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The dispute over who decides gambling regulatory policy has continued ever since the inception of the European Union (EU). Resolving this dispute will go a long way towards freeing up the member nations to allow the gaming industry to evolve and grow and prosper. Recent decisions by the European Court of Justice (ECJ) are affirming the rights of member states to determine regulatory policy as it relates to gambling within their own borders. One of the recent decisions has upheld the injunction granted to De Lotto, which operates the Dutch lottery, that prevented Ladbrokes from accepting bets over the Internet from Dutch gamblers. We asked Tjeerd Veenstra to help us understand the broader implications of this decision. In addition to being the Director of De Lotto, Mr. Veenstra has been instrumental in representing the interests of European lotteries in their fight to prevent liberalization from

upending the stability of the multi-billion euro European gaming markets. As Chair of both the Legal and the Regulatory Committees of the European Lotteries Association, Mr. Veenstra brings an informed perspective to these issues.

A primary purpose for the creation of the EU was and continues to be to break down barriers that impede cross-border trade and free market competition. That is a very worthy purpose and one that has resulted in great economic progress throughout the European Union (that statement holds true in spite of recent setbacks). National governments have asked for exclusions to allow them to impose protective barriers to protect their most favored indigenous industries. The EU Commission and the ECJ have resisted attempts to exclude industries from the mandate to compete in a free and open competitive environment. However, it has always been understood, and even recognized in the original Treaty of the European Union, that gambling is an industry that demands a higher level of control and regulation. For that reason, the principle of “subsidiarity” enters into the process of shaping public policy and regulatory frameworks in Europe. That principle basically states that there are some cases in which the interests of the member nations are best served by vesting regulatory authority at the local, or member nation, level; and that gambling is one such case. Even so, private operators have lobbied the EU Commission to intercede and force member states to reduce regulatory restrictions placed on gambling operators. This dispute has resulted in confusion over who has the authority to regulate the gambling markets. This confusion has made it difficult for anyone to know what is permissible under EU

laws and how the regulatory frameworks will evolve and how they will impact their business strategies. Recent ECJ decisions should free up the member nations to move forward with the business of building the regulatory frameworks that will govern this industry in a coherent and predictable manner. Even if those frameworks are more restrictive than some private operators would prefer, they will at least provide the predictability that private operators and their shareholders need to formulate strategy and investment decisions. The European gambling industry could be poised for a period of expansion that will be as exciting for the commercial community as it is beneficial for those who want to preserve stability and integrity in the markets.

Paul Jason, Public Gaming: *Could you please explain what this decision means to the Dutch gaming market and regulatory framework. To what degree is this issue settled once and for all?*

Tjeerd Veenstra: First off, you cannot make this distinction between the Dutch gaming market and the rest of Europe because we are all in the same boat. The ECJ is the high court of Europe and its mission is to set precedent and provide foundational decisions that apply to all members of the European Union. Its mission is to evaluate the issues on the basis of how we must understand and interpret EU Law and Jurisprudence and make decisions based on that. So this decision doesn't just impact the Netherlands. It is a

tremendous victory for all EU member states. Along with the Liga Portuguesa decision, this case affirms the rights of member states to regulate gaming for the preservation of Public Order. This is a very good thing for lotteries because lotteries depend upon the right of their own government to control the markets. But most importantly, it is a defense of the principle of subsidiarity. That is the principle that EU member nations do preserve the right to make public policy decisions where it makes sense to do so and where it is more effective to enforce it. The European Parliament voted specifically on the question of whether regulatory control of Internet gambling comports with this principle of subsidiarity. The Parliament voted overwhelmingly that regulation of gambling should be decided at the national level, not the EU level. These two ECJ decisions comply with the will of the European Parliament, which is as it should be. We are very pleased with the decision.

You asked about whether this is a final decision that settles everything once and for all. The answer is that these are complex issues that involve more than one question. But the combination of these two ECJ decisions, the Netherlands/Ladbrokes and the Liga Portuguesa decisions, do reflect the will of the European Parliament. There may be additional issues that need to be clarified, and more referrals to the ECJ for the High Court to do that, but the fundamental principles are being affirmed as they apply to the regulation of

gaming and gambling. Keep in mind, though, that does not mean that the national governments do not need to comply with basic principles of fairness and equity when opening up the markets to multiple operators, like France and Italy and others are doing. It just means that the government does have the right to preserve its government monopoly based on the conviction that it is the best way to preserve Public Order and minimize social costs.

