



**National Lottery**  
creating chances together

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**PGRI Introduction:** *The government of Belgium has petitioned the European Court of Justice (ECJ) to vacate a “Recommendation” issued by the European Commission. This is very big news for two reasons. One, the Recommendation in question is an attempt by the EC to “harmonize” the standards for i-gaming operators to operate across all EU member-states. This has profound implications for the i-gaming market-place and for member-states’ regulatory model. The other interesting aspect to this request to vacate is that it calls into question the scope of authority that is granted to the EC. It asks the Court to clarify the limitations of the authority of the EC over against the rights of the EU member-states. The outcome of this legal/political debate will shape the future of the gambling and lottery industries in Europe. More specifically, it will determine whether the European market-place will be required to liberalize, open up to multiple operators and free-market cross-border competition. That will result in a race to maximize prize-payouts augmented with intensive advertising and promotion to entice more people to gamble, and for current players to gamble more.*

*Our hope is that the EU countries be allowed to continue with the model of strict control over regulatory and taxation frameworks that limit the expansion of gambling and protect the lower prize-payout model of government lotteries. The very existence of the monopoly lottery model hangs in the balance.*

*Prior to joining the Belgium National Lottery in 2010, Piet Van Baeveghem was advisor to the Minister of Justice and the Belgian Prime Minister between 1999 and 2004, deputy director of the Minister of Economy between 2004 and 2007, and secretary general of the Belgian federation for credit institutions from 2007 to 2010. As director of the legal department, Mr. Baeveghem is responsible for regulatory affairs and quite immersed in the interesting politics of the ever-changing regulatory landscape in the European gaming industry.*

**Paul Jason, PGRI:** *Let’s first have you describe the institutional make-up of the European Union. How does it work, from a governance point of view?*

**Piet Van Baeveghem:** There are basically four important institutions inside the European Union (EU). There is the European Union Commission, which functions primarily as the administrator of the Union. The European Parliament is the democratically elected body that has legislative authority over ongoing issues of governance. Then there is the Council of Ministers which represents the specific interests of the twenty-seven different mem-

ber states. A new concern or initiative relating to the actions and directives of the European Union initially is addressed at the EU Commission level. Issues that assume a level of importance beyond that of administrative matters are then debated inside the Council of Ministers and the European Parliament. The role of the Council and the Parliament is to ensure that democratic reasoning, authority, and control are applied to decisions that affect all the member-states of the EU. The European Union Commission, however, does have the power to make recommendations. The EU Commission does not need the

blessing of the Council and/or the Parliament to make a recommendation.

The problem with the recommendation relating to i-gaming is that it reads like a directive and requires compliance on the part of the member-states. A recommendation can be issued by the EU Commission without the input or consultation of the member states or the Parliament. The content and wording of this recommendation, however, make it clear that this is more of a directive than a recommendation. That is the cause of major concern, and the basis for the litigation of the Belgian government. It has

now become necessary to clarify the scope of the EU Commission power, and the authority of its recommendation. We do not necessarily even disagree with the content of the recommendation. We do firmly disagree with the presumption that the EU Commission has the authority to turn its recommendations into directives. And even though we may not disagree with the content of this recommendation, it is necessary to establish the limits of the EU Commission authority in this case if we hope to have recourse when there is a recommendation that we do not agree with. Allowing this to pass uncontested would set a precedent that would severely impair our ability to contest future EU Commission recommendations.

*What is it about this recommendation that makes it function more like a directive?*

**P. Van Baeveghem:** The contents of the recommendation is so detailed and explicit in its expectations of the member-states that it does not operate like a recommendation. A recommendation is about principles. The operative principle in this recommendation is to protect the consumer and control criminality in the world-of i-gaming. That's fine, of course. The EU Commission can make suggestions about the initiatives that could be taken to support a general principle like protecting the consumer. But this recommendation goes far beyond that. It states, for example, that if a company is offering online gaming, then its name, place of registration, and e-mail address should be on the web site. It's not that we disagree with this particular requirement. But this recommendation does not constitute a comprehensive regulatory framework that would come close to actually accomplishing the result of protecting the consumer and controlling criminality. The EU Commission could not attempt anything on that scale because that would clearly exceed its scope and need to be referred to the Council of Ministers and the Parliament.

