

JUDGMENT OF THE
SUPREME ADMINISTRATIVE COURT

Case No.

5819-01

issued at Stockholm on 26 October 2004

APPELLANT

Wermö Krog AB (previously Värmdö Kinesiska Restaurang AB), 556464-9811

Attorney

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DEFENDANT

The National Gaming Board, Box 713, 645 59 Strängnäs

APPEAL AGAINST A DECISION BY

Stockholm Administrative Court of Appeal of 12 September 2001
in Case No. 810-2000 (Appendix)

MATTER

Order subject to penalty of a fine.

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CLAIMS ETC.

Wermdö Krog AB petitions that the National Gaming Board's [*Lotteriinspektionen*] decision, in which the company is ordered on pain of a penalty of SEK 100 000 immediately and not later than 24 November 1998 completely to cease acting as an intermediary for betting with SPP Overseas Betting Limited, should be revoked. In support of its action the company relies on what it has stated at lower levels and would also state the following. The objectives that the Swedish legislation is based on do not as such breach EC law. However, the implementation does not in practice contribute to achieving the aforesaid objectives. The government is conducting a policy that involves an increase in gaming and betting with a view to producing revenue for the government, at the same time as AB Svenska Spel and AB Trav och Galopp are being protected. The decision of the European Court of Justice of 6 November 2003 in Case C-243/01, *Gambelli*, establishes for instance that restrictions based on public interest considerations must be designed to secure¹ the realization of the desired objectives in such a way that the restrictions contribute to restricting betting activities in a consistent² and systematic manner. The Court further says that if the public authorities of a Member incite and encourage consumers to participate in lotteries, games of chance or betting to the financial benefit of the public purse, they cannot justify the measure that the court has to consider in the national case by arguing that general public order considerations necessitate restrictions on gaming opportunities.

The company has in the action submitted for instance several articles and reports and several video recordings.

The National Gaming Board defends the appeal and principally states the same arguments as those relied upon in the Administrative Court of Appeal and adds for instance the following. The judgment in the *Gambelli* case has not changed the European Court of Justice's practice in this area, the judgment must rather be seen against the background of the fact that the Italian legislation was adopted in order to protect certain private gaming organizers while others were forbidden to continue existing operations, and also of the fact that Italy was conducting a policy that involved a marked expansion of gaming with a view to increasing state revenue. The objectives of the Lotteries Act [*lotterilagen*] (1994:1000) are upheld in the practical implementation. The regulations, that are both necessary, proportionate and non-discriminatory, are thus compatible with EU law. That for instance AB Svenska Spel and AB Trav och Galopp market their games cannot be considered to breach EC law.

¹ Sw. "ägnade att säkerställa" has been interpreted as "designed to secure", but it may mean "appropriate for securing"

² Sw. "sammanhängande" is not an exact equivalent of "consistent", but "consistent and systematic" is the expression used in the relevant judgments. "Sammanhängande" is closer to "coherent" in meaning. I am in some difficulty here, since the Swedish words are used in quotation marks (quoting a judgment) on one occasion in the source text.

GROUNDINGS OF THE SUPREME ADMINISTRATIVE COURT'S DECISION

In principle, the Lotteries Act governs all forms of lotteries and provides, as a main rule, that these may only be arranged by permit. The principal objectives of the Swedish lotteries legislation are to protect the private individual and society and to direct the profits to the State and to purposes that are in the public interest.

Section 38 of the Lotteries Act [38 § *lotterilagen*] provides that it is not permitted in commercial operations or otherwise for the purpose of profit to promote participation in unlawful lotteries arranged within the country or in lotteries arranged outside the country. Section 52 of the same Act provides that a supervisory authority may issue orders and prohibitions required for compliance with the Act and that any directions and conditions issued pursuant to the Act shall be complied with and that breach of such order or prohibition may be made subject to a fine.

The main issue in the case is whether the prohibition on promotion of lotteries arranged abroad, which is relied upon as the ground for the order subject to a fine, breaches EU law and the order should consequently be set aside. It is obvious that the mentioned prohibition – like the Swedish lotteries legislation as a whole – cannot easily be reconciled with the provisions of the EU Treaty concerning the freedom to provide services within the Community (Article 49) and the right of establishment within the territory of another Member State (Article 43), and the material problem is therefore to determine whether the restrictions on these freedoms can nevertheless be accepted for special reasons.

Already the Treaty opens up certain possibilities to deviate from the basic provisions (Articles 45, 46 and 66), but more far-reaching exceptions on the basis of overriding public interest considerations emerge in the European Court of Justice precedents. The Court has laid down certain criteria for when national lotteries regulations should be held acceptable notwithstanding their being in breach of the aforementioned basic freedoms, and what is said in that series of judgments is of particular importance to this case; Cases C-275/92 Schindler, REG 1994 p. I-1039, C-124/97, Läärä, REG 1999 p. I-6067, C-67/98, Zenatti, REG 1999 p. I-7289 and C-243/01, Gambelli (not yet published in the law reports).

