

Philippe Vlaemminck

Legal Advocate for the European Lotteries Association
at the European Union level in Brussels

2011 is shaping up to be a year of unprecedented progress towards 'rationalizing' the regulatory environment in European Union gaming markets. Please visit our news website. www.PublicGaming.com, to view two important documents that presage events to come. There we have posted the transcript of a speech by the EU Commissioner for Internal Markets and an official statement by the members of the EU that clarifies their position on regulatory issues. Following is a discussion with the legal advocate who has been right in the middle of these issues for over 20 years now. Philippe Vlaemminck shares his thoughts on how these events will form the basis for a healthy and sustainable gaming environment in Europe. A logical and predictable regulatory environment will also enable commercial operators and lotteries alike to invest in growth.

Paul Jason, Public Gaming: *How important do you think the publication of the 'Green Paper' by the EU Commissioner for Internal Markets, Michel Barnier, will be.*

Philippe Vlaemminck: We do not know yet what the Green Paper will say, although we have a pretty good idea what issues will be addressed. What we do know, though, is that the EU Council of Ministers just issued a unanimous political statement titled Conclusions on the framework for gambling and betting in the EU member states. This statement clearly expresses the will of the Member states regarding the role that government lotteries perform for society. This is a crucial political signal to the European Union Commission that the Member states want consideration for the fact that lotteries make an important financial contribution to society and that the model that enables those contributions should be sustained. It states that governments should not be forced to deregulate in a way that destroys or undermines that model.

Commissioner Barnier has stated the primary purpose of the Green Paper is to address the regulation of internet gaming. (See transcript of his speech at www.PublicGaming.com.) He will attempt to begin the process of reconciling the concepts of free and open cross-border commerce, mutual recognition, and subsidiarity. Now, because of this unanimous statement by the member states, he will undoubtedly take into consideration the regulation of government lotteries.

It sounds like we have cause to be optimistic.

P. Vlaemminck: We do. But not by placing only expectations on the Commissioner and what he has indicated to date. We have reason to be optimistic because the Member states unanimously voiced an opinion and now they will be heard. These 27 member states are actually the ones who created the Union, who are in effect the owners of the Union. The EU Commission is empowered to enforce laws that promote free trade and other economic objectives. It has the authority to enforce those laws. But their power is derived from the EU Treaty. So when the Member states render a unanimous vote, they give a high level political signal that cannot be denied. The EU Commission is obligated to take that statement into consideration.

Is the EU Commission obligated to comply with the member states' opinion that states should be allowed to preserve the lottery model, which in most cases means a government monopoly and that the financial role in society is legitimate basis for governments to restrict commercial access to the lottery market?

P. Vlaemminck: No. The EU Commission is obligated to take this into consideration as a political decision, but not obligated to decide in a certain way. But this is a very important step towards an enforceable regulatory framework. For many years, these issues have been treated only as legal issues. With-



out a clear political direction, the legal issues remain unresolved. Now, finally, the EU Commission will address the issue of regulation of lotteries as a political issue.

Do states have the right to protect lotteries from competition for the purpose of channeling financial benefits to Good Causes? And, should gambling be considered as a matter driven by the principle of subsidiarity whereby the basic competence lies with the member states instead of the EU Commission? The members have now clearly stated that the answer to these two questions is yes. The EU Commission is not obligated to agree with that position statement. But this is the first time the debate has been framed in such a clear manner. This political statement of the member states is, therefore, the most important victory of lotteries since the start of the debate in 1992. So, yes, we do have reason to be optimistic.

Didn't the original Treaty interpretation given back in 1992 by the European Council acknowledge that gaming and gambling should be a matter of subsidiarity, that regulatory decisions could be made at the state level and not subject to EU Commission approval?

P. Vlaemminck: Subsidiarity is a princi-

ple that confers authority to the state where appropriate, but not without requirements to comply with EU laws. That said, the European Council did stipulate in 1992 that gambling is a matter of subsidiarity at the highest level. And since that time, Member states have been asserting that gambling should be regulated at the national level according to national public policy objectives. In spite of that, there has been an enormous amount of court action contesting the rights of Member states to regulate gambling and lotteries. One of the problems has been that there has been no distinction between casino gambling, sport betting, and government lotteries. All were treated as gambling. The reason this recent EU Council of Ministers statement is so important is that now the EU Commission will need to treat lotteries as a separate and specific issue. Any future debate has to take into consideration the specific public interest role of lotteries. That means that now, for the first time, there will be consideration for the Member states' position that lotteries should be treated separately from gambling, that the financial role that lotteries serve for society is a legitimate basis for restricting commercial access to the lottery market; and that lotteries need to have a protected environment, a so-called safe harbor, to be able to fulfill that financial role for society. Even though this does not predetermine what the EU Commission will decide, we can hope that the EU Commission will concur with the will of the Member states and reaffirm the principle of subsidiarity. In the case of lotteries and gambling, it was decided back in 1992 that the most appropriate level to regulate gambling services as per the principle of subsidiarity was the level of the Member states.

