MONOPOLIES AND THEIR CONTROL: PLACED BETWEEN CONFLICTING OBJECTIVES?

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INTRODUCTION

The first key preliminary reference from a national court regarding gambling and internal market freedoms was referred to the Court of Justice ("CJEU") three decades ago. Much has happened in the intervening years, and not least for the national court in question which now finds itself outside the European Union.[1] Meanwhile, national gambling markets have seen the emergence of remote gambling in light of the unstoppable rise of the internet as of the mid-1990s. Whilst the internet, and the means of communication which it facilitates, has helped fuel many questions regarding the compatibility of national gambling laws with EU law, the underlying fundamentals of such debates already existed given restrictions around the supply of land-based gambling.

Removing restrictions to market access has been a central feature to EU efforts to liberalise national markets and enable providers in the relevant sector to enter new national markets (telecommunications, gas, electricity markets etc.). Such approaches result in monopolies having to bear witness to new market entrants on their "patch", whilst equally enabling established monopolists to move beyond their national borders. However, in contrast to other sectors, gambling services have not been subject to a drive from Brussels for liberalisation and positive integration. The majority of the discourse around the application of the freedoms underpinning the internal market and gambling has arisen in the context of negative integration; namely case-law from the CJEU, the vast majority of which has been driven by preliminary references from national courts.

A key part of the CJEU's case-law has been the margin of discretion which it has accorded to Member States; national governments are free to choose their approach to regulating gambling markets. This results in different Member States taking different approaches; some opting for open licensing models where there is no cap on the total number of operators, whilst others elect for monopoly based supply. Member States are not required to take a blanket approach to

[1] The first preliminary reference from a national court was sent by the High Court of Justice of England and Wales in Case 275/92, *Schindler*.

the entire national gambling market; there is no obligation to subject remote gambling to the same approach as land-based gambling. Furthermore, different approaches can be taken within the land-based and remote sphere. This freedom to design the regulatory approach at the national (and also sub-national) level is not unfettered. Member States must play by the rules of European law, regardless of whether they seek to uphold an open licensing regime for remote sports-betting or a monopoly for the supply of land-based casinos.

Nevertheless, given the rise of remote gambling some Member States adopted the approach of making an unlimited number of remote gambling licences available, whilst setting high standards for those seeking to qualify for such a licence. This includes a number of Member States which have decided not to carry land-based monopolies over into the remote sphere[2]. Although a shrinking number, there are a few remaining Member States that swim against the tide and seek to maintain monopolies across both the land-based and remote spheres, with Finland and Norway being the most prominent examples in this regard. As already alluded to this does not entail that monopolies are not found elsewhere within the European Union; smaller segments of national gambling markets are usually supplied in this way, rather than a single approach being taken for the entire land-based or remote market.[3] In any event, the need to adhere to EU law applies regardless of the breadth of the monopoly held. The duty to abide by EU law, so as not to undermine the preferred regulatory approach, includes the manner in which a Member State grants access to the market, and where this relates to a monopolist, how the monopolist's behaviour on the market behind the protection afforded by its exclusive right.

This piece considers the restrictions which apply to the latter situation; how EU law delimits the ability of Member States to grant monopolies and maintain existing ones; in some instances monopolies which predate the development of EU law on this front. In doing so it will consider the constraints which EU law places upon the granting of a monopolistic position, before proceeding to address those which EU law places upon the behaviour of the monopolist. Essentially, the monopolist should not, and not be allowed to, act in a manner contrary to the reasons upon which its very existence is founded.

[2] For example, in France the monopoly which FDJ enjoys on land-based sports-betting was not carried over into the remote sphere.

[3] In the Netherlands, for example, Holland Casino holds a monopoly on land-based casino gaming whilst also holding a separate licence for offering remote gambling, under which it offers a broader range of products than it would be permitted to do on the basis of its land-based licence.

NO ACCESS GRANTED?: MAINTAINING A MONOPOLY

With Member States free to choose the regulatory approach to their gambling market, including sub-divisions thereof,[4] it comes as little surprise that consideration has been given to how a monopolistic position (exclusive right) is awarded. The key CJEU decision in this regard is *Sporting Exchange*, following a preliminary reference from the Netherlands' Council of State in May 2008. The preliminary reference was sparked by the lack of an open licence award process for the single sports-betting licence and the single horserace betting licence, i.e. two separate monopoly positions.

In short, the lack of a transparent licence award process for awarding these two licences was challenged before the national courts in the Netherlands. The licence was "semi-permanent"; typically have a duration of five years whilst being continually renewed to the same entity without any process whereby other potential applicants could compete. Both licences were held by private operators. Having considered how the obligation of transparency, as a "*specific expression of the principle of equal treatment*" in the context of the freedom to provide services applies to the award of public contracts and concessions,[5] Advocate General Bot addressed the matter of how this obligation should extend to the award of an exclusive right for the offering of gambling services. The Advocate General qualified the obligation of transparency as a "mandatory prior condition" which Member States must satisfy in order to award private operators the exclusive right to carry out an economic activity.[6] Neither the fact that an exclusive position was awarded on the basis of an administrative procedure, nor the nature of gambling services themselves, would relieve the competent national authorities of the duty to uphold this obligation.[7] Advocate General Bot's stance was that the Netherlands authorities would be obliged to open an adequate call for tenders unless "*they are able to show that their control over the successful entity is similar to that which they have over their own departments and that that entity carries out most of its activities with those authorities*".[8]

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[4] Subject to requirements flowing from the notion of horizontal consistency.

[55] The obligation of transparency is key to ensuring that competition for the market can take place, and has been developed in the context of public procurement, in relation to concessions which were not subject to requirements flowing from applicable Directives. This obligation does not require that a tender is launched, but requires the "*concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to opened up to competition and the impartiality of the procurement procedures to be reviewed*", see, for example, Case C-324/07, *Coditel Brabant*, para. 25.