The regulations that are applicable here are thus to be found in legal precedents. Some more general conclusions, that are of fundamental importance to this case, may initially be drawn from the mentioned judgments of the European Court of Justice.

One such is that there is scarcely any room for requesting an advance decision against the background of existing precedents. The European Court of Justice has made it fairly clear that no further definitions are needed at Community level in a case like this, but the national court is charged with deciding whether the national lotteries system is acceptable by applying the stated criteria. Of course, this does will prevent the European Court of Justice from examining a Member State's gaming regulations in detail, but then in an action for breach of the Treaty.

Another fundamental fact is the European Court of Justice's clear stress on the "very special nature" of gaming operations, which justifies the introduction of restrictions that would not have been accepted in respect of other types of economic activity (see Schindler, item 59). According to the Court, one cannot disregard the moral, religious or cultural misgivings that exist in Member States concerning lotteries as well as other types of gambling for money. Member States tend generally to restrict and even ban gambling for money and to prevent gaming becoming a source of income for private entities. The Court also points out that lotteries – against the background of the considerable amounts collected and the winnings gamblers can receive – involve a great risk of crime and fraud. Lotteries also constitute an incitement to spend that may have a harmful effect on both private individuals and society. Furthermore it is, according to the Court, not without importance that lotteries can in a crucial way contribute to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture. (See Schindler, item 60, Läära item 13 and Zenatti item 14).

According to the European Court of Justice, these special circumstances justify that national authorities are given adequate scope for discretionary assessment when it comes to determining what is required to protect gamblers and – more generally, taking into account each Member State's distinctive social and cultural nature – to maintain order in society, both as regards the way in which lotteries are arranged, the size of stakes and the use of the income generated. It is in these circumstances for them to determine whether there is cause wholly or partly to prohibit activities of this type or only to restrict them, and to prescribe more or less strict supervisory measures for that purpose. (See Schindler item 61, Läära items 14 and 35, and Gambelli item 64).

Provided the national legislation is supported by such legitimate objectives as are set forth in the aforesaid – which shall be considered collectively (Schneider item 58, Läära item 33, Zenatti item 31) – Member States have exceptional freedom to choose the means of achieving the objectives. The European Court of Justice accepts in principle even such drastic methods as a total prohibition on this type of economic activity and the creation of monopolies. That a Member State chooses to permit lottery operations as such but to subject these to a requirement for a permit, which can be reserved for a single operator or a limited number of operators on the market, is not an indication that the purpose is anything other than to achieve the objectives that the Court has deemed to be acceptable; if certain organizations are given special or exclusive rights, this has the advantage that the profits can be used for public interest purposes, that the desire to gamble and gaming activities are channelled to a limited circle and that the risk of the activities being used for fraud and other crime is reduced (see Läära item 37 and Zenatti item 35).

Member States' opportunities to deviate from the Treaty provisions in the gaming area are however not unlimited. In addition to what is evident from the aforesaid – and the fundamental requirement that national legislation must not be discriminatory or implemented in a discriminatory manner – it can be said that the restrictions formulated by the European Court of Justice focus on the question of whether the measures taken by the Member State that are purportedly aimed at providing for overriding public interest considerations are in fact designed to secure³ the realization of this objective and whether they are necessary and proportionate.

The question of the real purpose is crucial. More concretely, the problem is whether the Member States' restrictive policies in the area really have as their principal objective to protect the mentioned accepted private and public interests and are not primarily aimed at channelling the profit from the activities to the State. According to the European Court of Justice, one cannot ignore the fact that lotteries and other gambling for money can in a crucial way contribute to the financing of benevolent and public interest activities, but that such grounds cannot on their own justify a restriction of the freedoms provided in the Treaty but must only constitute an incidental beneficial consequence (Schindler item 60, Zenatti item 36, Gambelli item 62). Naturally Member States readily⁴ justify their legislation by the need to protect consumers and maintain order in society, and the national court must therefore verify that the regulations in fact serve these purposes in their actual implementation (Zenatti item 37). The rules must be designed to reduce⁵ the opportunities for gaming and contribute to

³ See note 1 above.

⁴ Sw. "gärna". May also mean "frequently".

⁵ Sw. "ägnade att minska" has been interpreted as "designed to reduce", but it may mean "appropriate for reducing".

restricting operations in a consistent and systematic manner, and the public authorities of a Member State must not encourage increased gambling for the purpose of benefiting the public purse (see Zenatti item 36 and Gambelli items 67-69).

