's* logotype and a request to gamble on horses. As *E-play* got compensation for placing the banner on its web page, it runs its business with economic purposes.

The Court found *SSP* constitute, in the meaning of *The Lotteries Act*, an "outside the country arranged lottery". The fact that "true lottery" in section 4 in the same Act, does not include betting in connection with horse races, does not mean that horse races are also excepted from "lotteries arranged outside the country" according to section 38.

¹⁵⁷ Case No. 401-03, *the National Gaming Board vs. AIK Hockey AB*, October 10 2003.

A banner can be regarded as promoting a lottery arranged outside the country.¹⁵⁸

When it comes to deciding economic interests “in commercial or otherwise, for the purpose of profit”, the Court pointed out that the term “commercial operations or otherwise” had not been thoroughly commented in the *preparatory legislative material*. It only states that the prohibition applies to tradesmen and that the promotion shall be part of a business of economic nature¹⁵⁹.

The Court found *E-play* violated the prohibition in section 38 in *The Lotteries Act*.

This case was appealed to The Supreme Administrative Court, which has granted leave.¹⁶⁰ The case will continue in January 2004.

¹⁵⁸ *Supra* note 141.

¹⁵⁹ *Supra* note 142, p. 77.

¹⁶⁰ Case No. 7119-00.

8 CONCLUSIONS

Is it fair to say that the Government is protecting the Swedish people against gambling problems when *AB Svenska Spel*, which is owned by the State, is putting so much more money in its advertising campaigns than it is on rehabilitating people with gambling problems? Is it fair to say that the Government is concerned about the Swedish people and want to prevent addiction, when *Svenska Spel* is introducing new types of gambling? Is it fair to say that the State is looking after people's health when *Svenska Spel* launches new advertising campaigns because of its new goals to have larger market shares? Are monopolies the best way to protect the Swedish people?

The Swedish politics behind gambling questions is a weighing between preventing addiction and looking after the consumers' interest of a good gambling supply. The goal is a sound and safe gambling market, where social protection interests and the demand for gambling are provided under controlled circumstances. The profit from gambling goes to public utility¹⁶¹, e.g. athletic associations, horse sports and the State. The purpose is to minimize the risk for fraud and illegal gambling, but also to be able to offer a variety gambling supply.¹⁶²

Trade restrictions might be justified on grounds of *imperative reasons*, such as the protection of frauds and the limitation of gambling abuse. The foreign legislation, at least the English, should however, give a sufficient protection. The aggressive marketing, by the State's betting companies, of games of luck in Sweden, and the actual increase of the accessibility, which is facilitated by the Swedish Government's realization of changing the laws, contradicts the fact that there would be a desire to limit the gambling possibilities or to counteract gambling abuse in Sweden, why, in my opinion, neither these purposes can justify a limitation of the freedom to provide services between Member States.

National regulations restricting gambling and supporting state monopoly are accepted according to *EC Law*, if the Member State has an approved protection purpose, to justify the restrictions on the free movement. It can be established, that the Swedish gambling regulation is restricting trade. But, is the legislation prohibited according to *EC Law*?

According to the *ECJ*, to have national rules in non-harmonized areas is not in violation of the *EC Law*, if the rules are:

- non-discriminatory
- necessary
- non-duplicative, and

¹⁶¹ Pius usus.

¹⁶² Faktablad från Finansdepartementet, "Den svenska spel- och lotterimarknaden", July 2003.

- proportionate.

In my opinion, the question for the Swedish Courts to consider is whether the Swedish gambling legislation is **non-discriminatory** and **proportionate**. In practice, the promotion prohibition makes the market entrance more difficult for services from other Member States, than for domestic services.¹⁶³ The consumers are, naturally, more acquainted with the domestic services. The promotion prohibition may be regarded as a significant restriction to foreign betting companies' possibilities to enter the Swedish gambling market. This means that if the Government wants to keep its monopoly it has to justify this with consumer protection and for the preservation of the social order. But it cannot use this justification and at the same time continue the massive advertising campaigns.

Foreign betting companies have to advertise their existence, as they are unknown in Sweden, to be able to become gambling providers on the Swedish market. That is why we have seen different methods, some more creative than others, of notifying the Swedish consumers about their Internet sites. In my opinion, the most successful advertising campaign is the one about "Abolish The Swedish Gambling monopoly", as this has been regarded as influencing public opinion – and not marketing – the campaign has not been objected to. However, the campaign suffered problems sponsoring athletic clubs, as many sport rules state that there can be no political messages around sporting events.

