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The legal and political battlefield shifts from Brussels over to the capitals of the EU member states

Paul Jason:

Commercial online gaming operators have brought countless “infringement cases” which call upon the EU to force the member-states to open up the markets and allow multiple operators to compete for the business. The European Union Commission issued a statement in December that they are not going to hear any more of these infringement cases, at least for the time being. Is this a win for “subsidiarity” (the right of member-states to decide their own regulatory framework)?

Philipp Vlaemminck: The decision of the European Commission to not proceed further with infringement cases does shift the regulatory authority back to the national capitals. It reflects an understanding on the part of the European Commission that regulation of gambling and lottery is a very sensitive and complicated matter that should not be undertaken lightly. Lottery is a multi-billion euro sector with profound economic and non-economic implications for all stakeholders, especially the good causes supported by Lottery and government lottery operators and the general society. Any regulatory decisions on the part of the EU Commission also needs to consider the social costs associated with gambling.

Combine these issues with the further fact that each member-state has its own gambling culture and its own public policy priorities. The EU Commission is implicitly acknowledging that, while we defend a number of universal principles, there is no uniquely correct regulatory structure that should be implemented by all member states. That is

what makes it so difficult for the EU Commission and CJEU to adjudicate legal and regulatory issues on a member-state level. That is why the member-state is in the best position to decide the regulatory framework that will serve its citizens in the best way. And so the EU Commission is wisely declining to proceed further with infringement cases for the time being.

We should acknowledge that the EU Commission is not making a definitive decision that they will never take cases forward to the CJEU brought to protest inconsistent regu-

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latory constraints in the future, or that all regulatory issues are now left to the member-state to decide. I do think the EU Commission is concerned that actions on their part may not contribute to the healthy and stable development of the market. And member-states have demonstrated competence in their ability to regulate their own markets.

It should be emphasized, though, that the CJEU has made crystal clear that the legal basis for regulations that constrain free and open cross-border trade is to preserve “Public Order”, i.e. protect the consume, minimize problem gambling and social costs and combat crime. Constraint of trade that has as its sole purpose to favor an economic sector, including the beneficiaries of lottery funds, is as such not fully consistent with EU law.

It seems like maybe it was a misguided strategy on the part of private operators to bombard the EU Commission with infringement complaints. Maybe it caused the Commission to recognize the folly of trying to impinge on the role of the individual member-states to determine their own gambling regulations?

P. Vlaemminck: I would agree that the multitude of cases being brought to the Commission made it even more clear how complicated and nuanced the issues are, and how they vary from case to case and jurisdiction to jurisdiction. It is the EU Commission’s job to adjudicate issues that affect multiple EU member states and/or important questions of EU law. The court’s decisions that apply to the specific circumstances of a singular case are not easily applied to other situations. The EU Commission was finding itself getting sucked into a black hole of never-ending litigation with little likelihood of meaningful resolution.

We are also living in a time when there are many profoundly crucial issues being addressed. The time and resources of the EU Commission are more taxed than ever, and the Commission wants to avoid rendering decisions on less consequential matters that might create discord with its members when it comes to more important. Issues like BREXIT and immigration and EU position as regards to external affairs like the Middle East and Russia logically take precedence over gambling and will require the full attention of everyone.

Further, there is already a large body of European Court of Justice case law that makes

clear what member states can do to stay compliant with EU laws. At this point, it is quite logical that the EU Commission refer the issues back to be decided by the national courts. The European Commission was never obliged to accept these complaints, and now they are choosing not to accept them.

Maybe the U.S. federal government will take a similar view towards allowing the states to decide their regulatory stance on online gaming and sports-betting?

Many European countries have liberalized their regulatory systems not because they wanted to but because they felt like the EU Commission would bring them to court if they did not. Is it possible that European member-states might re-institute some of the regulatory constraints? Or is it hard to put the toothpaste back in the tube?

