

**THE LIGA PORTUGUESA DECISION OF THE EUROPEAN COURT  
OF JUSTICE – AN ECONOMIST’S VIEW**

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SUMMARY: Introduction – 1. Gambling markets in the EU - An overview – 2. The *Liga Portuguesa* decision – 3. Some considerations from an economist’s point of view

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*Introduction*

Why are gambling markets treated so differently to other markets? This apparently trivial question is far from having a generally accepted scientific rationale and continuously gives reason for controversial academic and political debates. In most European countries gambling markets, including markets for sports betting, are subject to a very strict regulation up to the degree of being entirely controlled by the government. For example, this is the case in Germany, where the state monopoly has recently been reinforced by a new law (*Glücksspielstaatsvertrag*), which was put into force in 2008. But also in other major European countries the state monopolies still hold despite of the European competition law and despite of the changing technical environment, especially the rising importance of the internet, which makes it more and more difficult to protect the monopoly.

In the past ten years, the European Court of Justice (ECJ) has heavily influenced the national regulatory settings on gambling markets across Europe with several landmark rulings.<sup>1</sup> The overall view expressed in those judgements

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<sup>1</sup> The most important decisions of the European Court of Justice dealing with the gambling market include Läärä (1999), Zenatti (1999), Gambelli (2003) and Placanica (2007). See for an overview H. JANSSEN, L. REBGGIANI, *Das staatliche Sportwettenmonopol in Deutschland – Fessel*

can be roughly summarized by the following points: 1. The restrictions imposed by the national legislations were found to be in contrast with the idea of a free common market in the EU. 2. Such restrictions could nevertheless be motivated by the aim of enforcing matters of general public interest like protection from gambling addiction or fraud. 3. However, the restrictions would have to be appropriate to pursue these aims (which is still a matter of debate) and should be imposed to all market participants in a non-discriminatory manner.<sup>2</sup> Although the court didn't declare state monopolies as incompatible with European competition law, it forced national legislations at least to be coherent and non-discriminatory. This gave, for example, the impetus for a complete realignment of the Italian gambling market.<sup>3</sup> A coherent European legislation regulating the gambling sector is, however, still missing and this is regarded as the main cause for the perceived ongoing legal uncertainty throughout Europe.

This paper analyses the last judgement of the court in the case C-42/07 published on the 8<sup>th</sup> of September 2009, which we will call *Liga Portuguesa* decision. The verdict was expected (like many others in the past) to give a clear direction for dozens of pending cases in the EU member states. As far as we can observe, this hope was clearly dashed. Especially the expected clarification of the 'proportionality' criteria for justifying a state-monopoly suggested in the *Gambelli* and *Placanica* rulings did not occur. In this paper, we will not deal with legal questions primarily, but will rather follow an economic approach by trying to give a statement on the economic rationality of the *Liga Portuguesa* decision. With the object in question being an issue of market regulation, an economic assessment is in our opinion as necessary as a legal evaluation and may give valuable insights for further policy recommendations.

### 1. *Gambling markets in the EU - An overview*

Gambling markets throughout the world are subject to very different regulation regimes. In Europe and the U.S. one finds traditionally highly regulated markets, both for lotteries and sports betting. The rigid regulation is reflected on the one hand in high tax rates, which are commonly even higher than for other 'sin goods' like alcohol or tobacco,<sup>4</sup> and on the other in barriers to market entry for private

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*oder Schutzschild?*, in *List Forum für Wirtschaftspolitik*, n. 3, 2008, 175-197. A. KABURAKIS, *ECJ Jurisprudence and Recent Developments in EU Sport Betting*, in S. GARDINER ET AL. (eds.) *EU, Sport, Law and Policy*, The Hague, T.M.C. ASSER International Sports Law Centre Press, 2009, 555-580, provides an assessment from a legal perspective.

<sup>2</sup> This imposes strict rules also to state-monopolies. For instance, preventing players from addiction must be a prominent objective even for state owned or controlled gambling agencies.

<sup>3</sup> There were of course additional reasons for these rapid changes in Italy, for instance the prospect of growing fiscal revenues. A discussion of some recent developments is provided by F. TARICONE, *Le concessioni per le agenzie ippiche – La storia infinita volge al termine*, in *Riv. Dir. Ec. Sport* vol. 5, n. 2, 2009, 84.