[6] Case C-203/08, *Sporting Exchange*, Opinion of Advocate General Bot of 17 December 2009, para. 154.

[7] Case C-203/08, *Sporting Exchange*, Opinion of Advocate General Bot of 17 December 2009, paras. 156-7.

[8] Case C-203/08, *Sporting Exchange*, Opinion of Advocate General Bot of 17 December 2009, para. 171.

Such a line of reasoning reflects that taken by the CJEU in public procurement case-law, starting with *Teckal*, in terms of when Member States are not obliged to open public tenders for the award of contracts. Indeed, Advocate General Bot explicitly drew this parallel, when noting that the obligation of transparency does not apply "*if the public authority which is the contracting authority exercises over the contracting entity a control similar to that which it exercises over its own departments and, at the same time, if that entity carries out most of its activity with the public authority or authorities which control it*".[9] It is notable that whilst the CJEU reaches the same conclusion as the Advocate General, no reference is made to *Teckal*, and the line of reasoning which subsequently developed. The "what ifs" surrounding this parallel are returned to below.

Having noted what the obligation of transparency in the award of service concession contracts entails, the CJEU considered in *Sporting Exchange* that merely because the single licence "*is not the same as a service concession contract*" does not relieve the national authorities concerned of their obligations under Article 56 TFEU, and the in particular the principle of equal treatment and the obligation of transparency which flows from the freedom to provide services.[10] Whilst recognising that the margin of discretion which Member States enjoy the CJEU held that an exclusive licensing system "*cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services*".[11] Here, the CJEU avoids getting caught up in the intricacies of the type of licence or authorisation via which market access is granted.

Accordingly, the obligation of transparency must be upheld, unless the single licence is granted or renewed to a public operator "*whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities*".[12] However, the CJEU did not expand upon which the defining characteristics of what constitutes a public or private operator, and neither did it further address the nature of the control which would relieve the Member State of the need to run a transparent licensing process. This would be a matter for the national courts to fathom out, as considered below in relation to the Netherlands.

[9] Case C-203/08, *Sporting Exchange*, Opinion of Advocate General Bot of 17 December 2009, para. 145.
[10] Case C-203/08, *Sporting Exchange*, para. 46.
[11] Case C-203/08, *Sporting Exchange*, para. 49.
[12] Case C-203/08, *Sporting Exchange*, para. 59.

In this operative part of its decision the CJEU referenced two previous decisions where the nature of the operating party, each of which benefitted from a measure restricting the ability of other entities to enter the respective national market, was considered. Turning to these cases is valuable in order to decipher the notions of strict and direct State control. These cases concern the slot machine monopoly enjoyed by the "RAY" in Finland (*Läärä*)[13] and Santa Casa da Misericórdia de Lisboa in Portugal (*Liga Portuguesa*).[14] In essence the CJEU suggested that the regulatory regime to which both were subject would demonstrate governance which corresponds to that which would justifiably negate the need to uphold the obligation of transparency. Not long after the CJEU's *Sporting Exchange* decision the governance of another monopolist gambling supplier was considered, in *Zeturf*.[15] This will also be addressed below.

In *Läärä* the Finnish monopoly for slot machine gaming, held at that time by Ray-automaattiyhdistys (the Association for the Management of Slot Machines, referred to as "RAY") came under scrutiny, in the context of criminal proceedings against Mr Läärä for the operation of slot machines without the requisite licence. RAY was considered to be a licensed public body.[16] As such, in the parlance of *Sporting Exchange*, this would be an entity which would have to be subject to an adequate degree of direct state supervision to relieve the Finnish authorities from needing to uphold the obligation of transparency. However, that was not the material issue in this case, as the focus was whether the monopoly itself was tenable under EU law. Insight into the actual governance of RAY can only be gathered from Advocate General La Pergola's Opinion, whereby it was noted that:[17]

- RAY has a fourteen member Board of Directors, seven of which (including the Chairman and First Vice-Chairman) are elected by the Council of State, with three ministries each having one representative on the board.[18]
- RAY was subject to "adequate supervisory measures" by a 1996 five-year licence for the operation of the single casino in Helsinki; no details on these measures are forthcoming in the Opinion.
- Various contractual conditions governed the relationship between RAY and the outlets in which their machines were to be found, including that, which from today's

[13] Case C-124/97, *Läära*.
[14] Case C-42/07, *Liga Portuguesa*.
[15] Case C-212/08, *Zeturf Ltd*.
[16] Case C-124/97, *Läära*, paras. 21 and 40.
[17] Case C-124/97, *Läära*, Opinion of Advocate General La Pergola, 4 March 1999.
[18] Those of Social Affairs and Health, of Internal Affairs and of Finance.

perspective is quite remarkable, requiring the outlet to ensure that the machines were not used by individuals younger than 15 years of age unless accompanied by an adult(!).[19] The Ministry of Internal Affairs is described as being responsible for ensuring compliance with these requirements, as well as setting the maximum stakes.