But there is a method to the madness.

The Commission is limiting the scope of its recommendation for the very purpose of keeping it below the threshold that must be referred to the legislative bodies of the Council of Ministers and the Parliament. The problem for member-states and their lotteries is that, even though the scope of the recommendation is limited, if this EC "recommendation" becomes accepted by the member-states and the EU Court of Justice, it has the perverse effect of providing a minimum standard to which i-gaming operators will be held. It creates the appearance of a "harmonized" regulatory framework that the ECJ will enforce. This harmonized framework, though, will allow i-gaming operators much more freedom than do the laws currently existing in each of the member-states. Insofar as this set of recommendations becomes the set of rules enforced by the ECJ, member-states could then be prohibited from enforcing rules and standards that are not explicitly endorsed by the EC recommendation.

*This is a matter of governance with broader implications than i-gaming. But let's focus on the specific implications for the authority of the member-states to regulate and tax i-gaming.*

**P. Van Baeveghem:** Presently, there is no harmonization at European level. Each member-state regulates and taxes gambling, lottery, and i-gaming as it sees fit, while staying compliant with the general principles of the EU. Measures that restrict the movement of goods and services must be justified as needed to protect what we call Public Order, that is to protect the consumer and to control criminality. If the Court of Justice had a harmonized regulatory framework that applied to all EU nations, then it would require compliance with that. Since there is no harmonized regulatory framework, the Court gives the individual member-states some latitude to apply rules to protect Public Order, even though those rules may impinge on the free movement of goods and services. The EU

Court of Justice has rendered decisions that say, in effect, as long as there is no harmonization, each member state can determine on its own how best to protect its citizens from problem gambling, money laundering, and criminality in general. Otherwise, the member state must respect the fundamental EU principle requiring the free movement of goods and services. That principle is, after all, the basis for the very existence of the European Union.

The problem is that the application of an abbreviated set of rules to all EU member states, which is what the EC recommendation does, will create the appearance of harmonization, and that will create confusion over the rights of member-states to impose further restrictions on the industry of gambling and lottery. Potentially, the EU Court of Justice could interpret this recommendation as being the comprehensive set of rules and that member states are prohibited from imposing requirements that are not specified in the recommendation. The set of incomplete requirements contained in this EC recommendation will almost certainly make it much more difficult for member-states to enforce monopoly control over lottery and other forms of gaming. Without explicit exclusions that apply to gambling and lottery, the Court will apply the principle of free movement of goods and services to state lotteries and gambling just as it does to all other industries.

*It sounds like this is a very clever strategy on the part of commercial i-gaming operators to accede to some restrictions as the means to avoid the higher standards of member state restrictions.*

**P. Van Baeveghem:** Currently, with no harmonization of i-gaming regulations, the Court defers to the member states the right to regulate for the purpose of protecting the consumer and controlling criminality. If there is even a minor level of harmonized rules that protect the consumer and apply to all member states, the member-states will have a hard time defending their right

to monopoly status for their lotteries. Regardless of the intent or strategy involved, that will be the result.

*What is the agenda of the EU Commission? Are they deliberately working to undermine the authority of the member states?*

**P. Van Baeveghem:** The agenda of the EU Commission would be to get some form of harmonization. They know that anything broader in scope would require the input and consensus of the Council of Ministers and the Parliament. So they deliberately limited the scope to requirements that, on the surface, would appear to be such that everyone could easily agree with, so they do not need to negotiate with the representatives of the member-states in the Council or the Parliament. Regardless of their intent, the implementation of this recommendation cripples the authority of the member-states to regulate gambling and lottery. By providing some small measure of harmonization, the Court can no longer exclude gambling and lottery from the principle of free movement of goods and services.

*The outcome being that the markets are liberalized, consumer protection and controls against criminality are reduced, and all this happens under the guise of an EC recommendation that purports to enhance protection of the consumer.*

**P. Van Baeveghem:** In analyzing the detail of the recommendation, we found that the Belgium National Lottery is already compliant with 97% of the new recommendations. We checked with our colleagues in other lotteries in Europe, and every lottery came to the same conclusion. So what is the purpose of a recommendation that is already being done by the member states? So, what is the goal of the EC, why are they doing this recommendation? Their goal is to be able to show the EU Court of Justice, the highest court in the EU that adjudicates issues that affect every single member-state, that there is now harmonization. The Court can now rule against the states' rights to implement additional measures to protect the

consumer or minimize criminality, if those measures conflict with the principle of free movement of goods and services. Insofar as there is an instrument for harmonization, the Court could rely on that as the measure of what can and cannot be done by the member states.