<sup>4</sup> S. SMITH, *Lotteries as a Source of Revenue*, in M. VIREN (ed.): *Gaming in the New Market Environment*, Palgrave Macmillan, Basingstoke, 2008, 105-109.

suppliers. In most extreme cases, the entire market is served by state-owned or state-controlled firms. In some Anglo-Saxon countries as well as in many South-Asian nations there are much more liberal market settings in place. For small countries like Cyprus, Malta or Macau, offering a liberal gambling legislation has turned out to be an important source of revenues.

The strict regulation and the high taxes result in a smaller dimension of the European gambling market. As Table 1 displays, there are enormous differences between the size of rather deregulated markets like the Australian one and the situation in Europe.

TABLE 1: SIZE OF GAMBLING MARKETS AROUND THE WORLD<sup>5</sup>

<b>Ratio of Gross Gaming Revenues to GDP 2003</b>	
EU	0,52%
USA	0,65%
Canada	1,11%
New Zealand	1,45%
Australia	1,93%

Analyzing in more detail the European national gambling markets in terms of market size and of public revenues is not an easy exercise. As shown in our companion paper for Germany,<sup>6</sup> even for single countries it is rather difficult disentangling the often complicated ownership structures of public companies as well as tracking and quantifying the numerous small gambling taxes and other duties. These complexities rise substantially when trying to compare the 27 different legislations and national accounting systems across Europe.<sup>7</sup> This is probably the main reason why empirical comparative studies are rather scarce and most academic papers have to rely on data provided by the few existing accurate policy reports like those prepared by the Swiss Institute of Comparative Law<sup>8</sup> or by London Economics.<sup>9</sup>

<sup>5</sup> Data: W. R. EADINGTON, *Gambling Policy in the European Union: Monopolies, Market Access, Economic Rents, and Competitive Pressures among Gaming Sectors in the Member States*, in T. CORYN ET AL. (eds.), *Economic Aspects of Gambling Regulation: EU and US Perspectives*, Nijhoff Publ., Leiden/Boston, 2008, 79.

<sup>6</sup> L. REBEGGIANI, *Die Regulierung des deutschen Sportwettenmarktes – Reformvorschläge im Jahr Zwei des neuen GlüStV*, Discussion Paper, Leibniz Universität Hannover, 2009.

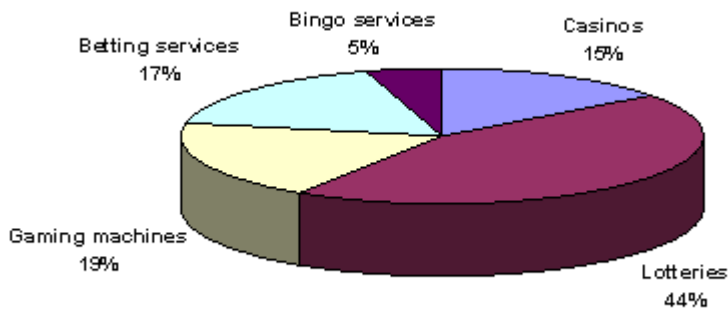
<sup>7</sup> This point has been stressed e.g. by M. VIREN, *Introduction*, in M. VIREN (ed.): *Gaming in the New Market Environment*, Palgrave Macmillan, Basingstoke, 2008, 22.

<sup>8</sup> SWISS INSTITUTE OF COMPARATIVE LAW, *Study of Gambling Services in the Internal Market of the European Union*, Swiss Institute of Comparative Law, Lausanne, 2006.

<sup>9</sup> LONDON ECONOMICS, *The Case for State Lotteries*, Report for the State Lottery and Toto Association, London Economics, London, 2006. Besides, there exist some commercial market reports from companies like LAFLEUR or MECN.

