1 Gambling – The Last Reservation for Monopolies in the European Union?

In the European Union barriers to national markets and national monopolies are gone. This concerns not only cassis and wine, but also complex an incorporeal products and services you cannot touch, but you have to trust. Financial products and services (which might pose serious financial dangers to customers) can now easily be offered in all Member States with a 'European passport' (thereby expressly confirming the country of origin principle). Consumer protection is dealt with by strict and very detailed regulation. If you look at the Financial Services Action Plan (FSAP) of the European Commission, the completion of an integrated internal market for financial products and services seems to becoming closer. Financial products are increasingly offered in cross-border situations. Even old-established monopolies, like state monopolies for postal services and telecommunication, are by-gone or bound to vanish thanks to the European Union.

Yet is it really the case that all barriers to cross-border services and all national monopolies are really gone? Unfortunately not. A turnover of several billion Euros in lotteries, sports betting and all other kinds of gambling (among them gaming machines, scratch cards and poker) – indeed a very large and steadily growing business segment – remain in the hands of such state monopolies. Most of the European lottery and sports betting market is dominated by monopolies that realise a yearly turnover of more than Euro 50 billion. Only a few Member States allow private operators to offer sports betting, the United Kingdom being

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1 The author expresses his personal opinion on the subject.
the one with the longest tradition (and with several publicly listed companies). Even fewer Member States allow private operators to offer online casinos (e.g. Malta).

The European Court of Justice (‘ECJ’) already held 1994 in its Schindler decision\(^3\) that the importation of promotional material for a lottery and tickets into one Member State with a view to the participation by residents of that Member State in a Lottery operated in another Member State relates to a service within the meaning of Article 49 of the EC Treaty. Since 1994 the ECJ has confirmed several times that gambling services are, of course, economic activities within the scope of the EC Treaty, the gambling market is at present far away from forming a real internal market. There are highly fragmented regional and national markets and regional and national monopolies for games of chance or special forms of gambling (lotteries, gaming machines, sports betting etc.). In some Member States, the state itself is offering gambling products or has mandated a state-authorised (and mostly state-owned or state-controlled) operator to do so. While upholding its monopoly, these Member States are trying to bar foreign private operators (and sometimes even state-authorised operators) from other Member States access to the market.

Under Community law, this is quite problematic. Not only the freedoms to provide services and the freedom of establishment are restricted. This behaviour is also problematic with regard to the competition rules of the EC Treaty, especially when state operators are acting ‘in concert’ or as a hard-core cartel, and with regard to the regulation of state aids and state monopolies. The German Federal Court of Justice, in its Faber decision,\(^4\) already held a few years ago that the cartelising of state operators in the Deutscher Lotto- und Toto-Block (‘DLTB’) was problematic. The German Cartel Authority (Bundeskartellamt)\(^5\) recently pointed out that the remaining private competition had to be protected. According to the Cartel Authority, the Deutscher Lotto- und Toto-Block must not dictate conditions of the distribution of lottery materials.


\(^5\) www.bundeskartellamt.de/wDeutsch/index.shtml