

How should we define 'strict control'?

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Wave upon wave of preliminary references have been sent to the Court of Justice of the European Union by national courts caught at the intersection between national gambling regulation and the principles upon which the internal market is founded.

Initially, the case-law concerned the mailing of lottery tickets in Schindler and the operation of slot machines in Läära, but with the rise of the internet and the revolution it sparked within the gambling industry, gambling has spread like wildfire through the Court's workload. Gambelli marked the beginning of this trend, and as the unwieldy convoluted case-law has developed only a few points have become certain. For example, unconditional mutual recognition no longer enjoys the future which it once appeared to have and restrictive measures must restrict gambling services in a consistent and systematic manner. Regrettably what such consistency entails remains a victim of the haze of uncertainty surrounding the case-law. The Court has been extremely accommodating of the Member States; having recognised their margin of discretion to regulate gambling it has placed very few real boundaries upon how they exercise their regulatory competence. Compared to the vast majority of the case-law concerning the free movement of

goods and the freedom to provide services the Court has been extremely restrained. There has been none of the judicial activism which has characterised its drive for negative integration of national markets in other fields and particularly the free movement of goods. Perhaps gambling is perceived as a sector within which the Court does not wish to become involved given what it considers to be moral considerations. This would not be without any precedence as the Court has taken the back seat on other issues which are socially and morally divisive. The Court frequently refers to the moral considerations which surround the regulation of gambling, yet it would be unimaginable to argue that gambling is comparable to other activities from which the Court has kept a distance, such as pornography and prostitution.

There is at least one strand of the case-law which offers private operators a fair chance of entering national markets and illustrates how the Court has not lost sight of all of its internal market jurisprudence. National authorities are competent to determine the design of their national market yet they remained constrained in the manner in which access to the market is granted. The significance of there being a licence award procedure which is compliant with European law became evident in Placanica where the Court held that operators unlawfully barred from the possibility of obtaining a licence in a tendering procedure could not be subject to sanctions upon the basis of not holding the requisite licence. The relevance attached to the licence award procedure became more evident in the infringement proceeding Commission v. Italy, then Betfair and most recently Engelmann.

However, the focus of this article is on an exception the Court developed in Betfair to the need for the grant or renewal of a licence to be opened to competition through the application of the duty of transparency. While this duty does not

require a full tender procedure along the lines of those contained within European public procurement legislation, it does require a "degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement procedures to be reviewed." It is worthwhile recalling that the restriction to the freedom to provide services through not opening the award procedure to competition "may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, 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."

Unsurprisingly the notion of 'strict control' in relation to private operators was not defined by the Court and thus it is the aim of this article to consider what this concept may entail in the context of regulating gambling operators, in light of other gambling case-law and that developed in relation to public procurement and the granting of service concessions. It should be noted that the notion of strict control in the context of Betfair is limited to setting aside the duty of transparency. However, other gambling related cases as discussed in this article call upon this notion when determining whether a monopoly is an appropriate restrictive measure for securing objectives in the general interest. For present purposes reference is only made to these cases to facilitate discussion as to how strict control as used in Betfair should be understood.

In Betfair the Court refers to two earlier gambling related decisions of the Court, namely Läära and Liga Portuguesa when considering the exercise of control by the state over an operator. Very recently this concept also arose in the Zeturf decision of June 30, 2011. Attention will be dedicated to these three decisions to ascertain what the Court may have had in mind when referring to the notion of 'strict control' in

Betfair. Furthermore this will subsequently be aligned with other case-law in which the need to put the award of a licence out to competition could be negated, such as Teckal, Stadt Halle and Parking Brixen.

Control has been used as a means to justify the restriction of the provision of gambling services to an exclusive operator as a means to confine the operation of gambling to controlled channels and form an appropriate measure for the purpose of achieving an objective justification.

Objective justifications relied upon to uphold non-discriminatory measures restricting the cross-border movement of services have been defined in a broad manner. Under Finnish legislation in *Läärä* they were found to include confining the desire to gamble and the exploitation of gambling and preventing the risk of crime and fraud in the context of such exploitation. Subsequently the objective of the Portuguese legislation was found to be protecting consumers against fraud on the part of operators in *Liga Portuguesa*, while those of French legislation in *Zeturf* were more broadly described as "combating the criminal and fraudulent activities linked to gambling, as well as that of protecting society, having regard to the effects of gambling on individuals and on society."