At the material time of this case, RAY was one of three monopolists in Finland. These have since been merged into a single all-encompassing monopolist, Veikkaus. Prior to this date, alongside RAY, Fintoto enjoyed a monopoly for horserace betting and Veikkaus for lotteries.[20]

Jumping, in a geographical sense, to the other side of the EU, attention to the governance of the Portuguese monopolist for offering lotteries, lotto games and sports-betting was addressed in *Liga Portuguesa*. Again, this case was concerned with a monopoly based market rather than access to that exclusive position, and in this context the CJEU noted that it was "*subject to strict control*".[21] Presumably the CJEU was not thinking along the lines which would subsequently be drawn in *Sporting Exchange* given that Santa Casa is described as being a "*legal person in the public administrative interest*". The relationship between Santa Casa and the Portuguese state appears to be a particularly close and intertwined one. Not only were Santa Casa's statutes embodied in law, the involvement of the state is clear:

- Santa Casa's director is appointed by the Prime Minister.
- Members of Santa Casa's board of management are appointed by Government decree.
- Revenues generated by Santa Casa are allocated between Santa Casa and other public interest institutions or institutions involved in social projects.
- Santa Casa's games of chance are provided by its Gaming Department, whereby:
    - The director of the Gaming Department, and two deputies, are appointed by the Minister for Employment and Solidarity and the Minister for Health.
        - The majority of the Gaming Department's committee members which are in charge of games, draws and complaints are representatives of the General Tax Inspectorate and the District Government in Lisbon.

[19] This has since been increased to 18 years of age for all forms of gambling in Finland. Increasing the minimum age has been attributed to a drive, as of 2007, to address various aspects of the Finnish gambling market including tackling problem gambling but also maintaining the monopoly system against the pressures imposed by scrutiny under EU law. See Littler, A. & Järvinen-Tassopoulos, J., "Online Gambling, Regulation, and Risks: A Comparison of Gambling Policies in Finland and the Netherlands", *Journal of Law and Social Policy* 30 (2018): 100-126, at p. 103-4.

[20] See Littler, A. & Järvinen-Tassopoulos, J., "Online Gambling, Regulation, and Risks: A Comparison of Gambling Policies in Finland and the Netherlands", *Journal of Law and Social Policy* 30 (2018): 100-126.

[21] Case C-42/07, *Liga Portuguesa*, para. 67.

        - Specifically in terms of the complaints committee, the chairman is a judge appointed by the Minister for Justice and enjoys the casting vote on matters. Two committee members are appointed by the chief tax inspector and the chief administrative officer of the District of Lisbon, whilst the third member is appointed by the director of Santa Casa.
    - Furthermore, the Gaming Department enjoys powers commensurate with those of an administrative authority, in that it can open, institute and prosecute offences surrounding the illegal operation of games of chance. It can, in this regard, exercise administrative powers to impose fines.

This demonstrates a remarkable degree of interconnectedness between the Portuguese state and Santa Casa, but one which nonetheless must withstand scrutiny under EU law. It should be noted that in terms of remote gambling Santa Casa does not enjoy a monopoly with regards to remote betting and casino games; at the time of writing it is one of 15 entities holding a licence from the *Comissão de Jogos*.[22]

The decision in Zeturf arose from a challenge against France's continued conferral of a monopoly for the management of off-course horserace betting to the Groupement d'Intérêt Économique Pari Mutuel Urbain ("PMU"). Pointing towards the prevailing situations in *Läärä* and *Liga Portuguesa* the CJEU noted that, albeit subject to confirmation by the referring national court in question, the system of betting was subject to a degree control analogous to those two cases. "*[P]articularly strict State control over the organisation of betting on horseracing*" would thus ensure, and France would be considered to exercise "*direct control over the functioning of the exclusive operator*" as well as the "*organisation of the events on which the bets are placed, the types of bet authorised and their channels of distribution, including the proportion of the winnings to the stakes and the conduct and supervision of the regulated activities*".[23] The CJEU indicated that relevant considerations pointing towards any finding of strict control related to the:

- Composition of the PMU's board of directors;
    - The board contained ten members, with the CEO and deputy CEO being approved by the two competent ministries (Ministry for Agriculture and the Ministry for the Budget)

[22] https://www.srij.turismodeportugal.pt/en/online-gambling/licensed-entities/.
[23] Case C-212/08, *Zeturf Ltd*., para. 56.

    - Four members were representatives of the PMU's member undertakings.
    - Whilst another four were representatives of the State, with each ministry appointing to members.
    - During deliberations each board member had one vote, whilst the CEO carried the casting vote where matters were tied.
    - Further government representatives would attend board meetings without any voting role.
- Control and supervision of horseracing and totalisator betting by the two competent ministries;
    - Inspection and supervision of horseraces and totalisator betting were carried out by officials within a department of the Ministry for Agriculture and by officials of the relevant policy service of the Ministry for the Interior and by senior Treasure officials. Such officials would have access to all documents and evidence, as well as locations and premises before, during and after races.
- Detailed rules and types of bets offered by PMU;
    - Both the rules and types of bet would be approved by the two ministers, following a proposal from the PMU, approval being conditional upon an opinion from the Minister for the Interior.

As noted above, whilst both Advocate General Bot and the Court reached the same conclusion in *Sporting Exchange*, the Court did not refer to the line of reasoning it had developed from *Teckal* onwards, under which public authorities are not obliged to respect the obligation of transparency when awarding contracts "in-house". This is often referred to as the "quasi in-house exception", whereby a decision to carry out an activity in-house does not conflict with public procurement requirements, and thus also not with the fundamental freedoms underpinning the internal market. Nevertheless, this is avenue of case-law is valuable in understanding when a Member State need not uphold the obligation of transparency when granting access to a monopoly position in a gambling market, or renews that position.

The CJEU held that a local authority need not satisfy the requirements of the (then) applicable public procurement directive, when awarding a contract to a legally distinct person, where "*the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential*

part of its activities with the controlling local authority or authorities".[24] The *Teckal* line of reasoning thus applies where the entity which was awarded the contract in question is a distinct legal entity from the entity contracting authority, but where the authority exercises control over the entity as if it were internal to the contracting authority and the entity were to perform the essential part of what it does on behalf of that authority. This is also indicative of a very close degree of integration between the authority awarding the contract and the entity receiving it.