The wording of this decision is interesting and telling. It seems like the ECJ is stating that the basis for the decision is the preservation of Public Order; that the decisions on how to best control gambling to minimize social costs and illegality should be made at the national level. It seems, though, that the ECJ is also saying that they are not going to hear arguments about whether a particular regulatory framework, or term or condition, is justifiable on the basis of preserving Public Order; that all that will be left to the national government to decide. That would seem to confer virtually all regulatory power to the national government.

T. Veenstra: I do not think the ECJ intended their decisions to be interpreted in that way. National governments are not entitled to use Public Order to justify whatever regulatory framework they choose. The European Union serves an extremely important function and the Commission and the ECJ are charged with upholding the laws that make that function work. All member states of the European Union have submitted to Article 49 of the European Treaty that affirms that all member states agree to allow free and open cross-border commerce. There are certain areas that are exempted from this free market approach within this internal market, gambling and betting among them. Gambling and betting are specifically excluded from the principle of mutual recognition (this principle states that being legally licensed to operate in one EU member states entitles the operator to do business in all EU member states). This exemption, though, is accepted only on the basis that it is necessary for the preservation of Public Order. That is a critical condition to this exemption. The restrictive policies must serve only the purpose of Public Order and not be imposed as a means of generating more money for the state. In other words, the justification for the preservation of a state lottery monopoly, for instance, can be based on Public Order, but cannot be based on the desire of the state to raise more money. The desire of the state to maintain high profit margins on its gaming monopoly is not an acceptable

reason for being exempted from Article 49 of the European Treaty. Free market competition and free and open trade across national borders are foundational to the purpose of the European Union. It's just that those principles must be balanced against the principle of subsidiarity – the notion that the ECJ and the Commission will respect the rights of individual nations to determine public policies and the laws to enforce them as long as they do not impinge on the basic workings of the EU. When it comes to gambling, the ECJ decisions reflect the commonsensical reality that preservation of Public Order, that minimizing social costs, problem gambling, and criminality, are important objectives and that the ways to accomplish those objectives are best determined at the national level. The ECJ has basically applied the principle of subsidiarity by ruling that the preservation of Public Order as it applies to the gambling industry is best left to the national governments.

Internet gaming, especially as it applies to sports betting, would seem to be an issue that requires an international approach. How do the principles of subsidiarity and Article 49 apply in this case?

T. Veenstra: It might seem like there is a contradiction, but there really is not. The Liga Portuguesa case confirmed very clearly that internet is also an area where the individual member state has full competence. Internet should not be regarded as a complete different activity that therefore requires a different approach. It must simply be seen as an additional distribution channel. It is however more effective with regard to enforcement of Internet gaming regulations and laws to develop a more international approach. But that does not need to conflict with the principle of subsidiarity. Each member state can have its own regulatory framework. The states can still collaborate to create international mechanisms for enforcing their laws even though those laws differ from state to state. Collaboration like that does not conflict with the principle of subsidiarity.

You have a similar issue in the United States. States control gaming policy and regulations. But they need assistance from federal governmental offices with international authority to enforce their state laws. The exact way this is to be accomplished has not been completely decided in the United States. But something like the UIGEA could serve as a perfectly good vehicle to support the rights of each state to have their laws enforced on an

international level. We need to build effective enforcement mechanisms to support our gambling laws in Europe. The Internet has created the need for those mechanisms to be international in scope, which means that we do need to have an international collaboration. But then we come again to the discussion about enforcement. Enforcement is very difficult if you try to establish that on a national level. Enforcement has to be dealt with at the European, or even the global, level. That discussion is now taking place in this working group of the European Council. It's necessary if you want to enforce laws that apply to activities, like Internet sports betting, that cross national boundaries.

Without the recent ECJ decisions that clearly support the rights of member states to create and enforce regulatory policy, it would have been difficult to create an international regulatory framework, wouldn't it? Now that you have guidance from the ECJ that you do have some authority, you can proceed to solve these other problems.