In this context control by national authorities over an operator was considered by the Court for the first time in *Läärä*. Given the chronological development of the case-law the notion of control in *Läärä* was not thought of in terms of strict control over a private operator or direct control over a public operator. Nevertheless, the control exercised by Finland over the exclusive right holder in question, albeit a public-law body, was examined. This case arose out of criminal proceedings against Mr *Läärä* who operated slot machines in contravention of the monopoly granted to the Association for the Management of Slot Machines (RAY). RAY operated slot machines, other gaming machines and 'other' casino activities in return for remuneration, as a means to collect funds for a number of public interest initiatives. While the Court concludes that the activities of the public-law association are carried out "under the control of the state" this is all that the 1999 decision details, thus reference has to be made to the Opinion of the Advocate General to garner greater insight. The Opinion of Advocate General La Pergola notes how there are 14 members on the board of directors. Seven of these,

including the chairman and first-vice chairman are elected by the Council of State while each of the following ministers has one representative within the board; the Minister of Social Affairs and Health, the Minister of Internal Affairs and the Minister of Finance. In contrast to subsequent decisions discussed below the working practices and thus actual influence of the ministerial members is not alluded to, presumably due to the public law status of RAY. Similarly reference is also made to RAY holding the single casino licence which is noted as laying down "adequate supervisory measures" without entering into any detail. Furthermore, the Ministry of Internal Affairs is responsible for ensuring compliance with the general contractual conditions which apply to the relationship between RAY and the outlets in which the machines are located, as well as setting the maximum stakes. The impact of this upon the actual governance of RAY is unclear, however. Ultimately, the exclusive right granted to RAY, and the degree of control over the operator, was found suitable for the objectives of the Finnish legislation.

Liga Portuguesa saw the Court determine that the control that the Portuguese state exercised over the monopoly operator of lotteries, lotto games and sports betting including the provision of such services via the internet was sufficiently strict so as to render the provision of such services by the single operator an appropriate means to achieve the objectives of the national legislation. The monopolist, namely the Santa Casa da Misericórdia de Lisboa, is characterised as a private legal entity undertaking 'non-profit-making objects of general interest'. In this regard the Court specifically detailed the national legal framework which governs the monopolist and specifically the Gaming Department thereof. This framework includes considerable ministerial involvement in the operation of the Gaming Department. The chairman of the Department and two deputy directors are appointed by the Minister for Employment and Solidarity and the Minister for Health. Moreover, ministerial appointments secure governmental control over members of the committees in charge of games, draws and complaints. Furthermore, the Court appeared to attach considerable significance to the fact that the operator had been granted the "powers of an administrative authority" which enabled it to prosecute those persons

alleged to illegally offer games in breach of Santa Casa's exclusive rights. From the facts of the case, although not directly referred to by the Court, it is evident that each game of chance is "covered by government regulation", including the size of the stakes, the frequency of the draws and the means by which prizes are paid.

Zeturf offers the most recent instalment in the definition of 'strict control'. The judgment was delivered following the reform of the French gambling market, namely the creation of a regulated online market which saw the demise of the online monopoly for horserace betting held by the *Pari Mutuel Urbain*. Nevertheless, legislative developments have not rendered the reasoning of the Court irrelevant. As an 'economic interest group' the 10 member board of directors of the PMU contains a chief executive officer and a deputy thereto, both of whom must be approved by the Minister for Agriculture and the Minister for the Budget. Moreover both Ministers can appoint two members to the board; thus four board members in total are directly appointed by the government. Each board member has a single vote while two of the government appointed officials attend meetings without any voting rights. The activities of the PMU, which include the organisation of the horseraces as well as the bets which are placed upon those races, are subject to inspection and supervision by the Ministry for Agriculture, the Ministry for the Interior and the Treasury. According to the facts provided the PMU did not enjoy a free hand at launching new products, for the regulation of totalisator betting was controlled by the Ministries of Agriculture and Budget, in light of an opinion of the Ministry for the Interior. On the basis of these facts, the Court considers that there appears to be "particularly strict state control over the organisation of betting on horseracing" and that thus "the state exercises direct control over the functioning of the exclusive operator, the organisation of the events on which bets are placed, the types of bet authorised and their channels of distribution, including the proportion of winnings to the states and the conduct and supervision of the regulated activities."

