GAMING IN EUROPEAN ECONOMIC LAW: ADVERTISING AND FREE PROVISION OF BETTING SERVICES IN DE EC*

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I. Introduction: The Issue

ISSUE: whether the new law of the Grand Duchy of Luxembourg where exclusively reserving the organization of Betts on the results of football matches to a private company licensed to that effect by the Government of Luxembourg and absolutely prohibiting the distribution of coupons and advertising in Luxembourg of competitions organized abroad, is compatible or not with the fundamental freedom to provide services within the Community, provided by Article 59.º *seq.* of the EEC Treaty.

According to the first paragraph of Article 59.º EEC Treaty the abolition of restrictions on the freedom to provide services within the Community concerns all services provided by nationals of Member States who are established in

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a State of the Community other than that of the person for whom the services are intended. Article 59.º *et seq.* require the abolition of all restrictions on this basic freedom, subject, nevertheless, to the provisions of Article 61 and those of Article 55.º and 56.º to which Article 66 refers.

II. The Freedom to Provide Betting Services in the EC

A. BETTING AS A 'SERVICE' WITHIN THE MEANING OF THE EEC TREATY

Betting must be considered a service within the meaning of the Treaty due to the following reasons.

1. *Article 60.º and 'bookmakers'.* To begin with, the first paragraph of Article 60.º provides that services are to be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to the freedom of movement of goods, capital and persons. Then, indent (d) of the second paragraph of Article 60.º expressly reads that activities of the professions fall within the definition of services. Now, according to the definition of the *Concise Oxford Dictionary*, a bookmaker or a bookie is a "professional betting man". By other words, a bookmaker is someone who makes a living in the gambling market providing, *inter alia*, the services of organizing Betts on the results of football matches.

2. *Irrelevance of "arguments on the moral plane": the case for "medical pregnancy interruption".* Secondly, we could argue against betting as a service from the point of view of moral and social traditions of each State. However, according to the words of this Court "arguments on the moral plane" are irrelevant because "it is not for the Court to substitute its assessment (value judgments) for that of the legislature in those Member States where the activities in question are practiced legally". Therefore, this Court concluded that "medical pregnancy performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60.º of the Treaty" (Case C-159/90, *Society for the protection of unborn children Ireland Limited v. Grogan*).

3. *Dixon's study: bookmaking as an ordinary leisure industry.* Third, moreover, "bookmaking is to be treated as an ordinary business" (DIXON, *From Prohibition to Regulation: bookmaking, anti-gambling and the law*; Oxford,

1991). This appears to be the conclusion of a number of studies made by the Royal English Commission, and ended with the Gaming and Lotteries Act in 1984. But this is only the last step of a campaign of legalization and administrative regulation, whose priorities are especially the prevention of criminal exploitation and individual excess.

These studies show the real situation of this kind of activity and of its market. In the English market there are large bookmaking companies that transformed their business by applying standard marketing techniques to betting. Simple back street betting shops are widely replaced by fewer shops situated on main streets with comfortable facilities, sophisticated communications and information technology, including cable and satellite broadcasting.

Consequently, betting has actually to be considered an entertainment service, because these betting offices have developed into places offering a series of new standards of enjoyment, information, entertainment and comfort. So, bookmaking became a "legitimate part of the leisure industry, rather than a source of social problems" (for more details about the evolution of betting and concerning legislation, you may see DIXON, *op. cit.*).

4. The European Report of 23 December 1992: Mr. Bangemann's statement. Then, according to what we found in the *European Report of 23 December 1992*, 455, the Commissioner for the Internal Market and Industry, Mr Bangemann, stated, during the Commission's December 23 meeting, after the EC Summit in Edinburgh, that "a game of chance is regarded as a service just like any other and thus subject to the provisions in the EC Treat". In the same report we can read that: "with lotteries being a national monopoly in many Member States, the Commission stresses the freedom to provide services guaranteed by the EC Treaty".

In conclusion, betting is clearly a service within the meaning of the Treaty, and not an activity situated in a gray area between legality and illegality. Now, we have to analyze whether the law of Luxembourg is contrary or not to the provision relating to the basic freedom to provide services.

