



## A risk-assessment of Lotteries' position under EU law: Imagine a constitutionally entrenched future.

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In our previous contribution to this magazine, under the title “A risk-assessment of Lotteries' position under EU law: Times, they are a-Changing,” we stated that in our opinion, Lotteries are on the eve of a legal and regulatory watershed which will require a collaborative effort of Lotteries within and beyond Europe in order to appropriately address these challenges.

In a nutshell, we argued that in the Member States of the European Union, Lotteries have traditionally enjoyed, both in law and fact, a position which has been privileged for many years. Taking a slightly general perspective, this 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; 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. We then signaled that the position of Lotteries will be (positively or negatively) affected by a judicial and legislative strategy which is being pursued by the European commission, and which is likely to lead to a uniform regulatory framework for gambling services in the EU.

Since it is unlikely that the development of an EU regulatory framework will accommodate the distinct position of Lotteries, in this contribution we propose a new legal approach which will be presented to the European Court of Justice over the course of the next one-two years. The objective of this novel “line of defense” is to steer the above development in a more advantageous direction for actors in the Public Gaming sector.

It is well-known that presently, at EU level the legal framework for gambling has been solely “judge-made law” through a long string of case-law spanning more than 20 years. The first judgment, in which one of the authors acted as an agent for the Belgium government, was the Schindler ruling. Here the Court stated that “it must not be ignored that, even though this is not an objective justification, lotteries significantly contribute to the financing of non-profit activities of general interest, such as philanthropic works, sport or culture.” The new line of argument which we propose draws on the fact that this express recognition has gotten somewhat lost in translation over the years of developing the jurisprudential legal framework. Given this reality, and given the fact that now two dozen judgments have created a well-established regulatory context for games of chance, it is necessary to “go back to basics.”

This is achieved through the notion of “EU public order.”

Normally, in jurisprudence of the Court, the distinct position of Lotteries through a monopoly or otherwise, is viewed as an exception to the essentially free market rationale of the EU treaties which is to be interpreted narrowly. Indeed, economic freedom is the general principle, and any exception for Lotteries must be justified for reasons of national public order

requiring a distinct position. The problem with this approach is that the position of Lotteries, and their support for good causes, is never expressly recognized within this notion of national public order. Indeed, their distinct position is at most viewed as a deviation from the norm, something negative but reluctantly accepted as a consequence of historical development. The notion of EU public order aims to change that legal reality. The objective is to utilize this concept to legally accommodate an ethical and social vision of the position of Lotteries in the societies of the Member States, and to elevate it at EU level so that it is given a foundational position within the EU Treaties alongside the principle of economic freedom – and not merely an exception to it.

How can we achieve this? In essence, on the basis of Schindler and case law thereafter, the argument goes that the Court has given space for the fundamental societal consensus which exists in the legal orders of the Member States as regards lotteries. It has done so in accordance with Article 6 of the EU Treaty, which states that general principles of EU law can be recognized insofar as they emanate from the common constitutional traditions of the Member States. On that basis, we argue that the aforementioned notion of EU public order displays a dual character which is a reflection of the so-called Unity in Diversity of the national and European legal orders. To develop this argument we draw on the federal structure in the United States, to which the EU in part can be compared.

Within the EU public order, unity-in-diversity means the following: From the perspective of Unity, there is the wide consensus on the special position of lotteries which emanates from the constitutional and social traditions of the Member States, where a strong connection is forged between the proceeds with an origin in an activity which is ethically questionable, and the support for societally and ethically desirable objectives. From the perspective of Diversity, there is the fact that, since the EU ordre public is the emanation of the national constitutional traditions, that within this EU legal framework it is for the Member States themselves to hammer out the details of their gambling policies. Within this European concept they themselves must set the level of consumer protection, and they themselves flesh out the connection which is made between games of chance, their proceeds and their goals, all in line with their cultural, ethical and religious, national orders publics.

Without any doubt, the aforementioned line of reasoning is relatively abstract in legal terms. Nevertheless, its real-world impact is potentially significant: if recognized it would permanently buttress the legally distinct position of lotteries in the judge-made law of games of chance in the European Union. Lotteries' distinct position would not be an exception – but part and parcel to the internal market itself. Second, should there ever be legislative proposals coming from the EU institutions, this judge-made law will not be simply swept away. Rather it will build on the framework as set out by the Court. Therefore it is crucial that by the time such regulatory developments become reality, the special position of Lotteries has been expressly pronounced to exist under EU law. Thus, with this legal argument, we wish to make a qualitative leap towards legally entrenching the distinct position of Lotteries in EU law. Whereas last time we ended our article by referring to Bob Dylan's landmark album: when times are changing, where he sang: you have to start swimming, or you'll sink like a stone; now we can refer to 'Imagine' by John Lennon. ♦

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