P. Vlaemminck: The EU Commission still requires compliance with EU laws. The laws do allow for the monopoly model as regards to Lottery and also other games of chance. But it must be for the purpose of consumer protection and/or fight against crime, and the application of laws must be consistent with that purpose. If turnover is growing rapidly, or if the incidents of addictive gambling are rising, and the economic benefit is being channeled towards a particular sector, then the country may still be sued for an illegal application of the monopoly model.

France and Belgium and others have adopted a model of controlled opening and licensing of online gambling. They realize that the inevitable trend is towards opening up of consumer options towards multiple gambling operators and offers. The fact that it is inevitable does not mean, however, that it should happen any more quickly than necessary. As the consumer demand for a particular gambling product increases, as the underground illegal market grows, there reaches a point where it makes more sense to channel and regulate the activity as opposed to continuing to attempt to prohibit it unsuccessfully. Of course, this can also be done through an exclusive operator model like Finland does.

Sports-betting in the U.S. is an example where the size of the illegal market has grown to such a level that it is long past the time where that activity should be regulated and taxed.

So now the national courts have a little more freedom and ability to decide on what is truly best for them?

P. Vlaemminck: Yes they will. That is a good thing but now we will need to be addressing the issues as they arise in 28 different national capitals. We can be sure that Brussels will still be relevant, and that there will be CJEU court cases in Luxembourg. Now we need to make sure we also defend the interests of Lottery in each of the member-state capitals.

The national lotteries are typically a political institution, and subject to the political oversight that entails. It is often not a part of

which are the powers vested in the EU by the member-states as per the Treaty. Law enforcement is not a power that has ever been conferred to the EU by the Treaty.

Law enforcement is a matter left up to the member-states to execute as they see fit. The EU may facilitate the cooperation between judicial systems by providing rules, procedures, and guidelines for how a judgement might be enforced in another jurisdiction. It is neither the role nor the competence of the European Union institutions or the Court of Justice to enforce member-state's laws in other jurisdictions.

The EU Commission was finding itself getting sucked into a black hole of never-ending litigation with little likelihood of meaningful resolution... The decision of the European Commission to not proceed further with infringement cases shifts the regulatory authority back to the national capitals. The EU Commission is implicitly acknowledging that there is no uniquely correct regulatory structure that should be implemented by all member states.

the Lottery charter to lobby the government on behalf of its constituents. The associations like NASPL and EL could and perhaps should also be the agents to advocate for the interests of their members at the national level. We know that legislators are hearing the arguments of representatives from other groups, like the EGBA and RGA who promote the interests of commercial online betting operators. We need to make sure our voice is heard as well.

One of the problems seems to be that there are inadequate legal mechanisms to enforce laws across borders, even within the EU. So Germany can't compel Lottoland to obey its laws even though Lottoland is based in Gibraltar, an EU country. Why doesn't the EU provide support for the execution of international laws within the EU?

P. Vlaemminck: It's a complicated legal matter but the European Union has only a limited number of competencies. The European Union Treaty includes very technical wording used to describe "conferred powers",

Well, how then are EU member-states to proceed in enforcing their laws that prohibit secondary lotteries over against Lottoland in Gibraltar?

P. Vlaemminck: That can and is being done to great effect. In Belgium, the National Lottery wrote a letter to the Gaming Commission, bringing to their attention that a betting game is being offered on the Belgium market without a license to do so. The Belgium Gaming Commission proceeded in accordance with a memorandum of understanding and transferred it to the federal computer crime unit which in turn transferred it to the association of ISP's (internet service providers). That memorandum makes clear that anybody who helps illegal operators work in the Belgium market is criminally liable under the law. The ISP's blocked the DNS and posts a warning message to the consumer's computer when they try to access the illegal website. The legality of these actions to enforce the laws have been challenged in court, but without success. These are legal actions, they are being effectively executed in practice, and they are

effective deterrents to illegal operators. Now, the blacklisted operators must pay a huge fine and absolve their criminal record for their application for license to even be considered. This approach initiated by the Gaming Commission is a great success. Even Nevada regulators follows carefully the methods that European regulators and others around the world are effectively prohibiting operators from entering their markets illegally.