B. FREE PROVISION OF SERVICES — THE INTERPRETATIVE CRITERIA OF ARTICLES 59.º AND 60.º: THE COURT OF JUSTICE CASE-LAW

The law in question is not compatible with Article 59.º *et seq.* because, although there is a public interest (general good concerning consumers' protection) justifying certain restrictions on the freedom to provide betting services, and although it's indistinctly applicable (non-discrimination on the grounds of

nationality), this public interest is, nevertheless, already protected by the rules of the State of establishment (principle of equivalence) and therefore the restrictive measures are not objectively necessary or, at least, the same result could be achieved by less restrictive rules (proportionality).

The Court has already established the interpretative criteria, formulating a rule of reason (Case 33/74, *Van Binsbergen*; joined Cases 110-111/78, *Van Wesemael*; Case 279/80, *WEBB*; Case 205/84, *Commission v. Germany*; Case C-76/90, *SAGER v. DENNEMEYER*).

1. Direct effect and the prohibition of discrimination (nationality, establishment of origin). In short the Court said that: a) Articles 59.° (1) and 60.° (3) have direct effect; b) these essential provisions require the abolition of all discrimination against the person providing the service by reason of his nationality or by the fact he is established in a Member State other than that in which the service is to be provided; c) there may be discrimination where imposing the respect for the conditions imposed to the nationals of the State where the provider is temporarily pursuing his activities.

2. 'Rule of Reason' (the sensitive nature of the service: general good, nondiscrimination, necessity, proportionality). However, the Court has worked out the following 'Rule of Reason': a) the particular nature of certain services may justify the imposition of certain requirements on the provider of the services, but only and in so far as: 1.° those requirements result from imperative reasons of protection of the general interest (general good); 2.° those requirements are indistinctly imposed on the persons or undertakings operating in the Member State (non-discrimination); 3.° the general interest is not adequately safeguarded by the conditions imposed to the provider of the service in his State of Establishment (necessity); 4.° the same result can't be achieved by less restrictive rules (proportionality). Then, we will see how these principles apply, *in concreto*, to the present case.

C. INSERTING THE CASE *SUB IUDICE* IN THIS LEGAL FRAMEWORK

1. *Consumer protection*: First — considering the first condition: general good —, we admit that betting is a particularly sensitive area from the point of view of the protection of the consumers as a general interest. Mainly because of its nature which is linked to certain irrational elements. So, in order to protect the consumers the bookmakers must be licensed by the public authorities of the State where they want to establish themselves. Only by this way it is possible to

subject them to the necessary *a priori* control ("home-country control") of the conditions according to which they intend to organize betting, and the supervision of their own capital resources and of their solvency.

a) ***monopoly v. home and host control.*** However — according to the condition of necessity of a restrictive measure and to the principle of equivalence — in the present case, the general interest is already protected by the rules of the state of establishment. In fact the English bookmakers are licensed by the British public authorities in order to exercise that activity. In other words, the bookmakers were already submitted to the necessary control required to protect the interests of the betters-consumers, namely providing fair conditions of betting and guarantying that winners are always duly paid.

Second, even if betting was not considered a service like any other, an authorization or control in the host country (Luxembourg), even under the most restrictive conditions, could be considered objectively necessary to protect the consumers of Luxembourg. However, even this remote possibility is excluded because the law in question absolutely prohibits any other company, national or foreign (non discrimination), from exercising this activity.

The Court expressly stated in Case Webb that it's necessary to take into account the evidences and the guaranties already given by the provider of the service for the pursuit of his activity in the Member State of his establishment. But the law in question doesn't satisfy this requirement.

In fact this prohibition simply doesn't allow the most safe and trustworthy bookmakers to provide their services to the consumers of Luxembourg. Therefore, this measure is clearly disproportionate. The same result, consumers' protection, could be achieved by less restrictive rules, for example, by the mentioned authorization and control in the host country (Luxembourg).

b) ***advertising and consumer protection: 'the informative advertising' policy of the Community and the Court of Justice case-law.*** Then, where prohibiting the distribution of coupons and advertising in Luxembourg of competitions organized abroad, the law in question hinders the free provision of services within the Community, without being objectively necessary or, at least, proportional to the protection of the general good (consumers' protection).

To begin with, the prohibition of distribution of coupons means, on one hand, that the consumers-betters of Luxembourg haven't got the right to get these forms of participation that allow them to receive a service that is provided, not in Luxembourg, but in a foreign country. It means, on the other hand, that the consumers of Luxembourg can not compare different condi-

tions of betting, and, therefore, that they are deprived of the possibility of making a clear and free choice.