In Figure 1 we provide some data about gross gaming revenues (GGR) to give an idea of the composition of the European gambling market: While in the U.S. the main role is played by casinos, the European market is clearly dominated by lotteries which generate by far the largest part of the revenues. Gaming machines outside casinos account for almost one fifth of the revenues, while bets (horse racing and other sport betting) rank only third. This value is however misleading for being heavily influenced by liberalized markets like the U.K. In countries with high regulation regimes like Germany, legal sport betting accounted in 2003 only for 1.5% of total GGR,<sup>10</sup> in Portugal just for 0.7%. This fact is often brought up by proponents of a different treatment of the sports betting market compared to other types of gaming.<sup>11</sup> The strict regulation for gambling products appears in their view as particularly exaggerated when applied to wagering which is regarded to be more of a leisure activity linked to real sporting events than a pure game of chance. Nevertheless, the low share in total GGR and in public revenues does not seem to lower political resistance in many European countries against these plans from supporters of high state regulation, probably worried about the signalling effect of such a first breach in the actual monopoly regime. Indeed, despite the low market share a remarkable number of proceedings deal with the wagering sector. The *Liga Portuguesa*-case is a good example for this.

FIGURE 1: GROSS GAMING REVENUES BY SECTOR IN THE EUROPEAN UNION 2003<sup>12</sup>



<sup>10</sup> After a period of timid deregulation following the Gambelli-ruling, in 2005 the share of betting services reached in Germany round 4%. However, there was a quick decline after the 2006 decision of the Federal Constitutional Court and the subsequent tightening of the state-monopoly.

<sup>11</sup> See, amongst others, N. ALBERS, *Struktur und ökonomische Beurteilung des Sportwettenmarktes in Deutschland*, in I. GEBHARDT/S.M. GRÜSSER-SINOPOLI (eds.), *Glückspiel in Deutschland*, De Gruyter Recht, Berlin, 2008, 56-92.

<sup>12</sup> Data: W.R. EADINGTON, *Gambling Policy in the European Union*, cit., 76.

In terms of taxation, revenues from gambling account for less than 1% of total tax receipts of European countries. Despite exceptionally high tax rates (up to 100% on casino gross gaming revenues in some countries), the amount raised is considerably lower than that collected with other 'sin taxes' like alcohol or tobacco duties.<sup>13</sup> Public revenues from gambling are often earmarked for 'good causes', including sport, culture, and education projects. While this is in principle honourable, it led to the formation of a powerful lobby of those charitable organisations benefiting from it, now having become the main proponents of high state regulation. Moreover, the fact that in countries like the U.S. or Germany most types of gambling are regulated at state rather than at federal level increases the importance of their receipts. On the one hand their impact on budget is higher; on the other, state governments have fewer possibilities to raise alternative taxes to substitute gambling revenues.

Finally, we shall note that in the last years there have been noteworthy efforts towards deregulation in many countries. Italy has undertaken several steps since 2004 in the direction of a progressive liberalisation of the gaming market. In particular, the market for sport betting is open to private companies which can apply for one of the licenses issued by the central gaming authority AAMS. In France, a draft bill was presented in March 2009 proposing a liberalisation of key market sectors in 2010. Despite several amendments, the first vote of the French National Assembly in October 2009 was in favour of the draft. Although most of the markets in continental Europe remain strictly regulated, the evolution in large markets like France and Italy, together with the growing pressure from the changing technical environment, could indeed lead to rapid changes.<sup>14</sup>

## 2. *The Liga Portuguesa decision*

The issue of the case C-42/07 was the challenge of a fine imposed both to the Portuguese Football League (*Liga Portuguesa de Futebol Profissional*) and the private company Bwin by the *Departamento de Jogos* of the *Santa Casa da Misericórdia de Lisboa*. The *Santa Casa* is a five century old agency under strict control from the Portuguese Government. It is entrusted with the exclusive right to organise and operate lotteries, lotto games and internet sporting bets.<sup>15</sup> Bwin is a private enterprise located in Gibraltar and operating from there with a regular

<sup>13</sup> In Germany, revenues from tobacco taxation are reported to be more than three times higher than the amount raised by taxing gambling (L. REBEGGIANI, *Die Regulierung des deutschen Sportwettenmarktes – Reformvorschläge im Jahr Zwei des neuen GlüStV*, cit., section 2.3). Sarah Smith indicates similar values for the UK (S. SMITH, *Lotteries as a Source of Revenue*, cit., 103).

