



# Joining Forces to Enhance the Lottery Model

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There is never a dull moment when it comes to the changes in regulations in the lotteries and gambling sector. In both the USA and in the EU, much has happened which will again influence the way forward and the future for Lotteries. In so many ways, the issues we face on both sides of the Atlantic are similar, even though they need to be understood within their own specific cultural and social environments.

In the EU, we have been talking for years about “subsidiarity” as the basic legal standard which states that every business sector needs to be regulated at the most appropriate level. For lotteries and gambling, that is the member-state level in the EU and the state level in the U.S. Today, facing the developments of new technologies, lotteries need to respond to those who challenge this basic principle, or risk losing their authority over regulation and taxation in their jurisdictions.

In the recent discussion regarding online gambling, this was expressed at the European Parliament as “active subsidiarity”. This is an important concept, referring to the ability to respond to the changing environment and reflecting the competence to do so. In practice, it means that states can grant Lotteries the right to use the internet (this being in line with the judgments of the Court of Justice of the EU which grant the right to states to respond to growing illegal activities on the internet). Various models have been implemented and often tested by the highest courts of the concerned states. In Belgium, the state introduced the license-plus model, granting only land-based licensees the right to use also the internet as an additional form of distribution. The Belgian Supreme Court considered that this was in line with EU law. In France, only the internet market was partially opened, while FDJ could keep its monopoly in the off-line market. The highest Administrative Court decided recently that this approach, and specifically the way FDJ operates as a lottery provider, was fully compatible with the jurisprudence of the European Court of Justice. The red line in these approaches is clear. The role of the state lottery is preserved, while the internet may only be used to offer lottery and gambling services to residents of the concerned jurisdiction. Respecting those two fundamental principles is of critical importance.

Opening up the market to operators of other states (as done by Malta and promoted by the remote gambling industry in various countries, like Denmark, with the argument that the trans-national scale and liquidity is necessary for an attractive offer) is totally unacceptable and violates the basic principles of state competence and authority over regulatory and taxation policy.

The most recent developments in the USA are fully in line with the approach in the EU. The opinion of the U.S. DOJ of September, 20, 2011 (albeit published on December 23) implicitly grants to states the right to authorize their lotteries to sell lottery tickets to adults over the internet with sales restricted to transactions initiated and received within the concerned state, regardless of whether the intermediate routing of electronic data passes through other states. This is a big victory for states and their lotteries and enhances their ability to market their products in an ever changing environment, and therefore to enhance their specific role to society.

Notwithstanding this excellent development, we can see again that others try to re-direct the meaning and intent of legal opinions and decisions.

Antigua’s lawyers contend that the DOJ opinion gives them leverage for requesting a favorable deal from the US authorities. Antigua has spent years pushing the WTO to deny the U.S. its right to regulate its markets for the protection of consumers and public order. Antigua even received support from the British remote gambling operators who decided to violate US federal laws and initiated in the EU a Trade Barriers action against the US. This procedure was never pursued, but is still pending. It is clear that the object and purpose of the DOJ opinion is being deliberately misinterpreted by the remote gambling people. The fact that the Wire Act only addresses sports betting does by no means diminish the right of the USA to invoke the public order exception to protect its citizens against cross-border gambling services offered without proper control in the state where the offer is made. Also, the European Court has in numerous cases recognized this fundamental right of the states by stating: “a Member State is entitled to take the view that “the mere fact that an operator such as Bwin lawfully offers gambling services via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators” (§69 Liga Portuguesa).

Another major new argument in support of the USA states’ rights to regulate their markets comes from another ruling of the Court of Justice of the EU. In a decision of the Court of 15 November 2011, it was decided that a tax system designed in such a way that offshore companies avoid taxation constitute an illegal state aid scheme contrary to EU law. This ruling will make Gibraltar less attractive for remote gambling operators who want to operate offshore and benefit from low taxation in addition to offshore gambling licensing (cases C-106/09P & C-107/09P EU Commission & Kingdom of Spain vs. Government of Gibraltar & UK).

The business and markets of gambling and lottery are becoming globalized. Technology is obsoleting legacy laws and regulations designed before the age of the internet. Thankfully, the European and U.S. courts are catching up, establishing the principles of protecting the consumer and recognizing the state interests in the lottery and gambling sector Today we see more legal rulings, and the tools to enforce them, emerging to enhance the role of state lotteries around the world. Lotteries have the right to use the Internet and States are entitled to protect their borders. Intermediate technology can be used as long as the integrity of state gambling is not undermined by off-shore based remote gambling operators.. And on both sides of the Atlantic, governments and their lotteries are developing their businesses and the means to protect them in quite comparable ways.

By joining forces, by sharing information, ideas, and experiences, by working together to build effective public policy arguments and positions that advance the common cause of government lotteries, we will prevail. The Smart-Tech conference in New York has become a great venue for lottery leaders from both sides of the Atlantic to meet and forge the collaborative approach we need to protect the interests of government lotteries and their stakeholders. ♦

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