The Member states still must justify their regulatory frameworks to be in accordance with EU laws. Since 1992, the European Court of Justice (ECJ) has not exactly recognized the important public interest role that lotteries perform as being a legitimate reason to maintain monopoly restrictions. According to the European Court the allocation of profits to good causes, although an important issue, could only be considered as an ancillary benefit and not an objective legal justification for restricting gambling services. The ECJ has required the justification for restrictive regulations to be based on Public Order and protection of the consumers. Now the Member states are asserting that future legislation should recognize lotteries' role of funding Good Causes as an acceptable reason for the monopolies to exist.

You're clarifying that it's not enough for the EU Commission to say that the principle of subsidiarity applies to the regulation of lotteries, they actually need to specifically say that the funding of Good Causes is a legitimate reason to maintain restrictive regulation of the markets. And now we can hope that the 'Green Paper' will take that position not so much because Commissioner Michel Barnier feels a certain way, but because the member states have so expressly voiced their will.

P. Vlaeminck: It will be a combination. The Commissioner has said after all these years of litigation and mistrust between the EU Commission, the Member state governments, and the commercial online gambling community, that he wants to come to terms with the issues of online gambling. The first step is to clarify what we can agree on at this point and use that as a framework for proceeding to resolve those issues that are not resolved. His stated objective is to understand all aspects of the problems; and to elicit input from all stakeholders for that purpose. The process will conclude with a decision on how much latitude the member states should have to regulate online gambling and now lotteries as well; and whether it will be necessary for the EU Commission to intervene and enact additional legislation. The Commission wants to have a broad stakeholder consultation to understand the problems, endeavoring to understand the political nature of these decisions.

When you're referring to stakeholders, the most relevant stakeholder by far are the Member states, right?

P. Vlaeminck: Yes, but it would also include all the remote gambling operators, the beneficiaries, the family associations, the sports associations, the media groups. Everybody is involved. But it is true that Member states, as well as the European Parliament and the Council, would be most representative of the general public and therefore have the most influential role in this process.

In conclusion, it sounds like it is unlikely that the EU Commission will force a breakup of the lottery model, which includes monopoly restrictions.

P. Vlaeminck: Right now we have reestablished a healthy degree of mutual trust between the EU Commission and the Member states. That is a very positive basis for hoping that the EU Commission will respect the will of the member states when it comes to the regulation of lotteries. The previous Commissioner for the Internal Market, Charles McCreevy, created mistrust between the Commission and the Member states by acting without adequate consideration for the

opinion of the Member states. The current Commissioner, Michel Barnier, wants to reestablish the trust by expressing respect for the views of the Council, and by eliciting input from all stakeholders for the creation of a position paper and initial regulatory framework which is dubbed the Green Paper. Commissioner Barnier is forging a healthy partnership between the EU Commission and the Member States. The result should be a regulatory framework that provides clear political direction and minimizes the need for unproductive litigation and confusion in the courts. And I do think it very unlikely that this framework will require the destruction of the lottery model based on a monopoly structure.

This is then a period of study and building of mutual respect and trust and exploring the options and the implications of different decisions. I would think it unlikely that during this period the EU Commission would force anything drastic to happen since that would not be consistent with the goal of working together to find mutually agreeable solutions.

P. Vlaeminck: Yes, indeed. You're absolutely right. That is indeed a new situation. We are thankful for the strength of the Council Presidencies and the enlightened views of the new Commission for creating a situation in which these issues will be resolved in an open-minded way that is likely to be favorable for the protection of the beneficiaries of lottery funds.

Even though the situation has changed in a way that is favorable for lotteries, it would be a mistake to think that the governments are now free to regulate as they wish. It won't change, for instance, the ECJ decision that the German regulatory structure is inconsistent and they need to change it to be in compliance. But the requirements for what they need to do to get into compliance with EU laws will likely allow for more latitude when it comes to the regulation of lotteries. The ECJ did not say that monopolies are not allowed, only that there has to be a consistency in the application of regulatory laws. We are very pleased that there is now a productive cooperation between the important stakeholders, but the principle of subsidiarity does not mean that states don't have to comply with EU laws and EU regulations & decisions.

But there will never be a regulatory framework that anticipates and answers all questions, will there?