<sup>14</sup> See on this point D. FORREST, *Gambling policy in the European Union: Too Many Losers?*, in *Finanzarchiv* vol. 64, n. 4, 2008, section 6.2.

<sup>15</sup> The *Santa Casa* was founded in 1498. It holds the exclusive license for the 1783 established national lottery as well as for different types of lotto games like *Totobola* (since 1961) and *Totolotto* (1985). In 2003, the *Santa Casa* was granted the exclusive right to organise and promote internet gambling services.

license. The company signed a sponsorship deal with the Portuguese Football League in 2005, thus becoming its principal sponsor. The sponsorship entitles Bwin to advertise in stadiums and to put its logo on the jerseys worn by players. Furthermore, the *Liga Portuguesa*- homepage is directly linked with the Bwin- website, where supporters can place online sporting bets.

*Liga Portuguesa* and Bwin were fined EUR 75,000 and EUR 74,500 respectively for offering internet bets and advertising them. The right to impose penalties for those who violate the monopoly is provided to *Santa Casa* by a legislative act. The two contractual partners brought proceedings before a national court in Portugal which made a reference for a preliminary ruling to the ECJ on the interpretation of Articles 43, 49 and 56 of the EC Treaty with respect to the Portuguese legislation. The question was whether or not the Portuguese monopoly was compatible with the freedom of establishment, the free movement of capital and the freedom to provide services.

In a preliminary remark, the ECJ refused to examine Articles 43 and 56. Given that Bwin does not have an establishment in Portugal, freedom of establishment (Art. 43) has no application to the present case. The free movement of capital (Art. 56) is regarded as secondary to the freedom to provide services. Examining Article 49, the European Court of Justice first of all declares that Portuguese legislation collides with the freedom to provide services, which is one of the pillars of the European common market. As recital 52 states:

- (52) It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (...).

Nevertheless, it quickly makes clear that such restrictions are allowed if motivated by “overriding reasons” of the public interest.

- (56) Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (...).

The “overriding reason” is identified in the judgement somewhat surprisingly as the protection of consumers from fraud and excessive spending. Since gambling is not regulated at a Community level, every member state is allowed to set its desired level of protection against such threats. The court recognizes that granting exclusive rights to a state-controlled institution like *Santa Casa* is a suitable instrument to pursue this goal:

- (67) In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

The fact that Bwin lawfully operates in another member state cannot be regarded, according to the ECJ, as a sufficient guarantee for achieving the desired protection level. Therefore, both the condition of suitability and of necessity are satisfied by granting *Santa Casa* exclusive rights for offering internet gambling services. These conditions, as stated by the ECJ in recitals 59 and 60, belong to the already mentioned ‘proportionality’ prerequisites established in former case-law as preconditions for allowing restrictive regulatory measures in the European common market.

Moreover, the ECJ regards the internet as particularly dangerous, given the lack of personal contact between market actors:

- (70) In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

The last justification goes beyond market regulation issues. It examines the very nature of market participants and comes to the conclusion that further risks could come from the ambivalent role played by actors like Bwin. Being at the same time sponsors of teams involved in the competition and provider of bets on them, they could be tempted to abuse their position by manipulating competition outcomes for profit reasons:

- (71) Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.

The Court concludes that given all these specific threats associated with internet betting, a prohibition imposed on private operators like the one suffered by Bwin and *Liga Portuguesa* may be regarded as justified by the overriding objective of preserving Portuguese consumers from crime and fraud. Therefore, the strict market regulation does not contravene to the principle of the freedom to provide services enshrined in Article 49 of the EC Treaty.

### 3. *Some considerations from an economist’s point of view*

Many of the national legislations regulating gambling rely on the (real or supposed)

necessity of protecting consumers from the negative effects of excessive play, mostly labelled as gambling addiction, and from its consequences on society. This applies, amongst others, to Germany, where the Federal Constitutional Court with its judgement from March 2006 has excluded fiscal interests as a possible rationale for a state monopoly and has left only the prevention motive as a valid reason.