Yet, how close is close? In the case of *Stadt Halle* the CJEU determined that the absence of a call for tenders would distort the principle of equal treatment where "*any private capital investment*" was held in the entity which otherwise enjoyed a close relationship with the awarding authority.[25] In this particular instance a public service contract had been awarded to an entity in which 24.9% of the shares were held by a private limited liability company. Notably, the CJEU did not seek to draw a threshold below which private investments would be acceptable because "*the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments*".[26]

Quite evidently therefore the involvement of any private capital will dilute the necessary degree of control required to negate the need to uphold the obligation of transparency. Moreover, attention must also be given to the actual activities of the entity receiving a contract in the absence of the obligation of transparency being upheld. In *Parking Brixen*, the CJEU addressed the nature of the contracting authority's degree of influence over the concession holder. So as to justify the lack of a tender procedure, the CJEU held that the authority must exercise "*a power of decisive influence over both strategic objectives and significant decisions*".[27] Despite a governance structure, in *Parking Brixen*, whereby the local authority in question was engaged in the governance of the entity to which it had awarded the contested concession, the recipient thereof had become "*market orientated*" whereby the local authority's control of it was rendered "*tenuous*".[28] Not only had the entity recently been converted from a special public undertaking to a company limited by shares, and was opened to other capital, it also undertook projects in new fields of work, but also geographically beyond the local authority area in that

[24] Case C-107/98, *Teckal*, para.
[25] Case C-26/03, *Stadt Halle*, paras. 50 & 51.
[26] Case C-26/03, *Stadt Halle*, para. 49.
[27] Case C-26/03, *Stadt Halle*, para. 65.
[28] Case C-26/03, *Stadt Halle*, para. 66.

Member State and internationally, and the local authority lacked actual management control in practice.[29]

All told, this demonstrates, in the same vein as the following section, that where a body seeks to benefit from a restriction of the freedom to provide services (the negation of the obligation of transparency through not running a public tender procedure or other degree of transparency and, separately, offering gambling services behind the protection from market forces which a monopoly provides) the applicable legal and regulatory regime must be such that the Member State (whether a local or national authority) has a regulatory architecture in place which can deliver the necessary controls. It would appear that in *Parking Brixen* the entity in question had outgrown its relationship with the public authority in question. Drawing parallels with gambling discourse, some may consider that holders of gambling monopolies "outgrow" the objectives and regulatory system which supports their existence.

Indeed, the consequences are clear when further translating these considerations to the domain of gambling monopolies. The involvement of any private capital would arguably render a monopolist as no longer being sufficiently public so as to be a public operator subject to direct State supervision. Furthermore, along the same line of reasoning, should the authority which awards the licence not be able to exercise decisive influence over the monopolist's strategic objectives, and significant decisions, then the degree of control would be too weak. Whereas the CJEU took a rather dry look at the governance structures of the relevant entities enjoying a monopoly position in *Läärä*, *Liga Portuguesa* and *Zeturf*, consideration of the parallel discourse in public procurement case-law indicates that attention should also be directed to how a monopolist behaves on the market; thereby encapsulating whether the public authorities in question can, and do, exercise control. On this basis simply considering the governance structures as described on paper, without reviewing their real application in practice, would not suffice. Indeed, it would seem rather flawed if a restrictive measure, and particularly one as restrictive as a monopoly, could be upheld by the dead letter of the law whilst actual practice were to point in the opposite direction.

In contrast to cases regarding the compatibility of a restrictive measure itself, such as the very existence of a monopoly, the matter of who needs to demonstrate that the monopolist is subject to suitably strict governance has not been explicitly addressed in the CJEU's case-law. In the context of establishing whether a particular restrictive measure can be objectively justified, the

[29] Case C-26/03, *Stadt Halle*, para. 67.

CJEU has established that the Member State needs to provide the court (at the national level) with evidence so as to enable the court to establish that the measure is proportionate. However, the CJEU clarified in *Stoss* that the earlier case of *Lindman* is not to be understood as requiring a Member State to produce studies in order to be able to justify a restrictive measure; the fact that a Member State cannot produce studies will not, alone, deprive a Member State of the ability to justify a restrictive measure.[30] In *Lindman*, the CJEU had established that reasons which are invoked in order to justify a measure "*must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State*", whilst the case file had did not disclose any statistical or other evidence of the risks which the Member State upholding the restrictive measure sought to rely on.[31] The Member State must be able to provide evidence to support its underlying concerns (for example that a particular restrictive measure is necessary to avoid excessive participation in gambling), but it need not produce a study specifically for this purpose. The CJEU has been quiet on this point with regards to demonstrating that a monopolist is subject to a suitably strict control or strict supervision; this may very well be simply by virtue of the fact that information pertaining to the robustness of the governance structures will be advanced by the State in order to defend its position before the national court.

Returning to the National Level

Attention will now briefly consider how the Sporting Exchange was received at the national level. The *Sporting Exchange* case-law has resulted in consideration of the nature of De Lotto's governance on several occasions, the first of which being upon receipt of the CJEU's decision from the preliminary reference. It should be noted that the De Lotto has undergone changes to its governance structure since 2011, and has shifted from a private to public operator.