P. Vlaeminck: That's true. Lots of important issues will continue to be litigated. For instance, the EU Commission Green Paper will not likely specify whether a transaction

processing server must be located in the country of consumption. Belgium wants these servers to be physically located in Belgium. Online gaming operators protest that is not a reasonable requirement. PartyGaming wants to offer a “white label” service in which they connect an operator to a multi-jurisdictional pool of players, but the various regulators have no idea who is connected and whether the integrity of the game is guaranteed. Some Member states point out that compromises their ability to audit and regulate the business. What is hoped is that the Green Paper will provide the political bases for making these decisions. Whose rights should be served, who best represents the interests of the public, how do the interests of the government to regulate reconcile with the objective of free and open markets and cross-border commerce, etc.

Hopefully, the Green Paper will recognize the right of a government to permit lotteries to conduct business without unnatural restrictions. If the lottery model is recognized as legitimate from a political point of view, the framework should indicate that they can engage in generally accepted business practices like advertising.

How long will it take for the framework to result in a regulatory environment that works with minimal confusion over what is allowed and not?

P. Vlaemminck: Four to six years since the EU institutional process involves that both the EU Parliament and the Council find a consensus. And it is time to do so. I honestly think the ECJ is fed up with the role of arbitrating countless disputes. The European Court does not want and never wanted to be the arbitrator in an essentially political debate. Their role is to judge the rule of the law, not to create the laws. They do not want to be in the position of ruling where there is no law. The ECJ wants the appropriate EU political institutions take up their responsibilities to set clear political guidance.

I think in this political context the remote gambling community that wants to export their service from low tax jurisdictions and not pay taxes to the states where the players reside, and not comply with the regulations of that state, will have a very hard time continuing justifying this point of view. They have based their position in the past on the notion that the EU laws require free and open borders and free competition etc. Now they'll have to justify those positions politically and that will be difficult to say the least.

The Presidency of the EU Council changes every six months. In the second semester of 2010

Belgium was in that role. How and why is that role important?

P. Vlaemminck: The role of the Presidency is very important because the Presidency sets the agenda and frames the issues that the members want to address at the EU level. For instance, the French, Swedish and Spanish all recorded progress towards a consensus of the Member states on these regulatory issues. That was good in that it set the stage. But it had little material impact on actions taken by the EU Commission. The statement of Conclusions adopted by the Council on 10 December 2010 will have concrete political impact. While this statement is not legally binding on the EU Commission, it does politically obligate the Commission to deal directly with the issues. The Belgian Presidency took an ambitious posture in calling for a vote and thus confirmed that the Member states are of one mind on these issues.

Congratulations. This is the culmination of years of work on your part and the part of your colleagues working on behalf of governments which want to regulate lotteries. You and your team, including Annick Hubert (partner with Vlaemminck & Partners) were listed as advisors to the Belgian Presidency of the Council in this matter. Not to criticize the political process, but doesn't it usually result in more talk and less action? What caused the Council to take this matter up in the first place and then to produce a material result like this?

P. Vlaemminck: There had been lots of talk, years of talking. So everyone did have a good idea of what we needed to do. But you're correct in thinking it was still a challenge to make it happen, to draft and negotiate this document that everyone would agree on and actually vote to affirm. The preparatory work was crucial and done months before in permanent dialogue between the Belgian diplomats and, besides my team of lawyers, a team composed by the Belgian National Lottery and the Belgian Gaming Commission. We started pushing for this from the first meeting that we had, setting out the goals and timetables. Many Member states did not want to address these issues but we persisted with the Belgian diplomats and the support of the other team members. We did the drafting work and advised the Belgian Presidency on what is possible and legal. The goal was to build the very best document that would get a unanimous agreement on the part of the Member states.

Well, how cool is that? Congratulations.

P. Vlaemminck: Thank you. This final effort involved three months of preparation and six months of hard work under the Belgian

Presidency. Of course, many others deserve credit for their participation and support over the years, especially the French, Portuguese, Finnish, Italian, and Dutch Lottery people who were together with the Belgian Lottery always in the frontlines; From the very beginning of the debate in 1992, The Belgian National Lottery was very actively involved and in front of the Belgian government in the courts. From the very beginning, we had an excellent working relation with the General Counsel of the Belgian Lottery, Mr. Dirk Messens who did understand the importance of this sustainable effort and did convince the succeeding CEO's of his Lottery in doing this. Belgium is the only Member state which has always been present at every single gambling case in the European Court of Justice. That creates political leverage. Belgium is considered to be the expert in this debate.

You've personally represented the Belgian government in most of those cases, haven't you?