The Gambelli Case might lead to some changes in the Swedish gambling legislation. Because of the rapid growing technical development, the regulation of online gambling must be flexible. Therefore should the Act in certain parts be of frame-character, while the more detailed regulation can be assigned the competent authority to decide.

In my opinion, **licensing**¹⁶⁴ the foreign betting companies would be a better way to control the market than keeping a monopoly, which results in operators establishing outside the country. People will still gamble, but the control would be more effective and proportionate. Sweden is perhaps afraid of losing the revenue the monopoly gives, but perhaps the revenues from company registrations, employment etc is better than nothing. The underlying assumption of governments, however, has been that, despite the

¹⁶³ However, it has to be stressed that this is only my opinion and I have no proof of the said effect, and, as far as I know, the *ECJ* has never tried or established this discussion.

¹⁶⁴ Realistically, licensing cannot prevent gamblers from seeking to use unlicensed sites or prevent unlicensed operators being able to operate in Sweden. But perhaps *the risks* of using such an unlicensed site will prevent gamblers from logging into unlicensed sites and that would lead operators to lose business to such an extent that they seek to be licensed. Of course the prohibition to advertise unlicensed operators' sites in Sweden would stay as it is - as an effective way of reducing hits on the site and therefore reducing revenue for unlicensed operators.

generation of employment and stimulation of the economy, unregulated gambling would inevitably create harmful social externalities.¹⁶⁵

¹⁶⁵ To add a political discussion to this Master Thesis, it can be stated that, foreign betting companies can promise higher winning sums. Their advertising campaigns tell us, that more money from the stakes goes back to the gamblers. But is that the truth? Foreign betting companies do not pay any taxes in Sweden. This means that no money from the stakes goes back to projects supporting e.g. young athletics and different contributes to sport. Foreign betting companies pay taxes in other countries. It is that country's young athletics we are supporting when we gamble on them instead. Sure, we get a larger sum of money if we win, but that money perhaps has to go to our children's athletic supplies, as they no longer get any support from the State. Or that sum of money has to cover higher taxes that the Government has to take out on something else. Now that its companies have no gamblers, it loses a lot of tax incomes, which it has to recover somewhere else. Is it fair that the European country, which offers the lowest taxes, attracts betting companies in establishing their company there, gets support from citizens in other Member States to their activities? Consequently, think twice before you decide that there is more money to win on foreign betting companies' services.

Bibliography

Books, Articles etc.

- Bogdan, Michael "Kan en Internethemsida utgöra ett driftställe vid bedömningen av svensk domsrätt och tillämplig lag?", SvJT 1998 p. 825
- Bogdan, Michael "Gränsöverskridande marknadsföring via Internet", SvJT 1998, p 623.
- Carlén-Wendels, Thomas Nätjuridik Lag och rätt på Internet, 3rd ed., Norstedts Juridik AB, Stockholm 2000
- Ledaren Sydsvenskan, October 12 2002
- Oliver, Peter Free movement of Goods in the European Community, Sweet & Maxwell 1996, p. 79.
- Reed, Christopher Internet Law: Text and Materials, Butterworths, London, Edinburgh, Dublin 2000
- Smith, Graham J H Internet Law and Regulation, 3rd ed., Sweet & Maxwell, London
- Svensson and others Praktisk Marknadsrätt, 7th ed., Norstedts Juridik, Stockholm 2002
- TV-show Uppdrag granskning, SVT, March 25 2003
- Warnling-Nerep En orientering i tryckfrihet & yttrandefrihet, 2nd ed., Jure, Stockholm 2003

Laws and Directives

SFS 1975:1339, Lag om Justitiekanslerns tillsyn

SFS 1975:1345, Förordning med instruktion för Justitiekanslern

SFS 1985:716, Konsumenttjänstlag

SFS 1990:932, Konsumentköplag

SFS 1991:601, Prisinformationslag

SFS 1994:1000, Lotterilagen

SFS 1994:1452, Förordning med instruktion för Lotteriinspektionen

SFS 1995:450, Marknadsföringslagen

SFS 1996:844, Radio- och TV-lag

SFS 1998:112 Lag om ansvar för elektroniska anslagstavlor

SFS 2000:274, Lag om konsumentskydd vid distansavtal och hemförsäljningsavtal

SFS 2002:562, Lag om elektronisk handel och andra informationssamhällets tjänster

Directive 89/552/EEC (amended by Directive 97/36/EC), on certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities

Directive 97/7/EC on the protection of consumers in respect of distance contracts (amended by 2002/65)

Directive 98/27/EC, on injunctions for the protection of consumers' interests

Directive 2000/31/EC, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy and electronic communications.

