

Is the Current Concept of “Public Order” Adapting to the Changing Gambling Environment?

By Philippe Vlaemminck



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In different places of the world, one can see the legal battles surrounding lotteries and other forms of gambling increasing exponentially. Internet has certainly been one of the major reasons for this battle. Indeed, Internet has created an enormous new world for consumers around the globe where they can meet, learn, buy, play...and gamble.

Many jurisdictions, especially in the Western hemisphere, refused to set specific legal borders to the Internet environment. Ubiquity is the basic word that lawyers tend to use to circumscribe that there is no clear connection with classic legal concepts and systems.

Does it mean that there are no rules, and that governments can no longer regulate? Certainly not, although some believe that Internet did create a borderless world that governments cannot control. Consumers indeed are benefiting from fewer constraints on the Internet, but more risks at the same time. The risks are largely due to the fact that the absence of constraints for the consumers, do concurrently and equally create fewer constraints for the organised crime.

In recent reports on organised crime, Europol explicitly mentioned that there is an increasing involvement of organised crime in legal gambling. As such, this must provide enough reasons to consider further and stronger regulation of gambling services which are, thanks to the Internet, more largely available than ever before.

Where gambling is regulated, the number of operators and what they are permitted to offer is limited. Under rules of international law, like under European law and US law, the arguments for defending such structures are driven by original concepts and views on ‘public order’ as existing in those jurisdictions. We need to ask if these concepts have changed over the recent years. Has technology changed how these concepts should be applied to the gaming industry?

Although the views on public order can be different from jurisdiction to jurisdiction, the underlying reasons and the limits of the concept are becoming increasingly international. Case in

point: In the Antigua case, the USA invoked for the first time the GATS public order exception under art. XIV GATS in relation to Internet gambling.

The only point of reference with regard to cross border supply of gambling services was and still is the jurisprudence of the European Court of Justice. In the European Trade Barriers case introduced by the British Remote Gambling Association against the United States, European Lotteries insisted upon the fact that the USA was defending the same “public order” principles as the European Member States. According to European Lotteries it could not be in the interest of the EU to start a new WTO dispute on Internet gambling services against the USA, only because the USA was applying its laws against illegal remote gambling operators from the UK. It is therefore useful to look a little bit more in detail at how the public order principle and the right

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to invoke it has developed over the different gambling cases that the European Court has addressed over the last years.

Reasons of public order can only be used when the measures intended to be in place for such reasons are strictly necessary for the aims pursued. In the Gambelli case the European Court narrowed this down by stating that only policies aiming at a genuine diminution of gambling opportunities fulfilled this criterion. Later, the European Court broadened the concept in the Placanica case (which was afterwards endorsed by the EFTA Court in Ladbrokes) by declaring that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming (Placanica ruling) or highly addictive games (Ladbrokes ruling) to activities which are authorised and regulated.

Today however, as a result of further legal battles, the concept of public order is still questioned. Is public order opposed to multiple operators and operators offering services on a cross border basis? Is it possible to have different systems, a monopoly for lot-

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teries, licenses for casinos, etc... co-existing? Can a monopoly be operated by a private operator? All those questions are currently emerging through different court cases.

Private operators do believe that the Placanica judgement opens the road for a number of licensed operators rather than monopolies. In new cases they do challenge the way that the single or multiple licenses are allocated and require that the license allocations follow transparent and non-discriminatory procedures.

In the European Parliament, a group of Members of the European Parliament is looking for a study to find out whether prohibition and/or restrictions at the national level could not be reeking for a competitive environment. The European Commission endorsed this. At the other end one can find anti-trust authorities questioning the operational models based upon public order and insisting that gambling services operate under full competitive conditions.

To get a better understanding of these developments, the French Presidency of the European Council invited all EU Members States to participate in a Working Group to address mainly the regulatory problems surrounding remote gambling.

At the same time, the discussions between the USA and the EU on the impact of the UIGEA on the British remote gambling operators (members of the Remote Gambling Association) will continue. According to the RGA, the USA enforces its laws in a discriminatory way. For this reason they request that the criminal actions initiated against their members be discontinued. Such demand can fundamentally undermine the public order model promoted by the EU Member States and the USA. For this reason, European Lotteries, supported by the WLA and NASPL, are vigorously opposing the RGA request. Still, the outcome is far from certain.

Looking at all these developments one can only conclude that it could be necessary to revisit the current concept of public order in gambling to provide adequate answers to technological changes. It is this challenge that governments all over the world are facing.

The International Association of Gaming Regulators is meeting in Rome in September 2008. Internet gambling is on the agenda. The undersigned is invited to chair this session. Let's see how regulators come to terms with it and whether they can propose solutions to their respective governments. ♦

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