The European Commission will make a new report about how the recommendation has been transposed in European member-states. That report will come on or before January 2016. And that in itself will further consolidate the authority of the European Commission because the Commission is also demanding that the member states collect information about the number of problem gamblers and money laundering cases related to gambling. This information will enable the Commission to make another report that is substantiated by facts and data. Unfortunately, it skirts the issue of whether the Commission should be in the position of taking these measures without the input of the Council of Ministers and Parliament.

And a strange twist in this saga is that Malta will take over the EU presidency in early 2017.

*Malta being the headquarters for many of the commercial i-gaming operators which want to avoid the regulations and taxes of the other member states.*

**P. Van Baeveghem:** Yes. Right at the right moment when all of this information is collected and the European Commission has taken the time to elaborate on its recommendations and lay the groundwork for advancing its agenda to create a low-level form of "harmonization," the one country with the most to gain from its implementation will occupy the office of president of the EU.

Let's be honest: it is not easy to argue against recommendations that protect the consumer. The reasoning that we have been discussing is somewhat complicated. It is much easier for political leaders to simply accept the notion that protection of the

consumer is a good thing so let's go ahead and accept the recommendation. That is why it is so vital that the issue is properly framed. The issue is not about the specific points of the recommendation, which are about consumer protection. The issue is whether the EU Commission has the authority to impose its recommendation as a mandatory requirement; and to do that without the input or consultation of the Council of Ministers or the European Parliament.

*But why is the EU Commission so determined and tenacious about this issue? Why don't they just respect the will of the Parliament of member-states which has voted unanimously (except for Malta and Gibraltar) that regulation and taxation of gambling and lottery is a matter of subsidiarity—that it should be decided at the member state level and not at the EU Commission level? Why can't the EU commission just accept that? Their insistence that the EU intervene into these issues just creates a confusing mess. And the alternative, conferring to the member-states authority over all matters of regulation and taxation of gambling and lottery, is such a clean do-able solution.*

**P. Van Baeveghem:** The principle of free movements of goods and services is in their DNA. The EU Commission sees it as their primary mission to push for the imposition of this principle across all economic sectors, and they can't understand that there are compelling reasons why gambling and lottery should be excepted from that rule.

*The member states that comprise the EU have clearly and emphatically expressed their will that gambling and lottery should be a matter of subsidiarity. Why won't the Commission respect the will of its own member states? Shouldn't the principal of democratic power and the rights of the member states over-ride that of free trade and commerce? Isn't this a case of ideological conviction violating all common-sense and respect for what is best for the member-states which are, after all, the whole reason for the existence of the*

*EU? It's almost as if the member-states exist to serve the EU Commission and not vice-versa.*

**P. Van Baeveghem:** It is true that the Commission believes strongly in the principle of free movement of services and that they see it as their mission to overcome any and all obstacles that get in the way of its implementation. Of course, the principle is the basis for a dynamic capitalist system that promotes innovation, economic efficiency and progress, lower prices to the consumer, and ultimately more wealth for society. The principle of free movement of goods and services is upheld by everyone who believes in the efficacy of the European Union. The implementation of this principle across all of Europe really is the reason why the Union was created. Gambling and lottery however have the potential for higher social costs and criminality, and that is why member state governments should be allowed to enforce their own regulatory frameworks. It is for the preservation of what we call Public Order.

*Member-states vary widely with regard to the degree that the gambling and lottery industries are liberalized, opened up to free-market competition. There is not a one-size-fits-all solution when it comes to the preservation of Public Order. Isn't that why it is so terribly misguided to attempt to impose harmonization onto the gambling and lottery industries? Isn't that why the regulation and taxation should be left wholly up to the member-states?*

**P. Van Baeveghem:** Exactly. The market in Denmark is far more free and open than the market in Belgium or Germany. It is fine for Denmark to choose that degree of liberalization. It is not fine to insist that all EU member-states be forced to apply that degree of liberalization. Member-states should be allowed to apply higher standards of protection for the consumer if they choose.

