

Public Order and European Jurisdictional Issues

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Philippe Vlaemminck

Paul Jason (PJ): *We want to get your insight and perspective on why lotteries should try to work together more to accomplish their shared objectives of preserving the right to control and regulate gaming within their jurisdictions and why creating an international legal approach is such an important part of this effort.*

Philippe Vlaemminck (PV): That's a very big question going back almost 14 years to the first court cases. There have been a range of cases in the European Court of Justice which is also the

court where national courts of member states can refer a case when there is a discussion of the interpretation of European law. Most of the cases related to lotteries and gambling that have been addressed were referral cases in which European courts were requested to provide an interpretation in the light of the facts of the national case. In all of the cases since 1994, with the first Schindler case up to the most recent case, the court has continuously said that in the EU you are entitled to restrict gambling services and the free movement across the different states of the EU only for reasons of 'public order.' Public order is a legal concept that allows states to limit trade for important societal reasons which include prevention of crime and fraud, these kind of things. In international law and the WTO you find also the concept of public order, for example in the case between Antigua and the U.S. wherein the U.S. could invoke the exception of public order to stop cross-border supply of internet gambling services from Antigua into the territory of the U.S. So, public order is a concept which is an exception whereby you say in order to defend society against the harmful impact of gambling, against potential criminal involvement like money laundering and other things, we as a state are entitled to regulate and restrict it. Without this public order reasoning, you cannot stop cross border supply of gambling service. It's actually the same in the U.S. where the different states organize gambling within their own jurisdiction and prohibit cross border supply of gambling. The different federal mechanisms used to enforce this and the reasons behind it are also public

order. Public order is the concept that supports the rights of jurisdictions to regulate gambling within its borders.

What the court has said from Schindler down to the most recent judgment in Gambelli is that you can stop cross-border supply from one member state into another member state based on public order, namely to prevent fraud and to defend consumers against the harmful effects of gambling. The core question being asked by the courts, since 1994 right up to the present, is... how do we need to understand this public order reasoning as it applies to gambling? For instance, if a lottery operator is in fact aggressively promoting lotteries, is that still defensible by justification of public order? The European Court of Justice says that your global policy on gambling must be a systematic and coherent policy whereby you address all the different aspects and whereby at the same time your policy must aim to what the court is calling, and I quote the court, "at a genuine diminution of gambling opportunities." That is the latest in the court jurisprudence. That is what the court said in Gambelli. In Italy they said if the government is not pursuing a policy which aims at the genuine diminution of gambling opportunities then you are not entitled legally to invoke public order as an exception. Understand that the wording is very important. The wording is "aiming at genuine demolition of gambling opportunities." The whole purpose of your legislation must be that you are trying to limit gambling, you are trying to channel gaming desires within strict limitations and your first objective is not to make money but to prevent the harmful effects of gambling.

PJ: *It sounds like the concept of public order doesn't speak to the aspect in which profits generated by gaming might better serve society by being channeled into humanitarian causes instead of being thrown into the free market private enterprise system.*

PV: Finland has a state monopoly to operate slots machines. The Court was saying that this is O.K., that the way Finland is regulating is appropriate. Let's say you have a choice between a private market whereby you impose taxes to limit the impact or a market whereby you allocate the entire profit to the state. It is clear that the second option is a better solution to limit the negative impact of gambling because if you monopolize it then you are not creating a competitive environment and if there is no competition between operators then you know there is much less risk that the operator will try to expand the market. A

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monopoly is normally an inefficient way to manage economic activity because it reduces the availability of products and services for the consumers. But as it relates to gambling, the effect of diminishing economic activity is actually a benefit to society.

PJ: *That sounds quite logical. Is that the analysis that you think the EU Commission will take when looking at the Germany situation?*

PV: There is a second case in the EFTA Court, namely the Nordic Ladbrokes case. Where the question is – is it appropriate to allocate the profits to whoever controls the gaming operations or is that indeed not the right way? That question has not been addressed properly yet. Germany was indeed obliged by a ruling of the Constitutional Court to take necessary measures to reduce gambling. According to the Constitutional Court the way the different German Länder are organizing it right now is not in line with the jurisprudence of the European Courts; however, the Constitutional Court did grant the states some time to take the necessary legislative steps to do so. One of the steps that has been taken by the different jurisdictions is to decide where is the most risky part of gambling... internet gaming. It ended up by prohibiting it so the most negative side of gambling would indeed be stopped. Whether that is a good solution is still something that one has to evaluate, because total prohibition may not really lead to less gambling. My view is that it in fact does not lead to less gambling – instead it leads to non-transparent gambling and then to illegal gambling. If you prohibit internet gaming as a whole then you will not implement transparent controls, so you in effect oblige the people who want to gamble through the internet to go to the illegal world. My view is that it is much better to make a government controlled internet gambling offering within the jurisdiction with all the necessary controls and limitations. That is the case in France where only at La Française des Jeux and PMU are entitled to go on the internet and sanctions are imposed on all of the other people. In the Netherlands only the state-owned casino operator, Holland Casino, which has a monopoly on casino operations, is also entitled to go on the internet with very strict rules within a transparent way. And the German solution... you prohibit internet gambling as a whole.