T. Veenstra: Yes, indeed. There's room for us to maneuver now and address these problems. Each ECJ decision clarifies additional points of concern and that frees us up to formulate strategic approaches to solving these problems. It gives all the member nations confidence that the time and money invested in solving these problems will eventually produce something meaningful and positive.

The remote operators, as represented by the European Gaming and Betting Association (EGBA) and other advocates for liberalization of the markets, claim that these recent ECJ decisions are not consistent with previous ECJ decisions. They claim that previous ECJ decisions were more supportive of their goal to open up the markets and the principle of mutual recognition.

T. Veenstra: They are simply wrong. The fundamental principles of Article 49 and subsidiarity and the fact that they can go hand-in-hand together has been confirmed again and again by the ECJ. It has also been confirmed and again very clear that the principle of mutual recognition is not applicable. The source of EGBA's (deliberately created) confusion is that each decision addresses only the specific question that has been raised at that particular time and for a particular circumstance and set of conditions. Their policy is to isolate the Court's decisions to individual member state issues and therefore deny the relevance of the jurisprudence for the rest of the EU. It is always hard to live with legal

facts if you don't like them. Reality however is that we have now up to 15(!) decisions since 1994 by the ECJ. Not one decision has derogated from the fundamentals that I just mentioned. The court has followed a consistent line. That's why our opponents should now stop arguing the obvious and try to live with the legal facts.

It seems that the ECJ has adopted some sort of "clean desk" policy in order to finalize the debate. After the Ladbrokes and Betfair cases, the ECJ delivered the judgment in joint cases Sjöberg and Gerdin on 8th of July. Furthermore we are very recently informed that the Court will give their judgments in the Winner Wetten, Markus Stoss and Carmen Media cases all together on the 8th of September. The year 2010 will be remembered as a very decisive year for our industry.

I find it ironic that, in the gambling industry, Europe embraces the tenets of free-market capitalism more enthusiastically than the U.S. does. There is no ambivalence over who has the right to regulate the gambling markets in the U.S. State governments have that responsibility and authority. They consider the welfare of their citizens, the state's fiscal agendas, and other things. But the rights of private operators to compete in a free and open market-place is not the imposing factor like it seems to be in Europe.

T. Veenstra: Yes. Europe does have different ways of dealing with monopolies and licenses. We have the traditional public operator, usually part of a government department of finance. And then we have private operators which can be non-profit foundations, or for-profit operators like Camelot who submit to strict control by the public authorities. And then there are the Ladbrokes, Bwins, Betfairs who challenge the rights of governments to restrict the way they operate. So there's a complete mix. You can only try to understand this mixture if you know for example the historical background in these states and the sociocultural differences between the different states. That is why it is not always practical or effective to try to impose a uniform policy at the EU level. The same would be true in the U.S. Your federal government does not want to get into the business of dictating regulatory terms and conditions to the states. There is no reason to do that and it would not work if they tried, right?

But it is interesting what you point out. The concept that markets in general should be allowed to operate freely, that governments should not interfere with the free and

open competitive marketplace, is newer to Europe than it is to the U.S. And so perhaps as a general rule Europe needs to be less flexible in how we implement the rules that force everyone to compete without government protection and over-regulation. That is why it is such an important victory for the ECJ to recognize what you have already recognized in the U.S.; that there are many reasons why gambling should be regulated at the nation-state level, not the EU or the federal level.

Would you say that the ECJ will refer any need for further clarification back to the national court level?

T. Veenstra: I would say that. It has been confirmed again that the individual member state has its own responsibility. It is up to the national courts to verify if the national government with its gambling policy acts in line with the conditions that lead to an exemption of article 49 of the EU Treaty (Freedom of services).

What is meant by the distinction between "active" and "passive" sales on the Internet?