The proportionality criterion appears to play a less prominent rôle in the light of the European Court of Justice's aforementioned statements concerning Member States' discretion to choose the level and method of the protection they wish to accord interests considered legitimate by the Court. The fact that a Member State has chosen a different level of protection to another Member State does not affect the assessment of whether the regulations adopted in the area are necessary and proportionate. The regulations shall solely be judged with regard to the desired objectives and the level of protection that they are intended to secure (Läärä item 36, Zenatti item 14). If there are alternative solutions available, it falls within the scope of the Members States' discretion to make a choice, however with the proviso that the alternative chosen must not "appear" or "seem"⁶ to be disproportionate with regard to the desired objective (Läärä item 39, Gambelli item 75).

The Supreme Administrative Court makes the following assessment as regards the compatibility of the Swedish system and in particular the so-called "prohibition on promotion" with the stated the Community law.

First, as regards the fundamental prohibition on discrimination on the grounds of nationality, it can be noted that Section 38 of the Lotteries Act – even if the provision has been given an unfortunate wording – does not contain any such negative discrimination but the prohibition applies to all, Swedish as well as foreign, lotteries that have not been granted a permit (See Parliamentary Bill 1998:99:29 p. 11 et seq.). It is also clear that the stated main objectives of the Swedish lotteries legislation are entirely in line with what the European Court of Justice has stated to be acceptable grounds for making exceptions to the freedom to provide services and the right of establishment. Nor is it in breach of EC law to apply a system with a general requirement for permits and in reality to reserve the market for a few operators. It would appear obvious that for such a system to work it must be possible to combine it with a ban on the promotion of prohibited lottery activities, in the way that this has been done. Nor can the legislator, assuming that the objective of the Swedish system really is what has been stated, be considered compelled to choose a less restrictive model for reasons of proportionality. On the same assumption, the absolute permit requirement with the linked supervision mechanisms can of course also be said to contribute to restricting gaming activities in a "consistent and systematic manner".

⁶ Sw. " 'förefalla' eller 'framstå som' ". I am not sure what the difference is between these two expressions.

The main argument advanced in the case for the Swedish system being in breach of Community law – as a consequence of which it would be impossible to apply the relevant provisions of the Lotteries Act – is however that the real objective is not the purported one but substantially to produce revenue for the State. The analysis relied upon by the appellant aims to show that the public authorities responsible for implementation do not at all have the ambition to reduce gaming activities, on the contrary they wish to promote these but keep foreign competitors of the authorized gaming companies out of the market. In the former respect, the appellant particularly refers to the gaming companies' extensive marketing and the continuous introduction of new, attractive forms of gaming and the fact that gaming is continuously on the increase; in the latter, one wants to show that the supervision focuses more on obstructing⁷ the gaming companies' foreign competitors than on counteracting the negative consequences of gaming activities for private individuals and the State. The appellant also questions the Government's motives in connexion with the granting of permits.

The Supreme Administrative Court can note that marketing in the gaming sector is both intense and quantitatively important in many places and in many media, not least television. It might be said that the State authorized gaming companies, using the expression employed in the Gambelli judgment (item 69), "incite and encourage consumers to participate in lotteries, games of chance and betting", without therefore being affected by the intervention of the supervisory authority. This, however, does not suffice to disqualify the Swedish system under Community law. That would further require, according to the mentioned judgment, that the measures are taken "to the financial benefit of the public purse".

Even if it would be naïve to assume that the considerable financial contribution generated by lottery activities plays an entirely subordinate rôle in the attitude of the public authorities, the Supreme Administrative Court however feels that one cannot assume that the revenue aspect is the only or entirely dominant purpose of a tolerant attitude to the gaming companies' advertising measures. One can in this context not ignore the fact that the gaming companies accepted by the State, although they are in a monopoly position within the country, *de facto* operate in a market subject to competition, since those who live here are not prevented from participating in lotteries organized abroad, through the Internet or otherwise. If one wishes to channel the interest in gaming that evidently exists in large sections of the population to enterprises that are considered to offer better consumer protection and less risk of irregularities, one cannot reasonably refuse companies that provide such activities under permits to launch their products actively and to

⁷ Sw. "bekämpa". Literally "fighting, combating", possibly "resisting".

give these a design that attracts those that are interested in gaming and persuades them to prefer the State supervised forms to other varieties. Even if the fact that the authorities overlook the gaming companies' sometimes aggressive marketing can raise doubts about the real purpose, the Supreme Administrative Court does not find that this circumstance constitutes adequate grounds for the claim that the principal objective of the Swedish lotteries regulation is to enrich the State and state-subsidized operations.

