



The Lotteries' Position Under EU Law: Times, they are a-changing.

By Philippe Vlaemminck, Partner, ALTIUS (Philippe.Vlaemminck@altius.com) & Bart Van Vooren, Senior Associate, ALTIUS (Bart.VanVooren@altius.com)

www.Altius.com



Lotteries are on the eve of a potential legal and regulatory watershed, which will require a collaborative effort of Lotteries within and beyond Europe in order to appropriately address the challenges which this development will pose to the sector.

In the Member States of the European Union, Lotteries have traditionally enjoyed, both in law and fact, a position which – if not privileged – has been distinct for many years if not centuries. Taking a slightly generalized perspective, this privileged position has been derived from a social contract whereby gambling was considered as a darker aspect of the human condition which – if not fully prohibited – required canalization towards legal and entertaining offers, and insofar as gambling was considered socially permissible and thus legally accommodated, that proceeds should support socially beneficial objectives such as charities, research, sports, the arts ... Legally then, this specific position was entrenched, sometimes as a monopoly, and in other cases certain exclusive rights were accorded to Lotteries in terms of position on the market, offering of games, and so on, but always under strict governmental control.

In the early 1990's, when the European Union pursued the completion of the single market, this position was challenged by the discipline of the EU freedoms which required that no obstacles be erected to – in this case – the free movement of gambling services between the member states of the European Community (now EU). However, the Treaties then, as they do now, permit that Member States impose certain exceptions for reasons of maintaining public order and/or consumer protection. The process that ensued is essentially one whereby the Court of Justice of the EU in Luxembourg over the course of two decades, progressively hammered out the framework within which Member States were permitted to organize their gambling policies within strict conditions. The first ever such judgment concerned Lottery tickets being sold between the Germany and the UK. In Schindler – where one of the present authors acted as agent for an EU Member State – the CJEU drew up conditions under which Member States could organize a distinct position for lotteries. Thus, the Court related this special position of lotteries to the public order exception to free movement of services. In doing so, the Court thought it relevant, that



Lotteries make a significant contribution to social works, charities, sport or culture. However, it was not sufficient to justify limiting the free movement principle, as the Court essentially found that merely seeking to fill Member States' coffers cannot justify limiting the fundamental principles of the European Union (free movement). Thus, alongside the special position of lotteries, there must be a dominant dimension of consumer protection, fighting crime or preventing fraud on order to justify any derogation.

That is the regulatory reality under which Lotteries operate today, and the most remarkable aspect is indeed that the EU legal framework in gambling was essentially judge-made. National legislators and governments drew up their national policies; but any policy-engagement between the national level and the EU level, occurred in Court. This meant that in terms of political process, especially in the early years, the European Commission, the Council and the European Parliament remained relatively inactive. Times, they are a-changing sang Bob Dylan, and indeed, for Lotteries, a huge shift is occurring. The legally distinct position that Lotteries have held in EU Member States faces a significant regulatory risk from the direction in which EU Law is presently moving.

In our opinion, the position of Lotteries will be (positively or negatively) affected by a dual judicial and legislative strategy which is being pursued by the European Commission: On the one hand, there are infringement proceedings launched by the European Commission against the gambling policies of numerous EU Member States to remove what are alleged to be unacceptable barriers to free movement. On the other hand, simultaneously (soft) legal instruments with a very weak and low level content are being published to organize the pan-EU market of games of chance in a fashion that is not unbeneficial to purely-for-profit private operators who have no affinity with the social contract of which Lotteries are an integral part.

The reason we call this a regulatory strategy on the part of the Commission, is based on the present authors' experience in other EU regulated markets: for example, the EU common market in aviation (and notably the extent to which member states were able to regulate relations with third countries in civil aviation) was proactively shaped by the Commission through exactly the same dual strategy: between the end of the 1990's and the early 2000's, the Commission published several non-binding documents favouring integration of the EU market to the detriment of national flag carriers. These were then followed in 2002 by a wave of nine infringement cases. The Member States partially won those cases, yet the fact that it was only partial was sufficient to change the political direction towards a harmonized EU approach. A similar dynamic can be observed in the regulation of gambling services: several non-binding documents have been or will be published on how regulation should develop at the European level, and seven infringement proceedings are being pursued against the Member States, while others are in the pipeline. While evidently speculative, there should be little doubt that the final objective of (at least parts of) the European Commission would be to propose an EU

level legislative instrument on gambling services. Such an instrument would constrain Member States' freedom to organize their respective markets, and it is far from certain that the special position of Lotteries could be safeguarded in such a Directive.

To the extent that Lotteries do not take proactive action to safeguard their position in a process that will take us from judge-made law to the EU legislators, this creates both risk and opportunity for the public gaming sector. If well-tackled, it may strengthen the position of Lotteries at a pan-European level, but if the public gaming sector fails to grasp the gravity and momentum of these possibly tectonic shifts, the result may be the loss of a privileged position thereby deflecting proceeds from philanthropic objectives to solely for-profit entities. Thus, inaction is not an option, but what must be done?

Within the confines of this contribution, we can at least point to the following crucial element: In order to counter the threat posed to the position of Lotteries from an overly enthusiastic Commission blindly pursuing the economic interests that underpin the EU Treaties, one important tool exists for Lotteries and the EU Member States in which they are based. Namely, the Council of Ministers (an institution of the EU that gathers the responsible ministers of all Member States) has in fact expressly agreed that Lotteries are to be recognized as distinct. Specifically, in December 2010 this institution unanimously adopted "Council Conclusions on a European Framework of gambling and Betting," expressly recognizing the special position of Lotteries as regards their benefit for society and in doing so, it explicitly requested that discussions at EU level have to take

this into account. What many forget, is that this is not just a political declaration: It is consistent case-law of the Court of Justice that this legally binds the direction which EU policy must take. This is not all that surprising: it is the Member States which have conferred certain powers upon the European Union, and hence they must have some say in what can be done with those competences. Thus, whereas it is the role of the Commission to safeguard that free movement principles are respected as "Guardian of the Treaties," the Member States are the "Masters of the Treaties." When they unanimously state that that Lotteries are 'special,' it is self-evident that this must indeed be taken into account in "all discussions at EU level" – including any initiatives of the European Commission.

This is, of course, but an abstract legal-policy consideration which should shape the forthcoming debate at EU level. The onus now lies on all Lotteries to individually and in a concerted effort counter the potentially negative effects of the aforementioned EU regulatory developments, and generate opportunity where it can be found in the future shifts in the applicable regulatory framework. Most certainly, Lotteries and the EU Member States will have to proactively integrate the aforementioned EU-level consensus on the distinct position of Lotteries and shape, influence and direct initiatives within the EU institutions. In order to do so, a concerted effort of national, transnational, and international levels will be crucial. To close with our reference to Bob Dylan's landmark album: when times are changing, he sang: you have to start swimming, or you'll sink like a stone. ♦