P. Vlaemminck: I began working with lotteries 22 years ago and have represented the Belgian government in every single gambling case since 1992. So, we've developed the legal expertise to understand the issues, the legal precedence, the priorities of the different stakeholders, and how to strategically present the lottery position so that it is acceptable within the rules and charter of the European Union. But it has been very much a team effort. European Lotteries has always paid a lot of attention to these questions and has over the years invested a lot in building knowledge and creating an appropriate environment for developing a strong legal advocacy. The succeeding Presidents of European Lotteries, from Ray Bates, over to Hans Jürgen Reissiger, Winfried Wortmann and Friedrich Stickler have invested a lot of time and effort in EU affairs. Also other Lottery Directors, like Christophe Blanchard-Dignac, Tjeerd Veenstra and Risto Nieminen are driving forces in this debate.

We also meet, typically around 15 lawyers from different Lotteries in Europe, every month in an European Lotteries regulatory working group (chaired by T. Veenstra) to work on these issues in our office in Brussels. We've been doing that for many years. And every year we have a two-day legal seminar of European Lotteries among all the lotteries to discuss legal questions, share legal information and data. There enormous exchange of knowledge, information, and brain storming has been taking place between the lotteries in Europe for many years. Lawyers like Michel Janot (FDJ), Barbara Hoffmann-Schöll

(ÖLG), Ana Paula Barros (SCML), Hubert Sicking (WestLotto) are true authorities in their respective jurisdictions and involved in the EU debate since the beginning as well, although often working in the shadow. Other lawyers like John Dillon (Camelot), Claudia Richetti (Lottomatica), Tuula Sundström (Veikkaus), Bengt Palmgren (Svenska Spel), Arjan Van 'T Veer (Staatsloterij) are equally playing an important role in our work as many others, some who left and others who joined our group, but too many to mention them all. We would very much like to work also more with NASPL, see NASPL become more politically engaged, and create a true international alliance of Lotteries to promote a regulatory environment that protects the public and the rights of governments all around the world to collect taxes on gambling revenues.

Is there a reason why the Belgian Lottery is considered the expert other than the fact that the EU Commission is based in Brussels?

P. Vlaemminck: Actually, it is more driven by the people involved, by longstanding and sustainable relations and mutual trust, than anything else, Paul. The European Lotteries is one of my clients, and this since many years, like the Belgian National Lottery and I have developed an especially close relationship with the Government here in Belgium. I have spent my entire career working on legal matters with the European Union and the WTO. We have had 28 cases on gambling in the European Court up to now (and others are following), and in every case we did rep-

resent the Belgian government and expressed an opinion.

You have described a convergence of different events that seem to be making all this possible, but ultimately it's about people like you and your colleagues who push hard, don't give up, and have the guts to strike hard when you know it's time to close the deal. The Council itself should be proud of their accomplishment, but you should also consider it a personal victory.

It is interesting that the focus on the financial support to Good Causes is being legitimized just as preserving Public Order is becoming more of an issue. Enforcement of laws against illegal operators, money laundering, fraud, organized crime, is being recognized as more vital than ever, isn't it?

P. Vlaemminck: Yes. Everyone, including the shapers of public policy, are recognizing that remote gambling requires law enforcement. We need to be able to stop illegal operators and the criminality that you refer to. There is now the suspicion that funding of terrorist activities may be facilitated by illegal remote gambling operations. So, yes, Public Order and law enforcement is considered now of adamant importance. We need to enable ISP blocking, blocking of illegal financial transactions, make sure that activities that are illegal in some Member states, like in the Netherlands, can't be imported from other member states, like i.e. Malta. And the only way to stop that from happening is to have ways to hold accountable and punish the per-

petrators and those which enable the illegal operators to act criminally. That requires two steps. First, there must be a regulatory framework that is clear. Second, there must be the right technological tools and law enforcement modalities to enforce the rules.

Once the 27 EU member states make that happen, maybe the governments of the rest of the world will join the effort to protect the public from criminal remote gambling operations.

P. Vlaemminck: Beginning with the U.S. The U.S. has an equal responsibility with Europe to develop and enforce an effective regulatory framework. It would appear that the debate in the U.S. is now focusing on freedoms, on the rights of the individuals and businesses to pursue their own goals with minimal interference from government. And that there is inadequate appreciation for the potential for fraud and criminality. Debating whether people and businesses should have the right to engage in certain activities is a part of the public policy process. But the U.S. will undoubtedly be facing the same challenges with illegal operators and criminality that Europe has been dealing with. Hopefully, they will realize that laws and regulatory frameworks to protect the public and collect taxes are necessary. That is where we need to come together and forge a transatlantic dialog. We are ready to support the US Lotteries in this challenge.

And that's why I'm hoping you'll come to present again at our conference in New York City! ♦