Such a motivation would be theoretically in line with standard economic theory: governmental interventions in a market economy are allowed if there are market failures which need to be corrected. Large negative externalities such as high social costs resulting from excessive play would constitute such a market failure. They would allow the government to restrict freedom to provide goods and services to suppliers and freedom of choice to consumers. In reality, even in presence of gambling addiction setting up a state monopoly is considered a too massive intervention given the dimension of the problem. This is the opinion of most economists, who can hardly derive a rationale for such a rigorous approach using standard welfare economics. Comparing welfare gains from gambling and losses caused by the strict market regulation yields in most cases negative results.<sup>16</sup> The adequacy of a state monopoly is questionable especially in light of the much more permissive measures adopted in regulating markets of other 'sin goods' like alcohol or tobacco, which are characterized by a far higher dependency and mortality rate.

In the case of the *Liga Portuguesa* decision, the legality of the state monopoly for internet bets is justified not for the reason of protecting consumers from addiction but for the aim of preventing them from fraud. This would correspond to another type of market failure, the inefficiency deriving from information asymmetry. The latter refers not to the well-known imperfect information of players which is often an essential part of their participation in gambling activities,<sup>17</sup> but to the aim of protecting (supposedly) inadequately informed consumers from (supposedly) dishonest providers. The ECJ emphasises this point by stating that the "lack of direct contact between consumer and operator" while placing a bet justifies a particularly high protection level, especially facing the high amount of money involved.

Such an argument sounds rather strange from an economic viewpoint. Although we know that there are plenty of market imperfections, the assumption of rational, independent consumers whose freedom of choice has to be respected is one basic pillar of democratic Western societies. If one has to protect consumers even from stock-listed companies like Bwin, why then not prohibit internet shopping at all, particularly portals such as EBay, with all the uncertified private sellers? Referring to the high amounts of money involved does not really improve the logic,

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<sup>16</sup> See for an overview L. FARRELL, *When Welfare Economics and Gambling Studies Collide*, in M. VIREN (ed.): *Gaming in the New Market Environment*, Palgrave Macmillan, Basingstoke, 2008, 23-53 and D. FORREST, *Gambling policy in the European Union: Too Many Losers?*, cit., section 4.

<sup>17</sup> Following the basic von Neumann/Morgenstern-model of decision-making under uncertainty, the expected utility from gambling is normally lower than that from just keeping one's money. Under this framework, a rationale consumer would not gamble at all.



because you can easily “squander money” e.g. by buying a junk car through an internet platform. Citizens of European societies are requested to take economic decisions of far higher importance like contracting a pension insurance than the one of whether to place an online bet or not. All in all, this kind of rationale does, from an economic point of view, neither fit the idea of a free market nor is appropriate given the actual technical environment, where remote transactions are part of everyday life.

Furthermore, the judgement gives remarkable emphasis to the ‘good causes’ run by *Santa Casa* (recitals 15-16). As already mentioned above, this is a historically developed, common way to increase social acceptance for gambling services, especially used by state lotteries. In principle, there is nothing to object to; one should nevertheless remember that such a financing could also be organised by collecting taxes from private companies and redistributing them to charitable institutions, sport federations, and others. This would be the normal way to finance merit goods, as it is done, for example, in the education or public health sector. Besides, several studies have pointed out that the ‘good causes’ receiving funds from gambling revenues are in many cases (orchestras, heritage, sports) consumed mainly by people from higher social classes. Given that the income share spent for gaming is normally larger for lower income recipients, the gambling taxes assume the character of regressive taxes redistributing from poor to rich.<sup>18</sup>

Finally, the ECJ briefly refers to the issue of possible incentives for game manipulation when firms like Bwin are both sponsors of a sport event and offer bets on it. Economists would categorize this instance as entailing a sort of negative externality on the supply side, since every kind of manipulation would negatively affect the production of the good ‘sport event’ which constitutes the ground upon which the bet is based. If the confidence in the integrity of sport events declines, the whole economic exploitation of the good suffers in the long run: gate revenues, sponsoring, broadcasting, and also offering betting services. Beyond that, Forrest and Simmons describe betting corruption as a form of insider trading, since involved persons realise gains at the expense of other market participants. They recommend the establishment of a specific anti-corruption policy framework with the participation of the regulatory authority, governing bodies of professional sports, and the gambling industry.<sup>19</sup>