Recalling the Council of State's 2009 preliminary reference, the two betting licences, where held by two monopolists (one foundation holding the sports-betting licence, and the other being a private company holding the single horserace betting licence). The Council of State interpreted the notion of strict control as entailing that a "special relationship" should exist between the private operator and State, through which the State can exercise control in a manner which it would not be able to do in the absence of that relationship.[32] At the material time De Lotto, as a not-for-profit private operator holding the sports-betting licence, was ultimately

[30] Case C-316/07, *Stoss*, para. 72.
[31] Case C-42/02, *Lindman*, paras. 25 & 26.
[32] ECLI:NL:RVS:2011:BP8768, para. 2.10.9.

deemed not to be subject to strict control, notwithstanding that the Minister of Justice and Security could appoint one of De Lotto's five commissioners.[33] Whilst this would enable the Minister to exercise more control over De Lotto's activities than would otherwise be the case, the Council of State took the stance that this did not result in strict control.[34] The four other commissioners on the board were appointed by the two bodies which received revenues generated by De Lotto's activities. Although the commissioner appointed by the Minister was the chair of the board, the board's decisions would carry on the basis of a majority vote. Therefore the Council of State was not convinced that the commissioner appointed by the Minster would be able to secure that strict control was exerted over De Lotto. The lack of an open transparent licence application process was thus in breach of the freedom to provide services.[35]

In November 2014 De Lotto once again received the sports-betting licence in the absence of a transparent licence application process. Essentially the same question arose once again, was De Lotto under strict control? Following the 2011 ruling of the Council of State, De Lotto's statutes were amended in 2013. In essence, the statues explicitly noted that the commissioners would be exercise their activities with a view to the objectives of De Lotto, thus respecting the prevailing gambling policy. Furthermore, the board of commissioners would be constituted of 6 members; two would be appointed by the Minister for Justice and Security; one of whom would have been put forward by the two beneficiaries and another who in addition to the normal functions associated with the position would pay particular attention to ensuring that Dutch gambling policy was upheld. This would involve meetings with the Ministry or State Secretary for Justice and Security.[36] This particular commissioner ("commissioner D") would also have a veto right in relation to decisions which would breach national gambling law. In view of the above, the District Court of The Hague considered that De Lotto was still not subject to strict control.

Reference was made to *Liga Portuguesa*, the District Court read this judgement as not suggesting that the control which the Portuguese State exerted over Santa Casa was the prevailing norm in establishing strict control, but that the CJEU had attached particular value to the manner in which Santa Casa was organised, its working methods and the way in which

[33] Given that the entity holding the horseracing licence was simply a private company, it is not given any further consideration.
[34] ECLI:NL:RVS:2011:BP8768, para. 2.10.11.
[35] ECLI:NL:RVS:2011:BP8768, para. 20.10.12.
[36] ECLI:NL:RBDHA:2016:2385, para. 7.3.

the Portuguese government exercised control over it.[37] Consequently, and despite the role of the commissioner, the District Court was not ready to conclude that this was sufficiently strict control.[38] Indeed, the District Court noted that no information had been forthcoming about the nature and content of meetings between the commissioner and Minister. Additionally the board could take decisions in the absence of the veto-right wielding commissioner. This demonstrates that at the national level attention is directed towards the actual influence of government appointed commissioners.

Perhaps this is what convinced the Council of State to overturn this decision on appeal in May 2018. Having analysed the role of the commissioner "D" the Council of State considered the changes to De Lotto's statutes following its 2011 decision to render control sufficiently strong. Points in this regard being:

- Not only can the Minister appoint commissioner D, but Minister can also terminate this appointment;
- Commissioner D can be represented by another director, should D be absent from a board meeting;
- Commissioner D can use their veto right to veto decisions of the board where this would result in breaches of gambling policy, such as the decision pertaining to the annual plan of De Lotto. The statutes of De Lotto explicitly recognise that decisions can be taken regarding matters such as advertising activities, the number of sales terminals, the means by which gambling is offered to the public and the internal control systems of De Lotto.

Therefore the Minister, through Commissioner "D", would be able to exercise a controlling influence over De Lotto, with such control being guaranteed by way of the fact that the statutes establish that they can only be changed with the Minister's blessing.[39] Through its analysis, the Council of State considered that the changes made compared to the first time this matter was heard before its benches were sufficient to bring control within the realm of strict control.

The notion of direct State supervision was once again addressed by the Council of State on 10 March 2021. Two challenges had been launched against the non-transparent sports-betting licence award procedure given that following the change in De Lotto's legal form it had been

[37] ECLI:NL:RBDHA:2016:2385, para. 8.2.
[38] ECLI:NL:RBDHA:2016:2385, para. 8.4.
[39] ECLU:NL:RVS:2018:1466, para. 6.7.

merged with the Nederlandse Loterij B.V..[40] The Nederlandse Loterij B.V. is, in short, a company in which all shares are held by the state, and which, in turn, holds all shares in several single licence holders on the Dutch market, including Lotto B.V.. Given that De Lotto had changed from the original foundation to a private company and merged into a holding structure (in which the other private company was the Staatsloterij B.V., the state-owned national lottery), the Council of State deemed it to be a public operator.[41]

The question was thus one of whether Lotto B.V. was subject to direct State supervision. At this juncture the Council of State saw no grounds to embellish the exception developed in *Sporting Exchange* with the quasi in-house exception as developed in the aforementioned *Teckal* line of reasoning, adhering instead to the "specific criteria" developed by the CJEU in *Sporting Exchange*.[42] Parallels had already been drawn between the two tracks; Advocaat-Generaal Widdershoeven, again of the Council of State, and in a case regarding the award of an arcade premises licence in the municipality of Vlaardingen, noted that the *Sporting Exchange* exception "appeared to be inspired by" the quasi in-house exception line of reasoning.[43] Furthermore, the authors of a report commissioned by the Netherlands Ministry of Justice and Security nevertheless take the position that the two tracks are similar in as far as they relate to conditions concerning supervision and the justification of measures restricting free movement.[44] Not joining these dots would appear to be something of a missed opportunity but need not stand in the way of other national courts expressly making the link.