Then, the prohibition of advertising is the very negation of consumers' protection. In fact, it means, in one hand, that the foreign bookmakers are not allowed to inform the consumers of Luxembourg about the services they provide in others States. It means, on the other hand, that the consumers of Luxembourg don't have got the right of getting information about the market of the services of betting, because they're deprived of the access to the basic information about the existence and the conditions of the services they may be interested in receiving.

We would like to recall what the Court stated in the Case 362/88, *GB-INNO-BM v. CCL*: "The question thus arises whether national legislation which prevents the consumer from having access to certain information may be justified in the interest of consumer protection. It should be observed that the Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information. Thus, the preliminary program adopted by the council in 1975 provides for the implementation of a consumer protection and information policy. The Council approved a second program of the European Economic Community for a consumer protection and information policy successively confirmed by the Council Resolution of 23 June 1986. (...) It follows from the foregoing that, under Community law concerning consumer protection, the provision of information to the consumer is considered one of the principle requirements".

Therefore, this prohibition of advertising is contrary to its alleged grounds of justification: consumers' protection. This aim could be achieved by restricting only the content of the advertising message to what's necessary to inform the consumers about the existence of a service (and its conditions) provided within the Community (see, *inter alia*, Article 21 of the Portuguese Advertising Law, or the Betting, Gaming and Lotteries Act of 1984 in U.K.).

Then, the Directives 10/9/84 and 3/10/89 and the European Convention on Transfrontier Television and the proposal of Directive of 28/5/91, do not prohibit advertising of betting services. And, for example, the Directive on misleading advertising of 84 only provides a minimum harmonization, allowing the Member States to take measures that guarantee a better protection to the consumer, but only and in so far as those measures do not constitute technical barriers to, for example, the freedom to provide services. That's why several Member States allow advertising of betting services, but limit this advertising to informative purposes. By this way they protect the consumers and at the same time they don't restrict, for example, the freedom to provide services.

2. ***Conclusion: disproportionality.*** In conclusion, the prohibitions of the law of Luxembourg are disproportionate because the same result (protection of the general good, consumers' protection) can be achieved by less restrictive rules (see Case 205/84, *Commission v. Germany*; Case 76/90, *SAGER*). Therefore, according to the Court of Justice 'Rule of Reason', the law in question constitutes a restriction on the freedom to provide services incompatible with Article 59.º et seq. of the EEC Treaty.

D. QUESTION OF THE EVENTUAL APPLICABILITY OF ARTICLES 56.º AND 55.º TO THE PRESENT CASE

1. ***Special services, public security and monopolies.*** It follows from the foregoing, mainly the consideration that betting is a service just like any other, given by the Commission in the European Report, that public policy can't be invoked as a ground of justification of the law in question. In fact, betting is not a "special service" which allows a national monopoly to grant the income benefit to the society as a whole. Conferring this privilege exclusively to one private company is not the best way this result: it would be sufficient the imposition of a nondiscriminatory taxation to all the companies, in order to support sport events.

Moreover the prohibitions of distribution of coupons and advertising and the exclusive concession don't avoid criminal exploitation and the existence of black market. On the contrary, they give raise to the illegal and uncontrolled betting, because there is no satisfaction of all the demand of consumers-betters: if you increase the size of betting market improving the facilities and the information given to the users you will consequently reduce the appeal of illegal market (cf. DIXON, *op.cit.*). Therefore public security is not guaranteed by these restrictions and so cannot be a ground of justification according to Article 56.º.

2. ***Connection with the exercise of official authority.*** Article 55.º is not also applicable because betting is an activity which is not even occasionally connected with exercise of official authorities, therefore not submitted to these exceptions of the free provision of services. In Case 2/74, *Reyners v. Belgian State*, the Court stated that the exception to the 'freedom of establishment' (in our case, the freedom to provide services) must be restricted to those activities which in themselves involve a direct and specific connection with the exercise of official authority". We can't reasonably give this description to the activity of organizing Betts on the results of football matches.

3. *Public morality: analogical application of Article 36.º?* After everything we have said it is not also reasonable to argue that this law is justified on the grounds of public morality, under an analogical application of Article 36.º. Although we do not want to discuss the question of the analogical applicability of this provision (defended, for example, by KAPTEYN, *Introduction to the Law of the European Community*, 2a ed., 1990) it's quite clear that public morality can't justify such radical restrictions we've analyzed.