The *Bundesliga*-scandal of 1970/71, which caused a sharp decline in match attendance, is a prominent example for such a loss of reputation. But even the recent *Calciopoli*-affair has contributed in Italian football to the comparatively low spectator interest observed during the latest years. The *Serie A*, in the Nineties the most popular professional football league in Europe, was in the seasons 05/06 and 06/07, when the scandal was brought to light, the one with the lowest match attendance among the ‘big five’ European leagues analysed in the Deloitte annual

<sup>18</sup> See on this point S. SMITH, *Lotteries as a Source of Revenue*, cit., section 5.4.

<sup>19</sup> The formal model is presented in D. FORREST, R. SIMMONS, *Sport and Gambling*, in *Ox. Rev. of Ec. Pol.*, vol. 19, n. 4, 2003, section 4.

report.<sup>20</sup>

These threats connected with corruption and match-fixing should be taken seriously – once a reputation is destroyed not only the commercial potential but also the whole merit good character of sports is in danger.<sup>21</sup> A possible policy recommendation when dealing with major companies like Bwin could be to restrict advertising of gambling companies to event sponsorships, for example by displaying the logo in stadiums or in opening credits of TV coverage. The direct sponsorship of a team or a player may remain prohibited.

Another problem arising in this context is the question about property rights. In contrast to lotteries and lotto games, sporting bets are linked to a real world event, namely a sporting competition. Who is the owner of the ‘good’ upon which the bet is based? If the good ‘sporting event’ is produced by market actors like the involved sport teams, doesn’t a state-monopoly regime assume the character of an expropriation by the government? This is striking especially when looking at professional team sports, which are private undertakings dependent on the profits gained by selling their product. The *Liga Portuguesa*-case is such an example, but in Germany, too, there have been several instances where professional sport teams had to renounce to already stipulated sponsoring contracts with gambling firms and lost a lot of money.<sup>22</sup> With professional sports becoming more and more a commercial activity, these economic considerations should be taken more into account.

At first sight, the *Liga Portuguesa* decision enforces gambling monopolies throughout Europe. If the level of protection may be freely chosen by national governments according to the country’s “moral, religious and cultural” characteristics (recital 57), then basically each government could claim the need for setting up a state-monopoly. A more careful look reveals that the already known problematic issues remain: the ruling does not provide a fully convincing justification for the restriction of key rights of a free market like the freedom to provide services. This emerges quite clearly when having an economic look at the judgement, but even from a legal point of view courts all over Europe are awaiting a precise definition of the ‘proportionality’ requirements for treating the gambling market according to the same standards as other markets.

All in all, we suppose that the solution of the problem should be found at a

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<sup>20</sup> See DELOITTE (ed.), *Annual Review of Football Finance 2009*, Manchester, 2009. There are also some recent examples of Asian football leagues where wagering has declined dramatically since they were found to be heavily affected by frauds connected to betting activities.

<sup>21</sup> An example of such a negative development is professional cycling: once regarded as the most pure, ‘heroic’ sport, it is nowadays so frequently linked to doping scandals that the image has completely changed becoming that of a ‘cheating circus’. The result was a dramatic fall in spectator interest, sponsoring and broadcasting engagement.

<sup>22</sup> The most prominent case was the *Bundesliga*-team *Werder Bremen*, which had to give up a sponsorship deal with Bwin during the 2006/07 season. At the same time, Bwin continued to support other European clubs like *Real Madrid* or *AC Milan*, so that the legal restrictions turned out to be a genuine competitive disadvantage for the German team.

political level rather than by relying on judicial decisions. A coherent market regulation to be established at a European level should still be prominent on the political agenda of the EU. From an economic viewpoint, we recommend for sports betting a regime reform with a careful opening to private actors, without renouncing to public control over the sector. The influence of the government should be concentrated on regulatory policy issues, establishing first of all powerful national agencies throughout Europe responsible for licensing private companies and for a continuous monitoring of the market. As the latest football betting scandal in November 2009 impressively shows, an effective monitoring system is far more important for protecting sportsmen and wagerers throughout Europe than rigid market regulations applied to single countries.

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