Other countries in Europe are using this same basic methodology to prevent illegal operators from disrupting their market-place. Actual implementation may vary somewhat, but the result is the same. The state just needs a thoughtful, comprehensive regulatory structure that is legally enforceable. It does not work where the state has not set up an appropriate and enforceable legal and regulatory system. Without that, the judgement can be challenged. In the end, though, we do have the legal basis and the capability to stop illegal operators.

You moderated a session at the EL Congress in Krakow. Caroline Larlus, the Department Head with the French regulator ARJEL, indicated that they are very successful at preventing illegal operators like Lottoland from entering their market.

P. Vlaemminck: I think she made a distinction that was quite fundamental. There are companies, like secondary lotteries who try to enter your market without a license which is illegal, but when you actually block them, they stop. There are also what she described as the more dangerous criminal organizations from Eastern Europe and Russia. These operators have no regard for the laws because it is not their intention to operate a fair betting game, much less comply with laws and pay taxes. They exist solely to steal the consumers' money. They open and close operations as quickly as needed, changing their IP address every day. A legally enforceable solution against these operators is more difficult.

I see that the UK Gaming Commission is taking steps to reign in Lottoland and apply other restrictions to the expansion of gambling. Is the most liberal hotbed of gambling markets deciding that enough is enough?

P. Vlaemminck: The UKGC has always endeavored to assure a fair market-place, and an advertising and marketing communications environment that properly informs the consumer. The UKGC is also reviewing the way they allocate licenses and the options to reduce the number of licenses. I believe

they are giving more consideration to Public Order and problem gambling. There are more fines being levied to hold operators to a higher standard, which indicates that the UKGC is taking steps to reduce the social costs and risks of gambling in England.

The member-state is in the best position to decide the regulatory framework that will serve its citizens in the best way. Member-states do have the legal basis and the capability to stop illegal operators.

The model of the Health Lottery in the UK seems to be spreading to other countries. What can government Lotteries do to keep them from taking market share?

P. Vlaemminck: The enabling legislation allowed small local organizations and municipalities to operate lotteries. This was the only exception to the exclusivity provided the national lottery. It was clearly not the intention that these small local lotteries be organized into the sophisticated nation-wide enterprises that they have become. And now this model is being applied in Norway, Netherlands and other markets. They are not illegal so there does not appear to be a legal remedy. Public Policy makers just need to decide if they want their national Lotteries to continue to grow and generate funds for good causes, in which case they need to provide legal protection to the intended exclusivity status of the national lotteries. The community of Lotteries should make sure their political stakeholders make informed decisions and don't just ignore the situation. Lawmakers do have the prerogative to clarify the laws so that this exception to exclusivity stay true to its original intention of only allowing the operation of small local charity lotteries.

Additionally, though, government Lotteries need to develop market-driven strategies to compete with these threats, and retain their customer base.

I believe there is huge untapped potential for government Lotteries to engage in much

more extensive collaboration. The operation of multi-national games demonstrate that Lotteries are quite capable at creating and implementing complex initiatives. They need to apply that resourcefulness to other spheres of business operations. Cloud computing, sharing central server capacity and functionality, API's to rationalize the relationships between operators, retailers, and commercial partners ... these are just some examples. Some betting products, like sports-betting, would be significantly improved if there could be an international cooperation. The community of Lottery operators commands significant power in the market-place. Working together in these ways will unlock even more capabilities to put even more distance between them and their competitors. Lotteries can win the battle if they improve and enhance cooperation.

What about 3rd party online re-sellers like theLotter.com which make lottery products available everywhere. They buy the lottery ticket from the authorized operator, so the revenues are going to the beneficiaries of the legal operator.

