

worldonline gamblinglawreport

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Sweden, monopolies and the freedom to provide services

Swedish law reserves the right to offer gambling services to operators licensed by the Swedish Government. Therefore, the question of foreign operators' ability to access the Swedish market remains largely unanswered. Ulf Isaksson and Mattias Pettersson, of Danowsky & Partners, examine the most recent case law clarifying Sweden's position on licensing.

On 23 February 2010, Advocate General (AG) Yves Bot delivered his Opinion in the European Court of Justice's (ECJ) joined cases *Otto Sjöberg and Anders Gerdin*¹. According to his Opinion, Swedish gambling legislation prohibiting the promotion of lotteries arranged outside Sweden complies with EC law. However, the AG states that EC law precludes national law that penalises the promotion of lotteries organised outside Sweden differently from lotteries organised in Sweden without a licence.

Background

Swedish gambling legislation reserves the rights to provide gambling services to licensed operators, under the strict supervision of public authorities. The legislation seeks to exclude all private 'for-profit' interests from the gambling market. All profits are reserved for the benefit of the public at large, i.e. the State and non-profit organisations.

As a result, there are only two companies, both state-owned (*AB Svenska Spel* and *AB Trav och Galopp*), that hold a monopoly on most national gambling activities in Sweden. These two companies are also the only companies that are allowed to promote gambling and lotteries. According to Sections 38 and 54 of the Swedish Lottery

Act (1994), it is illegal and punishable by a fine or up to two years' imprisonment to commercially - or for the purpose of financial gain - promote participation in a lottery arranged outside Sweden.

The Swedish Lottery Act is only applicable within the territory of Sweden and not when the promotion of a lottery takes place from abroad. Therefore, it is not a criminal act under Swedish legislation to organise gambling activities or a lottery from outside Sweden, nor to accept bets placed by Swedish players, provided that the company is not represented or does not operate in Sweden. It is also not illegal for a person in Sweden to participate in a lottery or betting organised abroad or in Sweden. The Swedish Government has given the National Gaming Board (*Lotteriinspektionen*) the responsibility for supervising and enforcing the Swedish Lottery Act. Following the ECJ's November 2003 judgment in *Gambelli*², many concluded that the prohibition on promoting participation in lotteries arranged outside Sweden through publishing adverts for companies established in other Member States, did not comply with EC law. Between November 2003 and August 2004, *Expressen* and *Aftonbladet* published adverts in their sport pages for lotteries and betting services offered on the internet sites of companies Ladbroke's, Expekt, Unibet and Centrebet. All companies were established in Malta or in the United Kingdom.

In 2003, the National Gaming Board reported the former Editors-in-Chief and Publishers of *Expressen* and *Aftonbladet* - Otto Sjöberg and Anders Gerdin - to the police for the promotion of gambling activities organised by companies established outside Sweden. The prosecutor later

brought charges against the Editors-in-Chief and, in 2005, the Stockholm District Court convicted them for a violation of the Swedish Lottery Act. The judgments were appealed to the Swedish Court of Appeal but the Court did not grant a leave to appeal. The decision not to grant a leave to appeal was appealed to the Swedish Supreme Court. In an 8 February 2008 decision, the Supreme Court stated that, due to uncertainty regarding Swedish gambling legislation and its conformity with EC law, a higher court should determine the legal position. Therefore, the cases were remitted to the Swedish Court of Appeal for further assessment. On 24 September 2008, the Swedish Court of Appeal requested a preliminary ruling from the ECJ regarding the Swedish Lottery Act's compatibility with EC law. The Court referred five questions to the ECJ. The first question was whether discrimination on grounds of nationality may be accepted under some circumstances, in the national lottery and betting market, on the basis of overriding reasons in the general interest. Question number two to five concerned the proportionality of Swedish gambling legislation.

The AG's Opinion

The ECJ held an oral hearing on the case on 14 January 2010 and AG Bot delivered his Opinion on 23 February 2010. In the Opinion, he first establishes that the questions referred to by the Swedish Court must be answered in the light of the freedom to provide services established in Article 56 of the Treaty for the European Union (TFEU) - former Article 49 EC. A prohibition to promote a lottery or betting arranged outside Sweden, such as under Sections 38 and 54 of the

Swedish Lottery Act, constitutes a restriction on the freedom to provide services. In the absence of community harmonisation on gambling, Member States will determine what is required for the degree of protection which they seek to ensure.

However, national legislation must be suitable for achieving the objectives invoked by the Member State and cannot go beyond what is necessary to achieve those objectives. In any event, those restrictions must be applied without discrimination. Swedish gambling legislation prohibits, without distinction, the promotion of gambling organised in other Member States and the promotion of gambling organised in Sweden without a licence, but the remedies for violation of the prohibition are different. While the penalties of a fine or imprisonment for up to six months are laid down for promoting lotteries organised from abroad, those who promote lotteries organised in Sweden without a licence do not incur equivalent criminal penalties but only administrative fines. According to AG Bot, lotteries organised by companies established in other Member States do not necessarily pose greater risks of fraud and crime to the detriment of consumers than illegal lotteries organised within the Swedish territory. The difference in treatment also cannot be justified by the differences between the two categories of offences in terms of caused disruptions or the conditions under which they can be discovered.

AG Bot refers to the ECJ's Santa Casa ruling³, confirming that online lotteries pose a greater risk of fraud and criminality than traditional offline lotteries, such as frauds in connection with online payments and the risk of falsified

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betting results. A Member State can, under certain circumstances, grant an exclusive right to the online gambling market to a single operator, which is subject to strict control by public authorities. According to AG Bot, the same risk of fraud and criminality entitles the Member State to prohibit the promotion for lotteries and betting arranged outside the Member State.

In light of the above, AG Bot suggests in his Opinion that Article 56 TFE - former Article 49 EC - does not preclude Member States' legislation which reserves the right to organise gambling to licensed operators, carrying on their business under the strict supervision of public authorities to protect consumers against the risk of fraud and criminality, and to prohibit promotion of gambling offered by companies established in other Member States.

However, Article 56 TFEU precludes national legislation under which anyone who promotes participation in lotteries or betting on the internet organised by a company established in another Member State is liable to criminal penalties, whereas anyone who promotes participation in such lotteries or betting organised within the national territory without a licence does not incur such penalties. In their pleadings and at the oral hearing, the Editors-in-Chief argued that the case is about the newspaper business and not the national lottery monopoly. The effectiveness of the prohibition to promote participation in a lottery arranged outside Sweden is low since millions of Swedish households can see similar ads via TV3 and Kanal 5, which are broadcast from the United Kingdom. Nor does the marketing prohibition have any impact on the overall level of use of lotteries and

betting in Sweden. The two state-owned companies conduct heavy advertising campaigns and Swedish consumers also receive advertising from other Member States and via the internet. The AG did not leave any comments on this in his Opinion. A date for the ruling of the ECJ in the case has not yet been determined.

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1. Cases C-447/08 and C-448/08.
2. Case C-243/01.
3. Case C-42/07, 8 September 2009, *Liga Portuguesa de Futebol Profissional* and Bwin International.



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