Ultimately the Council of State found that there was direct State control over Lotto B.V. so as to not to undermine the lack of a transparent licence award process prior to changes to the structure and governance of the licence holder. The Council of State noted that the most important powers were held by the shareholders of the Nederlandse Loterij B.V., "in this case the State", and relate to matters such as; appointing/terminating directors and members of the board, approving large investments, approving important changes in the identity or character of the undertaking, and amongst other points, given that the Nederlandse Loterij is in the hands of

[40] One challenge had been launched by the trade association representing the interests of remote gambling operators, known as the Nederlandse Online Gambling Associatie (NOGA); ECLI:NL:RVS:2021:470. The other challenge was initiated by the Sporting Exchange Limited (Betfair); ECLI:NL:RVS:2021:468. For reasons of efficiency further references made to the latter judgement only.
[41] ECLI:NL:RVS:2021:468, para. 5.2.2.
[42] ECLI:NL:RvS:2021:468, para. 5.2.3.
[43] ECLI:NL:RVS:2016:1421, para. 3.8.
[44] Manzuna, E.R., De Vries, S., Janssen, W.A. & Van der Veer, A., *Het juridische loterijenstel in Nederland: EU-proof? Een onderzoek naar de conformiteit van de regulering van loterijen in Nederland met het Europees recht*; Utrecht University Centre for Public Procurement & RENFORCE 2021, p. 66.

the State the State would then be able to ensure that the public interest would be central to its activities. The Council of State considered that the State enjoyed full decision making powers over important shareholder decisions, furthered by the relationship between the State, as shareholder, and policies which govern the relationship between such entities and the relevant policy-department within government.[45]

If a national court could be convinced to apply the stricter, and not unrelated, test developed in *Teckal* and thereafter, it could most certainly be anticipated that a more robust review of the actual practices of the monopolist would be reviewed. Not merely would the governance structures on paper be reviewed, but attention would be given to how the monopolist has behaved on the market, recalling that in *Parking Brixen* the behaviour of the monopolist in question was such that had become "market orientated". This would also enable the substance of the review to move towards that associated with assessing whether the monopoly is permitted to begin with, rather than maintaining a separate track for analysing the lack of a transparent licensing process for awarding the exclusive position. As will be demonstrated in the next section below, a monopoly will be eroded when the monopolist acts, and is allowed to act, in a manner inconsistent with the objectives which underpin it. A more expansive, "quasi in-house" inspired review of the possible justifications for not awarding a gambling licence via an open procedure would bring such considerations into the analysis of whether the lack of a process, for that licence, is indeed tenable.

PREASURE ON MONOPOLIES

Money for Good Causes: Context

Within the European legal order Member States are competent to regulate their own gambling markets, conditional upon this being done within the contours of European law. For measures which restrict the cross-border provision of (gambling related) services which are not discriminatory on the basis of nationality or place of establishment, the CJEU's case-law has been particularly lenient towards Member States. Having recognised that they enjoy a "*sufficient degree of latitude*"[46] the Court has subsequently upheld a light touch review of restrictive measures. This notwithstanding, non-discriminatory restrictive measures must all jump the same elementary hurdles in order to be considered as "EU law proof". Following the passage of time, and a multitude of preliminary references, these hurdles have been further

[45] ECLI:NL:RVS:2021:468, para. 5.2.5.
[46] Case 275/92, *Schindler*, para. 61.

detailed and refined for monopoly based supplies. It is thus necessary to consider how the behaviour of the monopolist can undermine the foundations upon which its exclusivity and existence stands.

First though, it is necessary to appreciate the context within which monopolies have historically emerged. The Europeanisation of national gambling discourses has resulted in the analysis of established regulatory regimes against the requirements of EU law, as such EU law has become a source of pressure on national regulatory models alongside those arising from the pressures associated with the internet based gambling services. Regulatory approaches which were introduced prior to the emergence of EU law, or perhaps more simply prior to attention for how the regulation of gambling and EU law interact, are now reviewed through the lens of EU law.[47] This may entail that earlier narratives around an existing regulatory approach shift so as to conform to the sound and language of what EU law permits, in terms of justifying measures which restrict free movement. However, it is questionable whether earlier objectives actually disappear or whether the overall narrative is re-cast, with those elements which are less tenable in the light of EU law shrinking towards the shadows.

Not infrequently, the introduction of a legal supply of a particular form of gambling has been justified, at least partly, on the basis that monies will be generated for specific causes. This has been referred to as the alibi model, whereby the generation of income for sports or charitable causes is relied upon to help garner support for the introduction of a particular form of gambling.[48] This is not to say however that other factors may have been at play, such as establishing a local form of supply to capture local demand, discouraging participation in a particular form which was legally available in relative close proximity, but in another jurisdiction.

Under EU law the protection of taxation revenues cannot justify a restrictive measure, and the same applies to the generation of revenues for good causes. Such considerations have been

[47] Interestingly Järvinen-Tassopoulos juxtaposes within a single paragraph the observation that in light of discussions spurred on by EU law "*… the inclusion of the prevention, treatment and study of compulsive gambling in the core of Finnish gambling policy is an attempt to show how responsible the monopoly system controlling gambling in Finland is*" with "*in the 1970s, minors were still considered to be independent enough to play gambling games, they have gradually become to be regarded as a risk group withing gamblers*". See Järvinen-Tassopolous, "The prevalence of gambling and problem gambling in Finland", in Raento, P., *Gambling in Finland*, (Gaudeamus, Helsinki, 2014), p .90.