Directive 2002/65/EC concerning the distance marketing of consumer financial services

Preparatory Legislative Material

Prop. 1970:57, Marknadsföringslagen (den tidigare gällande)

Prop. 1992/93:75, Satelitsändningar av TV-program

Prop. 1993/94:182, Ny Lotterilag

Prop 1994/95:123, Ny Marknadsföringslag

Prop. 1998/99:29, Kriminalisering av främjande av deltagande i lotterier som anordnas utom landet

Prop. 2001/02:153, Loterier över Internet m.m.

SOU 1999:106, Konsumenter och IT – en utredning om datorer, handel och marknadsföring

SOU 2000:50, Från tombola till Internet – översyn av lotterilagstiftningen

Links

www.atg.se

www.bossmedia.se

www.expekt.com

www.folkspel.se

www.iccwbo.org/home/statements_rules/rules/1998/internet_guidelines.asp

www.ladbrokes.com

www.nic.se/english/allmannavillkor_eng.shtml

www.speoronline.se

www.svenskaspel.se

www.unibet.com

Table of Cases

Swedish Cases

The National Gaming Board

The National Gaming Board vs. Haninge Innebandy
Case No. 615/2002, October 24 2002

The National Gaming Board vs. AIK Hockey
Case No. 611/2002, October 11 2002

The National Gaming Board vs. GAIS
Case No. 620/2002, October 16 2002

The County Administrative Court in Södermanlands Län

Case No. 3208-00, January 10 2001, Anders Bergsten vs. The National Gaming Board

Case No. 2607-02, October 30 2002, AIK Hockey AB vs. The National Gaming Board

Case No. 2670-02, November 5 2002, GAIS vs. The National Gaming Board

The Swedish Ice-hockey League's Competition Board

Case No. 14-02/02, The Swedish Ice-hockey Leagues' Competition Board vs. Hammarby Hockey, September 20 2002

The Chancellor of Justice

Decision No. 1116-03-30, The Chancellor of Justice vs. Dagens Industri
September 2 2003

The Eskilstuna City Court

T 2417-03, Unibet vs. The National Gaming Board

The Administrative Court of Appeal in Stockholm

Case No. 810-2000, Anders Bergsten vs. The National Gaming Board

Case No. 401-03, The National Gaming Board vs. AIK Hockey AB

Case No. 689-2001, Anders Bergsten vs. The National Gaming Board

Göta Court of Appeal

Case B 864-99, Musa Ergül vs. The Chamber of Prosecutors in Norrköping

Case B 241-00, Johanna Runesson vs. The Chamber of Prosecutors in Växjö

Case B 715-00, Per Andreasson vs. The Chamber of Prosecutors in Örebro

The Swedish Marketing Court

MD 1983:7, Konsumentombudsmannen vs. Extra Film AB

MD 1989:6, Konsumentombudsmannen vs. SAS

MD 1995:2, Verdandi vs. Stefan Bengtsson and Tidningen Aftonbladet AB

MD 1998:12, Konsumentombudsmannen vs. Swedish Match and Tidningen Dagens Nyheter

MD 1998:17, Konsumentombudsmannen vs. De Agostini

MD 2000:8, Konsumentombudsmannen vs. AB Bodion

MD 2000:19, STOP – Scandinavian TV Organisation against Piracy – Sweden vs. Elinge Electronica Lda and L.E.

MD 2002:18, Sveriges Spannmålsodlare AB vs. Kooperativa Förbundet

MD 2003:27, Com Hem AB, SENDA I Sverige AB and ViaSat AB vs. Flashback Media Group AB and J.A.

European Cases

The ECJ

C-6/64, Costa vs. ENEL

Joined Cases C-267 and 268/91, The Tribunal de Grande Instance, Strasbourg, vs. Bernard Keck and Daniel Mithouard

The joint cases C-34/95, Konsumentombudsmannen vs. De Agostini, C35/95 and C-36/95, Konsumentombudsmannen vs. TV-Shop I Sverige AB.

C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä and the Finnish State.

C-67/98, Questore di Verona vs. Diego Zenatti

C-243/01, Tribunale di Ascoli Piuno vs. Piergiorgio Gambelli and Others

C-42/02, Ålands förvaltningsdomstol vs. Diana Elisabeth Lindman