P. Vlaemminck: Yes but they are selling illegally into jurisdictions where neither the game, nor the 3rd party re-seller, nor the operator itself is licensed to operate. That is illegal. And it is illegal for the operator to sell to retailers who turn around and sell to illegal 3rd party re-sellers like theLotter.com. I see that Florida appears to have just terminated one of their very largest retailers for selling to theLotter.com. That is the right thing to do. Operators do, after all, have an obligation to make sure their distribution partners are complying with all laws. Selling to re-sellers who violate the laws of other jurisdictions should clearly be prohibited. Aiding and abetting illegal activity makes one equally responsible under the laws of most jurisdictions.

This is not the first time this method of illegal re-selling has been attempted. The legal recourse to prevent this kind of unauthorized re-selling has been effective. Not that some are not successfully evading legal consequence, but the legal basis is there for preventing this kind of unlicensed activity.

I would be concerned, too, that U.S. lotteries be careful not to open Pandora's box. The biggest, richest market in the world is the U.S. U.S. lotteries have much more to lose than they have to gain by the globalization of lottery sales.

P. Vlaemminck: You know, the Antigua case was never actually resolved. The World Trade Organization (WTO) accepted the public order exception invoked by the US but ruled partially against the U.S. right to prohibit the sale of online gambling products from Antigua into the U.S in the horse racing sector due to an active interstate sales policy. But if U.S. lotteries were to sell their products outside of the U.S., or to be complicit in the sale of those products through 3rd party re-sellers, it would become quite untenable for them to prevent others from selling their products into the U.S. Do U.S. Lotteries really want to go there?

Of course, that does not close the door to a cooperation agreement with other licensed operators to sell the product in other jurisdictions, but on a legal basis.

We know that legislators are hearing the arguments of representatives from other groups, like the EGBA and RGA who promote the interests of commercial online betting operators. We need to make sure our voice is heard as well.

Now a Munich court declared lottery monopolies to be unlawful. Is there no end to the discord in the Germany regulatory situation?

P. Vlaemminck: That is just one court and does not necessarily telegraph the direction of things in Germany. In any case it does not put an end to the monopoly but requires the legislator to adopt some changes. Germany is a market-place with many controversial hurdles when it comes to regulations and stability. Germany needs to find a proper solution. But you know, there is always a

solution to any problem. It just takes time and persistence and analysis. For instance, I started to redraft the Belgian law in the year 2000. Everyone thought it would take a couple months to complete. It took two years. I drafted thirty versions before we had a final draft that was acceptable to all the relevant parties. I had countless discussions with everyone from all the interest groups to the parliament and the head of the cabinet of the ministry. You listen, you propose solutions, you listen to objections and counter-proposals and craft compromises and even then, it takes many iterations to end up with a draft that is acceptable to everyone. And you may need to bring external people on board to break gridlocks. It takes time, but it is possible to resolve it - there is always a solution. I am convinced we can find a good solution for Germany.

Are there any truly "existential threats to" the government Lottery model?

P. Vlaemminck: There will always be threats but none turn out to ever be "existential threats". Lotteries have always prevailed, but they need to adapt to the changing world. They need to strengthen their cooperation. We need vision and leadership to identify and take advantage of the new opportunities. I am quite confident that Lotteries will continue to have great directors, great advisors, great suppliers, who will work together to forge a successful and sustainable future. Cooperation is the key to the future.

I think there is a red line that binds all of us who are passionate in our commitment to government Lotteries. The red line will always be the principles that Lotteries stand for. Lotteries exist to serve society, which they do with energy, ambition, and also caution to protect the consumer, and caution to protect the value of Brand Lottery. Our stakeholders are everyone who cares about preserving integrity, high standards for player and consumer protection, and channeling economic benefit to the Good Causes that depend on Lottery funding. ■