As regards the question of whether the State's supervision of gaming activities is designed to secure⁸ the realization of the objective of protecting the private individual and society against the negative consequences of such activities, the appellant has in the Supreme Administrative Court's opinion shown certain deficiencies in the supervision. The State authorized and supervised gaming companies appear mainly to work on a commercial basis, and their agents – that have most of the direct contact with gamblers and therefore have the best opportunity to observe and counteract harmful consequences of a financial, social or personal nature – appear not to be subject to any direct supervision by the National Gaming Board. That supervision is in some respects less efficient does not, however, mean that it lacks importance to the possibility of attaining the established objectives. The Supreme Administrative Court is not of the opinion that these shortcomings as such show that the Swedish regulations and their implementation have a different objective to that stated.

Nor does the Supreme Administrative Court find that the government has shown bias in the granting of permits by taking into account public finance reasons and disregarding the protection aspects that constitute the basis for the lotteries legislation.

To sum up, the Supreme Administrative Court wishes to state the following. The European Court of Justice has precisely in the gaming area shown considerable tolerance towards the considerable restrictions of the treaty-based freedom to offer and receive services and right of establishment within the Union that are common in the Member States. The Supreme Administrative Court finds that the lotteries legislation and its implementation do in some respects raise the question of compatibility with the conditions laid down by the European Court of Justice in this context, but that the Swedish system must still as a whole be considered to comply with the requirements.

The Supreme Administrative Court wishes to add the following. The European Court of Justice has left it to the national courts on each relevant occasion to try whether the practical implementation of the Member States' regulations harmonizes with Community law, and therefore the outcome may vary over time. The stability in this area is dependent on the Member State wishing to retain a restrictive system, continuously reviewing it in order to ensure

⁸ See note 1 above.

that it complies with the requirements of Community law. The Supreme Administrative Court notes that the Government on 19 May of this year adopted directives (2004:76) for a special investigator that will be charged with, e.g., preparing any proposals that may be required to adapt the regulations in the area to developments in EC law, in particular against the background of the more recent precedents of the European Court of Justice.

It follows from the aforesaid that there is no reason on Community law grounds to refuse implementation of the provisions of the Lotteries Act that are relevant in this case. The Supreme Administrative Court makes the same assessment in this appeal as the lower courts. The appeal shall therefore be rejected.

DECISION BY THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

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Hans Ragnemalm

[*signature*]
Kjerstin Nordborg

[*signature*]
Stefan Ersson

[*signature*]
Nils Dexe

[*signature*]
Carina Stävberg

[*signature*]
Charlotta Lokrantz
Referee of the Supreme
Administrative Court.

Div. I

Presented 2 September 2004.

JUDGMENT OF THE
SUPREME ADMINISTRATIVE COURT

Case No.

7119-01

issued at Stockholm on 26 October 2004

APPELLANT

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DEFENDANT

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APPEAL AGAINST A DECISION BY

Stockholm Administrative Court of Appeal of 25 October 2001
in Case No. 698-2001 (Appendix)

MATTER

Order pursuant to the Lotteries Act.

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CLAIM ETC.

Anders Bergsten petitions that the National Gaming Board's decision of 8 December 2000, in which he was ordered not later than 15 December 2000 to terminate the link to SSP International Limited that he maintained on his web site (www.travrevyn.com), shall be set aside. In support of his action, he argues for instance that the prohibition in Section 38 of the Lotteries Act [38 § *lotterilagen*] (1994:1000) against promoting participation in lotteries arranged outside the country in commercial operations or otherwise for the purpose of profit does not cover the act in issue in the case, i.e. having a general advertisement on a web site for a company conducting business that includes lottery operations. He also argues that the prohibition is in breach of EU law.

The National Gaming Board defends the appeal and argues, for instance, that the so-called banner in issue did not contain any general information about the company but an invitation to place bets on horses, a picture of a trotting race, the address of SPP's Internet gaming business and a link to that business; the obvious purpose of the banner was to entice new lottery participants to SSP's betting⁹. The Board rejects the appellant's Community law arguments.

GROUNDINGS OF THE SUPREME ADMINISTRATIVE COURT'S DECISION

The Supreme Administrative Court has in a judgment of today (Case No. 5819-01) found that the prohibition in Section 38 of the Lotteries Act [38 § *lotterilagen*] against promoting participation in lotteries arranged outside the country in commercial operations or otherwise for the purpose of profit cannot be considered to be in breach of EC law as expressed in the findings of the European Court of Justice. What has emerged in this case does not change this assessment.

The Supreme Administrative Court makes the same assessment as the Administrative Court of Appeal as regards the question of whether Anders Bergsten for the purpose of profit promoted participation in a lottery arranged outside the country by providing space on his web site for a so-called banner with a link to a foreign betting company. The appeal shall therefore be rejected.

⁹ Sic. SPP's business appears to be betting on horses, but "lotterideltagare" or "lottery participants" is used here in the source text.

DECISION BY THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

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Hans Ragnemalm

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Referee of the Supreme
Administrative Court.

Div. I

Presented 2 September 2004.