[48] Kingma, S., "Gambling and the risk society: the liberalization and legitimation crisis of gambling in the Netherlands" (2004) 4:1 *International Gambling Studies* 47.

recognized as having a positive side effect by the CJEU,[49] and where a restriction "*incidentally benefits*" the treasury this will not undermine an otherwise justifiable restriction.[50] In reality, Member States often seek to pursue multiple regulatory objectives, and therefore the generation of revenues may take a backseat against those of consumer protection, the prevention of excessive gambling and seeking to avoid crime and fraud. Nevertheless, practice must also reflect this narrative; a Member State cannot profess to seek to avoid the negative consequences of excessive gambling whilst allowing a monopolist to aggressively advertise and offer few effective player protection measures, even if sports or a particular cultural or societal sector benefits from the revenues generated. In instances where the generation of revenue for the treasury plays a role, a "*global assessment of the circumstances*" in which the restrictive measure in question was "*adopted and implemented*" must be undertaken.[51]

This remains to be of particular relevance where a Member State seeks to uphold one of the most restrictive approaches, a monopoly. Not only are monopolies vulnerable because of the manner in which the exclusive position on the market was granted, but also because of the behaviour of the monopolist once "live". The regulatory structure within which the monopolist is confined must also be fit for purpose.

Justifying Restrictive Measures: Advertising

Stoss provides important fuel to this angle of the discourse, because with national court took the stance that the monopoly in question was not subject to a constituent and systematic policy for gambling. When considering whether restrictive measures can be justified by objective justifications in the general interest, consideration must also be given to whether the restriction is suitable for the objectives given and part of this proportionality assessment must address whether the restrictions "serve to limit betting activities in a consistent and systematic manner".[52] In other words, a Member State cannot purport to uphold a restrictive measure with a view to preventing gambling addiction whilst permitting the licence holder to engage in aggressive marketing and market expansion policies.

[49] Case 275/92, *Schindler*, para. 60, where with reference to lotteries it was noted that they "may make a significant contribution to the financing of benevolent or public interest objectives such as social works, charitable works, sport or culture".
[50] Case C-3/17, *Sporting Odds*, para. 28. See also Case C-98/14, *Burlington Hungary*, paras. 60 & 61, with references to earlier gambling related case-law.
[51] Case C-390/12, *Pfleger*, para. 52.
[52] Case C-243/01, *Gambelli*, para. 67.

Summarised by the CJEU, the national court's doubts in *Stoss* were founded upon the finding that "*the holder of the public monopoly on bets on sporting competitions encourages participation in other games of chance; because, in relation to casino games, the said Land is opening up new gaming possibilities, particularly on the internet; and because federal legislation authorises the exploitation of other games of chance by private operators*".[53]

Drawing upon the earlier cases of *Läärä* and *Liga Portuguesa* the CJEU reiterated that a Member State will have "*additional means of influencing*" a monopolist's conduct beyond "*statutory regulatory and surveillance mechanisms*" which will likely enable a better degree of control over the supply of gambling services and provide better guarantees for the implementation of the relevant policies, compared to a situation of authorisations, supervision and penalties.[54] This reiterates the notion behind the concept of direct State supervision of public entities; that the control is such that it is something more than that which would prevail in a system characterised by licences awarded to private entities, whereby operators are subject to a real threat of their licence being withdrawn and other penalties potentially being applied. Perhaps somewhat paradoxically, there is no known example to the author of a monopolist having its licence withdrawn. Does the key to this rest in the fact that controls are ineffective or hint towards the nature of the monopolist's relationship with the State's authorities entailing that matters never reach such as stage?

Furthermore, given that a monopoly is more restrictive than other regulating market access, the CJEU sets the bar high for a monopoly to be found compatible with EU law, as it "*can be justified only in order to ensure a particularly high level of consumer protection*".[55] Whilst Member States can define the objectives and design of their gambling markets, a monopoly can only be upheld where the level of protection is particularly high, suggesting that it must be higher than it would be with other another less restrictive measure.

Attention, in *Stoss*, was not only directed towards the output of the regulatory technique, the particularly high level, but also the regulatory architecture associated with securing it. The associated legislative framework must be "*suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively planned*" in light of the objective underpinning the monopoly, and that the monopolist is "*subject to strict*

[53] Case C-316/07, *Stoss*, para. 25.
[54] Case C-316/07, *Stoss*, para. 82.
[55] Case C-316/07, *Stoss*, para. 83.

control by the public authorities". Significantly this points to there being a regulatory apparatus in place which is able to suitably control the monopolist against predetermined indicators. All told this should result in the monopolist being subject to "strict control". This observation is not preconditioned by consideration of the public or private of the monopolist, and this decision pre-dates that of *Sporting Exchange*. Nevertheless it is indicative of the need for the monopolist to be subject to control which is stricter than it would be in market governed by a system of licences and supervision by state authorities. Additionally, reference to "*quantitatively measured and qualitatively planned*" points towards the need for specific regulatory objectives rather than vaguely worded objections and notions.

Not only is *Stoss* informative in terms of the regulatory control to which the monopolist is subject, but usefully the CJEU applies the notion of consistent and systematic to a monopolist's advertising practices. Whereas a suitably "*extensive range of games, advertising on a certain scale and the use of new distribution techniques*" does not prima facie undermine a restrictive measure, [56] and indeed advertising in itself will not undermine a monopoly where it is purely directs consumers towards the monopolist's offer, the outer boundaries of what is permitted may soon be reached in practice. A monopolist's advertising must "*remain measured and strictly limited to what is necessary in order to channel consumers towards authorised gaming networks*".[57] As such, the CJEU held that advertising cannot "*aim to encourage consumers' natural propensity to gamble by stimulating their participation in it*", thus whilst advertising may act as a signpost to the monopolist's offer it cannot encourage or stimulate demand. How might such demand be stimulated? Here the CJEU was quite specific in referencing approaches such as "*trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest*"; thus gambling should not be downplayed or otherwise cast in a positive light through association with those who benefit from the revenues it generates. Another approach was "*increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours*".[58] Should a Member State purport to uphold a policy of preventing incitement to squander money on gambling and combat addiction, but in fact condone or even encourage the opposite, then the regime will not be consistent and systematic, and thus the monopoly will not be a justifiable restriction of the freedom to provide services.