PJ: *This question relates to the UIGEA, which seems to effectively cut off the supply but leaves important questions unanswered. Do you have any examples that would illustrate how it might not be a good thing to do one side of the equation, the supply side, without coming to grips with the demand side of the equation.*

PV: The UIGEA does say that you can organize internet gambling within a single jurisdiction or state as long as you set up tools and techniques to prohibit minors and people outside your jurisdiction from playing. This is at least a very good beginning. It does not positively provide all the answers, but at least it tells the states that if you want to organize it then these are the borders, regulate it within your own jurisdiction. That is something very good and something we are missing in Europe. Stay within your own borders. UIGEA does not positively address demand because that has to be covered state by state. How does each state in its own social, economic, cultural and political environment want to address this?

My preferred solution is that indeed you organize it as a monopoly.

Let's make sure games are made available on the internet through the state controlled or owned monopoly operators. You have to make the assessment in your own jurisdiction as to what kind of games people are indeed playing the most and how to regulate them properly. In the Netherlands they said that the only people we will allow to offer internet gambling is the state-owned casino, not the state lottery. In France, the state will offer internet gambling. In Austria, the state lottery will offer gambling. There are indeed different solutions. In Finland, Veikkaus has been entitled for many years to offer internet gambling, but they have properly regulated it. People who want to play must physically prove their ID – prove who you are and that you are Finnish – then pre-register to play. They also put limitations on how much players can have on their internet gambling account, how much they can play each week, and they receive warnings if they play too long. There are many ways to properly regulate. But it is important to at least make an offer that responds to the demand.

PJ: *Will the European Commission come up with a single set of rules as it relates to the control and regulation of gaming in all the different jurisdictions? Or will this be an ongoing process of dealing with each case separately?*

PV: Let us be clear that there is no political consensus at the moment inside the EU because there are some jurisdictions like UK and Malta who believe that the internet is a free world and therefore should be freely available all over the world as long as it is properly controlled in the jurisdiction where the operator is licensed. That is conflicting with the ideas of France and Finland, the majority of the European states and the United States. They hold that just because you are regulated and licensed in the UK should not mean that you are allowed to offer your games throughout the entire global world. We don't know today what the European commission will do. What we do know is that following a study by the Swiss Institute of Comparative Law, which is 1500 pages from every state in Europe, they came to the conclusion that there are restrictions everywhere. They also understand that in every state the restrictions are different. You cannot say that France is equal to Belgium and they are both the same as Luxembourg. Every state has different restrictions which are historically linked. The result is that the Commission, and especially the commissioner in charge, Mr. McCreevy, is saying that it is far too difficult to get a political consensus, so currently it is left to the courts to rule on it. I think that this is not a responsible way. A regulator, a legislator, needs to intervene when there are a number of court cases indicating that this not a single dispute but an issue that involves all the member nations and therefore requires an overall discussion of the market. We cannot continue to live in an environment where we run from litigation to litigation. We need to have a stable legislative environment in which we look not only at questions of freedom of services but we also look into every single aspect of gambling.

PJ: *Is there any progress towards creating an international legal approach to resolving these issues?*

PV: I think there is a need for that. All people who are looking at this in a serious way admit you cannot regulate the internet in your own jurisdiction alone. You need to have a global view whereby you come to agree-

ments on an international level about how to tackle specific problems. One of the major problems in internet gambling is that many of these supplier companies are operating from off-shore jurisdictions. How do you stop that? How will you stop criminal organizations from setting up internet gambling sites which serve as money laundering devices? That is one of the issues that the U.S. Congress mentioned in the UIGEA, where they suggest that we look within the context of the Organization for Economic Co-operation and Development (OECD) and more specifically within the Financial Action Task Force (FATF) which is the device within the OECD that looks at money laundering. The U.S. has recognized that if you want to tackle money laundering, which is very important in the context of internet gambling, you cannot do it on your own. You must do it within an international context like the OECD.