In short, *Liga Portuguesa* and *Zeturf* strongly suggests that in order for sufficiently strict control to be exercised over private operators there must be significant ministerial presence within the managerial board of the monopolist. Such presence can be qualified in both terms of

quantity given the presence of multiple government appointees, and also in relation to the closeness of those appointees to the day to day management of the operator. Strict control thus appears to require, and especially in light of *Zeturf*, that the state has the ability to control the day-to-day decision making of the operator. This suggests that a hands-on approach is required whereby strict control equates to constant oversight and control.

Back to the Netherlands

Although in the *Betfair* proceedings the Dutch Council of State did not have the benefit of the *Zeturf* decision when drawing its conclusions in light of the response of the Court, it nevertheless found that the incumbent operator, *De Lotto*, was not subject to strict control and therefore the renewal of its licence without any respect for the duty of transparency was held to be incompatible with EU law. Naturally though the Council of State had recourse to the Opinion of Advocate General Bot, who strongly suggested that the national authorities should only be allowed not to put the award of the licence out to tender where "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 activity with those authorities." Advocate General Bot repeated this understanding of this exception when he equated such control with 'in-house' status in *Dickinger and Omer*. Such an understanding aligns the notion of 'strict control' with the high degree of control which an authority must have over an entity to benefit from the 'in-house' exception in the line of case-law leading to the *Stadt Halle* decision, as discussed below.

At this juncture it is worthwhile recalling the nature of control over the operator in question. The *Stichting de Nationale Sporttotalisator*, which operates under the name '*De Lotto*', is a non-profit-making foundation governed by private law. The preliminary reference by the Council of State also concerned the licence awarded the monopolist charged with operating the totalisator for horserace betting, at the time in question, *Scientific Games Racing BV*, described as a subsidiary of a US corporation. Ultimately, however, the Court only responded in its preliminary reference with regards to the sports-betting operator *De Lotto*. The Court recalls that *De Lotto* is

"managed by a five-member commission whose chairman is appointed by the Minister". Other members of this commission belong to organisations representing the beneficiaries of the revenues generated by *De Lotto*. Also "the collection of funds" by organising games of chance was noted by the Court as being the object of the operator. Since the Luxembourg Court did not offer any view on the nature of the control over *De Lotto* it is worthy to note that in its March 2011 judgment the Council of State held that one commission member out of five was insufficient to guarantee strict control, particularly in light of the fact that decisions were taken on the basis of a majority and thus the ministerial appointee could readily be overruled.

In-house and off the market

In developing the 'in-house' exception within the public procurement and services concession case-law the Court established a very high degree of control as being necessary so as to permit the relevant authorities to derogate from the need to open the award procedure for a contract or licence to competition. Flowing from *Telaustria*, in which the Court held that contracting authorities were bound to ensure a sufficient degree of advertising existed to permit competition for a concession, even where European public procurement legislation did not apply, case-law has sought to delimit the grounds upon which contracting authorities can avoid any degree of transparency. Subsequently the Court held in *Parking Brixen* that to not permit any competition for the award of a services concession "does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency". In assessing the failure of the authority in question to open the award of a concession because the operator and the authority where one and the same entity, the Court recalled the earlier decision of *Teckal* in which the in-house defence had been tried within the context of the procurement directives. *Teckal* established that directives were not applicable where the 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". Subsequently in *Stadt Halle* the Court determined that the control that an authority has over its contracting party must not be tainted by any capital, no matter how small, held by private undertakings. This was considered as excluding "the possibility of that authority exercising over that company a control similar to that which it exercises over its own departments".

Concluding thoughts

To date the Court has not precisely aligned these two strands of case-law for it has not considered the ownership of gambling operators in a manner reminiscent of its approach to the presence of private capital in *Stadt Halle*. Nevertheless, this should not come as a surprise because to do otherwise would dissolve the distinction between such private operators and "public operator[s] whose management is subject to direct state supervision." Moreover the Court does not appear to be attempting to create a new degree of control with a lower threshold which would provide Member States with the opportunity not to award or renew licences for gambling services without any competition. Control over the operator must be strict but it does not appear that it is a less onerous hurdle to pass than within the public procurement and concessions case-law. Indeed, it may be a higher threshold to jump because an individual authority will be unable to point to the lack of private capital within an entity to hold that a competitive licence award procedure is not required. Private operators clearly do not consist of solely public shareholdings and thus attention can only be focused upon the actual control exercised over the operator. Attention will then have to be focused upon the control exercised over the operator. Furthermore, given that the Dutch Council of State did not consider the incumbent operator to be sufficiently strictly controlled so as to maintain the licensing system in the Netherlands, there is certainly room to hope that this criterion has no future as a smokescreen.

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