[56] Case C-316/07, *Stoss*, para. 101.
[57] Case C-316/07, *Stoss*, para. 103.
[58] Case C-316/07, *Stoss*, para. 104.

Returning to the generation of revenues for good causes, in Zeturf, the CJEU recognised that public operators are not immune to potential conflicts of interest whereby the generation of revenues for public interest objectives may interfere with other public interest objectives being pursued; *"[a] public or non-profit-making operator may, like any private operator, be tempted to maximise its income and develop the gambling market, thus undermining the objective of seeking to reduce gambling opportunities*".[59] This is significant, because the CJEU recognizes that operators which do not have a profit making objective (in the sense that a private entity would) can be subject to revenue maximising incentives.

Where the raison d'être of a monopoly regime, prior to the Europeanisation of national gambling discourse, was to generate revenues for particular good causes then this will prove problematic. This is likely to be especially challenging for those systems which have adhered to what was referred to earlier on as the alibi model. Yet the challenges are not necessarily limited to those regimes with such a historical approach. As detailed, the generation of revenues for good causes cannot justify a restrictive measure, even measures which are less restrictive of cross-border trade than monopolies. Monopolies will only be sustainable where they seek to uphold a particularly high level of consumer protection, which inherently entails that the monopolist cannot engage in advertising to stimulate demand in their offer, but only point a signpost towards it. Concurrently, the content of such advertising materials cannot heavily draw upon the good causes which benefit from the revenues generated by the monopolist. Furthermore, the governance structure to which the monopolist is subject must be fit for purpose and ensure that monopolist behaves within the contours of the monopoly. Neither a public monopolist, subject to direct State supervision, nor a private monopolist under direct control, should be in a position to act in a manner inconsistent with their own existence; advertising and stimulating demand can have consequences. Not only could such consequences arise in terms of tying the Member State's hands in terms of its ability to sanction those who offer gambling services without a local licence, given the regulatory regime's lack of compatibility with EU law, but, on the same grounds result in the eventual dissolution of the monopoly, or a reduction in its scope.

The regulatory regime to which the monopolist is subject should thus not enable that party to allow the generation of revenues for the relevant good or charitable causes to undermine the objectives which underpin its very existence. It can be readily imagined that this could prove

[59] Case C-212/08, *Zeturf Ltd*., para. 59. See also paras. 60 and 61 in this regard.

particularly complex where the interests of the beneficiary/ies and the regulatory body/ies are interconnected, either in terms of the legal construct within which they operate, or politically.

INCOMPATIBLE MONONPOLY REGIME: WHAT NEXT?

Should a national court conclude that a monopoly is not justifiable, and therefore in breach of EU law, this does not entail that the Member States is obliged to recognise licences awarded by other jurisdictions. Such a finding of incompatibility with EU law will have both legal as well as policy implications.

Should a restrictive measure, such as a monopoly, not be justifiable within the contours of EU law, then the competent national authorities will be unable to sanction an operator for having offered locally unlicensed services in that Member State. From a longer term perspective, in policy terms, the CJEU recognised that whilst Member States would not be obliged to liberalise their gambling market, they would also be able "*to reform the existing monopoly in order to make it compatible with EU law or replace it with a system of prior administrative authorisation based on objective, non-discriminatory criteria which are known in advance*".[60] Either the monopoly and the governance thereof should be revised so as to ensure that it is in fact fit for purpose and line with the objectives which uphold its existence, or licences should be awarded subject to non-discriminatory conditions and the requisite degree of transparency.

As observed earlier on, monopolies vary in their scope between jurisdictions. There may be several monopolies each covering different market segments or a single monopolist offering all permitted forms of gambling in a jurisdiction, whereas some markets will be hybrid in nature; some permitted forms will be subject to one or more monopolies whilst other segments will see access granted on the basis of an open licensing system. A monopolist covering a large swathe of the national market, even the entire market, would not need to be rolled back entirely, but the CJEU's case-law would permit the scope of the monopoly to shrink to fewer permitted forms with some areas being opened up to competition. Conditional upon the overall regulatory

[60] Case C-336/14, *Ince*, para. 92.

landscape being "horizontally consistent",[61] across all sub-divisions, mere "*divergence in legal regimes*" would itself not render a reduced monopoly unsuitable.[62]

CONCLUDING REMARKS

Monopolies in gambling clearly invoke questions in terms of (i) how competition *for* the market is arranged and the instances where the absence of such can be justified, and (ii) those regarding how the monopoly, which erases the scope for competition *on* the market, can be justified under EU law. The CJEU's case-law has to date kept these two discussions parallel, whilst brining considerations of how the monopolist behaves on the market, in the context of justifying the absence of competition *on* the market, would arguably provide for a more robust review of the justifications for denying competition *for* the market; to date the latter has primarily occurred on the basis of the governance structure as it exists on paper.

As demonstrated above, monopoly based supplies have the potential to be undermined by the generation of revenues for good causes and advertising; whilst recognising that such providers generate income which contributes to worthy causes constraint must be shown. The negative consequences which arise from the excessive consumption of gambling do not distinguish themselves between the destination of revenues generated. Should a Member State decide to regulate the market on the pretext that it is going to offer a particularly high level of consumer protection, then it must do just that, regardless of to whom monies flow.

All in all this entails that monopolies and governments remain under scrutiny; is the monopoly itself, and how access is granted to that position, compliant with EU law?

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[61] Case C-46/08, *Carmen Media*, para. 68, whereby a Member State cannot pursue a policy of encouraging participation in forms of gambling which are not subject to the monopoly should this undermine the objectives which underpin the existence of a monopoly for another market segment. Such an approach will not satisfy the requirement to be consistent and systematic.
[62] Case C-46/08, *Carmen Media*, para. 63.