PJ: *Is there any likelihood that it will be done that way?*

PV: I think so. There are numerous European states including France and Germany as well as organizations like Europol, the European Police Authority, who indeed believe that money laundering is important in relation to internet gaming. Europol acknowledges in its latest report on organized crime that there is an increasing involvement of organized crime in gambling. All criminal aspects must be tackled and everybody, including the U.S. authorities, must understand that internet gambling is used by organized crime as well as terrorist organizations to fund their operations. That's why international cooperation is so extremely important.

PJ: *So it's a realistic possibility that France and Germany will work with the U.S., and perhaps other countries, to get control of internet gaming?*

PV: Yes, I think so. I think especially today because of this battle that is continuously going on whereby the bookmakers are trying to open up the markets. The political feeling is growing that we need to regulate that and therefore we need to regulate it at the international forum where we can combat the harmful effects of uncontrolled gambling.

PJ: *The conflict between some German states, like Saxony, which are imposing bans on certain kinds of betting and the Commission that has told German states that they have to open up to more of a free market – how will this unfold?*

PV: Let me be very clear – there is disagreement between European Commissions Services and some of the major member states. And it's not just about Germany. The European Commission disagrees with France and the way France wants to organize it. But that is a typical political situation. I would say it will probably be a very hard battle, but knowing the way that both France and Germany and other states are looking at it I think at the end of the day we need to find a common solution. The European Commission has to understand all of this. To understand this better, we all need to cooperate and study this more. I think the EC does not completely and fully realize all of the negative impact and effects that gambling can have. That's indeed a question of understanding each other more and talking with each other more and embracing a more international, cooperative approach.

PJ: *You have said that it is important for professionals in the lottery sector in the U.S. to invest more time to understand what's going in Europe and visa versa.*

PV: Everybody has to cooperate because it is an international problem. It is a problem that is affecting all democratic societies.

First, we are facing international crime and terrorism and internet gaming is abused by those organizations so we need to co-operate and work together to fight it.

Second, even outside the framework of international crime, gambling remains an abnormal activity. It remains a 'special sector,' an activity that can hurt social life and society. Too much gambling can destroy family life, can destroy employment, and can have all varieties of negative societal impacts. That is not the way we ethically and morally want to address our life. We need to find solutions whereby we offer first of all the least addictive games, then to fulfill that demand, the need that people have to want to play, but to do it in a way that ensures that public operators are ethical, that minimizes gambling problems, and that we redistribute back into society what people are losing in gambling. An important benefit of gambling, even if it is not the main objective, is that we organize things so that the money is brought back to society for good causes and humanitarian purposes. I think this is an important aspect that has to be taken into consideration.

The third aspect is that we need to learn from each other because we are all looking for solutions and all of us have part of the knowledge, but not all of the knowledge. In a democratic society knowledge is not based on the knowledge of one single person but upon our ability to communicate and share knowledge with each other. Your magazine and others like it are important tools that help to develop knowledge and awareness in a democratic society. That communication is what can lead to a better understanding of the problems, the ways to regulate gambling, and finding technological solutions between different stakeholders, the beneficiaries, the society, the regulator, the operators, the suppliers – all of them have to be involved in that discussion on both sides of the Atlantic. In the U.S. you can also learn something in particular. We in Europe have been facing this battle for a long time. The U.S. is surprisingly only facing this battle recently, namely in the WTO where finally the public order concept in international law was helping them stop the supply from Antigua into the U.S. The WLA, especially former President Reidar Nordby and myself have worked together with USTR in Washington to support the U.S. government in its dispute with Antigua. I think that it is extremely important that European lotteries and the WLA continue to help the U.S. in that battle.

The U.S. could face an internal battle that has not been started yet, and that is based upon the (Dormant) Commerce Clause discussion. The impact of the Dormant Commerce Clause is similar to the European discussion on the freedom of interstate business that can only be limited for reasons that are necessary and proportionate. You must have serious reasons to limit the interstate business and those reasons must be necessary, must be required by the circumstances and must be appropriate. The Dormant Commerce Clause has not been applied to gambling, but it has been applied to the supply of alcohol whereby this reasoning has been elaborated. Maybe European jurisprudence and case history can provide the U.S. with some insight into how to address cross border or interstate business issues. Perhaps in this debate over the constitutional freedom to regulate things within your own state the U.S. might be able to learn something from the way these problems are being dealt with in Europe. On the other hand, the U.S. has taken an incredible step in the right direction with the UIGEA and this can definitely help Europe. Interaction, communication, and mutual support are critical in my view. ♣