T. Veenstra: Operators obtain a license to operate in each country separately. Since the principle of mutual recognition does not apply to gambling, having a license to operate in Gibraltar, for instance, does not entitle you to operate in Portugal. You have to get a license in Portugal and in every nation you want to operate. Remote operators, though, are trying to make a distinction between actively promoting and marketing the service and just "passively" allowing a person from another jurisdiction to place bets. The remote private operators are trying to convince the courts that they should not be prevented from accepting bets from citizens in jurisdictions where they are not properly licensed as long as they do not "actively" promote their website there. But obviously, if you accept bets from residents of a jurisdiction where you are not licensed to operate, then you are in violation of that nation's laws. This distinction between active and passive selling is since this judgment an unnecessary and irrelevant one. Only thing that matters is the accessibility of the website

I guess I do not understand how anyone could make a case that "passive" acceptance of bets from jurisdictions where you're not licensed to operate legally should be allowed. We all know that the technology is readily available to block Internet access by geographical location, so there is no

reason why operators should be allowed to violate the laws of any nation, regardless of whether they actively market the product there or not.

T. Veenstra: That's it. You make it perfectly clear, Paul. It is not a technological problem. There is a lot of Geo-location software that effectively detects where the gambler resides. It is the responsibility of the remote gambling operators to install this software. On the other hand there are more acceptable possibilities for the governments to enforce their restrictive gambling policy. In the Ladbrokes judgment it has been declared that website blocking is an indispensable element of the protection with respect to games of chance and is therefore not disproportionate.

I noticed that the EGBA is protesting the Czech Republic's decision to prohibit advertising and marketing of foreign unlicensed Internet gaming operators. It seems like the EGBA is still trying to push an agenda and strategy that the ECJ has made clear will not work.

T. Veenstra: It is sometimes hard to follow their reasoning. In the last judgment of the ECJ about the Sjöberg and Gerdin cases it is said that prohibition on advertising of private gambling operators established in other member states is fully compliant with EU law. Discussion closed!

It seems to me that these decisions empowering the national governments will ultimately be best not only for the preservation of Public Order. It will also be very good for the industry, even remote private operators. I would propose that a regulated environment will be good for commercial operators and suppliers because they will now be able to project and predict how the markets will evolve.

T. Veenstra: That would be true as long as these operators are all willing to abide the law, the rules and regulations, and pay their taxes. His will be tough on them because they don't like restrictions and paying taxes. To give you an example, the issue was even discussed in European Parliament because the remote gambling operators build their businesses on sports betting but are not contributing to the financial support of sports infrastructure. They made money off of sports, their businesses could not even exist without organized sports, and they paid nothing in return. Lotteries in Europe typically pay a large percentage of their revenues to support sports, adding up to more than 2 billion euro per year that facilitates on a long term basis the sports infrastructure in Europe. To illustrate the dif-

ference: the more than 250 remote gambling operators that have a license in Malta altogether pay approximately 19 million euro in gaming tax per year. The National Lottery of Luxemburg, a small state with a few hundred of thousand inhabitants pays more than 20 million euro per year.

There was another issue in France. The operators complained that it was unreasonable for the French government to require the operators to locate their transaction-processing servers in France. How are these disputes being resolved?

T. Veenstra: The national government is obligated to treat everyone fairly and equally. But the national government does have the right to determine tax rates and other terms and conditions and if the company wants to be licensed to operate legally then they must comply with the laws. They must pay their taxes and meet all the terms

and conditions as determined by the national government.

The future is looking bright for the beneficiaries that lotteries support. It is a nice by-product of Public Order that a system that generates funding for good causes is allowed to continue to operate.

T. Veenstra: Exactly. The present system benefits society in both ways. It enables the regulations that minimize social costs. And it also gives the profits back to society. How can you do better than that?

I just read this morning about a three and a half year old case against the organiser of a Texas Hold'em poker tournament in the Netherlands. The criminal court of The Hague ruled that poker cannot be considered a game of chance under the country's gambling laws. What are the implications of the ruling that poker is a game of skill? Does that mean that organized, casino-like poker

playing facilities are now legal in Netherlands? Is Internet poker now legal, since it is not considered to be a game of chance?

T. Veenstra: A very typical judgment of a lower court that has to and will be challenged in an appeal. It is striking that in the oral hearing the Ministry of Justice referred to a study of the Dutch Gaming Board. That study explains that in 35 European countries poker is defined as a game of chance. The judge however declares that the extent of support for this opinion does not deliver the (scientific) proof for rightness of the opinion. Of course this judgment will create some confusion and suppliers will take advantage of this situation. But there will be an appeal. Furthermore the Minister of Justice has explained that he will sustain in his restrictive policy with regard to poker. ♦