Belgium, for instance, is still quite conservative, but was pressured into opening up the sports-betting market to online betting in 2011. Advertising and promotion exploded and so now GGR in sports-betting

is far higher than it was four years ago. And lottery has been cannibalized as the consumers migrate from lottery over to gambling. This is not necessarily the public policy that our legislators would have chosen if there was not pressure to liberalize the market.

*Advocates for liberalization point out that competition between multiple operators promotes innovation and results in a better product and service for the consumer.*

**P. Van Baeveghem:** But what is a better gambling product? Is it games with a higher payout ratio? Games that offer bonuses to sign up and bonuses to play more and more? That is the kind of innovation driven by opening the markets up to competition. And not coincidentally, these innovations are the very things that cause problem gambling.

The whole argument from the advocates for liberalization is based on the premise that what works for other industries should be applied to gambling and lottery. They contend that the basic rules of market-driven capitalism should be applied to gambling. Free-market competition produces the positive feedback cycle of providing a product or service, driving an increase in consumption which results in economies of scale and competition, which in turn drives down the price to the consumer. As prices reduce, consumption increases further and production costs decrease further, and so on. This is a marvelously effective model if the goal is to maximize production and consumption. But is that necessarily the goal when it comes to gambling? Shouldn't member-states at least have the prerogative to choose a regulatory and taxation framework that does not promote the expansion of gambling, that does not entice their citizens to gamble as much as possible?

*Advocates for legalizing the illegal markets frame the issue differently. They say it is better to tax and regulate than to drive the business underground; and that the tax and regulate model is better protection for the consumer.*

**P. Van Baeveghem:** We have figures that clearly show an increase in problem

gambling since sports-betting was opened up to multiple online operators in Belgium in 2011. It may be the case that the consumer should be given safe and secure gaming options. But nothing promotes addictive gambling more than multiple operators competing for the business. That is what drives payout ratios higher, promotional offers to be more and more enticing, and problem gambling to increase.

To make matters worse, the innovative promotions and higher payouts of the liberalized markets cause consumers to migrate from lottery to the more addictive forms of gambling. This does not protect the consumer. It does drive innovation, enhance the value-proposition to the consumer, and expands the gambling market. But it also promotes problem gambling and channeling economic benefits away from Good Causes over to commercial operators and this is not necessarily a good thing for society.

There will always be illegals operators. Some governments are choosing to legitimize the illegal operators, thinking that it is better to regulate and tax them than to drive the business underground. That can be their choice. But others may choose to fight back and not turn the markets over to these underground operators. They should have the option of choosing that approach rather than being forced to give in to the illegals.

*So what is the status right now? What are the likely outcomes of these debates?*

**P. Van Baeveghem:** In 2010, the member-states of the European Union unanimously requested that the European Commission take an initiative to create mechanisms to enforce the laws against illegal online gambling. The member-states do not need directives on public policy. The need is for methods to enforce existing laws and policies. The Commission, unfortunately has done exactly the opposite. They have done nothing to create an international framework and system to enforce the laws. And instead insist on directing member-states on public policy.

Now, each member-state will have the opportunity to intervene in the procedure. That will take two years which brings us up to the beginning of 2017, when Malta will take over the presidency. It is during this period that we could try to convince the Court of Justice that the European Commission has trespassed its competencies, exceeded its authority.

*But in the meantime, does the Commission recommendation get applied?*

**P. Van Baeveghem:** Yes. The Commission does expect the member-states to

comply with and implement the Recommendation. It will be difficult, though, for the European Commission to force the member-states to take specific actions. The final report on the compliance of the member-states with the Recommendation will be made by the European Commission in January of 2017.

*How will Malta's assumption to the office of affect the proceeding in 2017?*

**P. Van Baeveghem:** One of the most important powers of the EU president is the authority to define the agenda, to set

the agenda. So if Malta decides that they should not consider further initiatives on gambling, they will simply not put it on the agenda. That's the prerogative of the EU president. And EU presidents can also act to slow down or speed up discussions. The president has no constitutional powers to act without the consent of the EU institutions. But the power to set the agenda and control the pace of the proceedings matters greatly when it comes to the practical matter of governing and legislating. ■