

# CONSOLIDATING THE SOCIETAL ROLE OF LOTTERIES IN EUROPE

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**F**ollowing the ruling of the European Court in Schindler in 1993, the debate on the role of Lotteries shifted almost exclusively towards the protection of consumers and responsible gaming, and the protection of public order against crime and illegal gambling. This in turn reduced the influence and role of Lotteries in society.

**Misinterpretation, or at least absence of accurate interpretation, of the overall case law of the European Court of Justice did take the focus away from the important societal role of Lotteries and their valuable contribution to our societies.**

To some extent, Regulators and shapers of public policy have chosen to think of online gambling as an independent activity, or even new game category, instead of just another form of distribution as it should be. Classifying online commerce as a new product is illogical and causes regulatory confusion. We will only refer to this problematic regulatory issue incidentally, but it would certainly be useful to address in a separate article. Here it is enough to say that there is no good reason to think about online gambling as a new sector or game category that should be regulated separately from their land-based counterparts given it is only another form of distribution of a like service, something that the European Court and also the World Trade Organisation already decided in the famous Antigua case.

In this article we only want to go deeper into the societal role of Lotteries. In 2010, under the previous Belgian Presidency of the European Union, the Member States adopted with unanimity the following declaration:

### III. THE SUSTAINABLE CONTRIBUTION OF LOTTERY AND RELATED SERVICES TO SOCIETY

RECALLS that all EU Member States have different types of state lotteries or lotteries licensed by the competent state authorities, providing lottery services.

NOTES that a few Member States temporarily or permanently authorize smaller scale lotteries for the benefit of charitable or philanthropic purposes. In the same manner, certain Member States allow for other games of chance to fund such benefits.

RECOGNIZES that contributions, in particular from state lotteries or lotteries licensed by the competent state authorities play an important role for society, via for example the funding of good causes, directly or indirectly where applicable.

AGREES that this specific role should be recognized in discussions at the European level.

Today, more than 10 years later, the above declaration is not yet fully implemented as a fundamental principle under EU law, although the Court of Justice did give us

the necessary tools to do so in a number of cases. **Lotteries stand for important non-economic values and societal principles that need to receive a protection similar to economic freedoms. Therefore protecting Lotteries cannot be seen as an exception to the economic freedoms but require to be considered of equal and constitutional importance.** The EU Court of Justice did in various cases recognize that there are principles established by the Court to validate such equal recognition.

Most Lotteries are still operating as monopolies, at least legally. In jurisdictions where online gambling has been set up independently from the existing land-based operators, such monopoly becomes almost irrelevant. As a result, consumer protection has been undermined.

The conferral of exclusive rights to operate gambling activities is a measure necessary to enable governmental authorities to limit exploitation of the human impulse to over-indulge in gambling and to avoid the risk of crime and fraud related to games-of-chance. Countries like Finland show that this can be done in a successful and at the same time very responsible manner. Others have a dual system with a monopoly for certain activities and licenses for others. This is equally legal to the extent that the lines between the various activities are clear, the scope of the various exclusive rights respected, and a proper risk

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assessment policy is implemented.

It has been held, both by the EFTA Court and the European Court, that a monopoly system sometimes serves the purpose of fighting addiction related to gambling more effectively than would be the case with a system authorising the business of operators that would be permitted to carry on their business in the context of a free and open competition market within a non-exclusive legislative framework.

When seeking an even higher level of protection, a State is entitled to take the view that it is only by granting exclusive rights – which is subject to strict control by the public authorities – that it can tackle the risks connected with the gambling sector, thereby pursuing the objective of preventing incitement to over-spend on gambling and combating addiction to gambling with sufficient effectiveness. The Court specifically recognised the legality of a monopolistic gambling model also with regards to online gambling, something which is basically in line with its rulings that online gambling is only another form of distribution of games and not an independent business model or new category of games.

Recently, in *Fluctus and Fluentum*, the Court took a more holistic view. The Court found that a system of organising market in games-of-chance in Austria in which the advertising practices of the holder of the monopoly on lotteries and casinos are intended to encourage active participation in the games by conferring on it a positive image by virtue of the use of the proceeds for activities in the public interest, or by increasing its attractiveness by means of attention-getting advertisements which hold out the promise of large prizes, can be compatible with EU law and the theory of controlled expansion as already ratified by the Court.

Indeed, such an increase could just as well be the result of a channelling of illegal activities into the controlled gaming networks. The ruling thus allows for a more flexible case-by-case application of advertising and commercial policy by exclusive right holders at the national level.

So today it is clear that applying the monopoly model for lotteries and attracting people to play lottery games for the benefit of society is finally considered to be an appropriate way to address illegal activities on a market. The starting point of the good causes funding allocation needs to be found in the cases recognizing the prohibition or limitation of private profit.

The prohibition or limitation of profit has been part of the way in which lotteries can be operated in the Member States of the European Union since the first relevant judgment on games-of-chance of the Court. This was further explicitly confirmed by the Court of Justice in the judgments in the Finnish *Läärä* case and later also in the Swedish *Sjöberg and Gerdin* cases. In these last cases the Court clarified that limiting private profit and limiting lotteries to (in)direct contributions to charities is an acceptable principle from the Swedish Gaming Policy because, just like with the *Schindler* judgment, it fell within the scope of consumer protection and the protection of public order.

The Court further states that the basic premise of free competition does not apply in full in the games of chance market. Competition should normally lead to better products/services and lower prices for the benefit of consumers. But “better” gambling products or services and lower prices, which generally make these products/services more attractive, are not always necessarily better for consumers.

In other words, it can be beneficial for consumer protection and the protection of public order to limit the number of (lottery) providers in a market. There are several ways to limit the number of providers including, but not limited to, choosing a model in which the pursuit of private profit is prohibited or limited. The prohibition or limitation of profit reduces the incentive for companies to participate in this market. It is worthwhile for fewer companies to make investments (or incur debts) if these cannot later be translated into large profits for the company and its shareholders. A prohibition/limitation of profit therefore can serve both consumer protection and public order. This is also the opinion of the European Court’s Advocate General in the recent *Admiral* case, but still to be confirmed by the Court.

The Court already confirmed in 1999 in a Finnish case that a monopoly regime under direct State control may be more effective in managing the risks associated with the gaming sector and in achieving the legitimate objective of preventing incitement to excessive gambling expenditure and combating addiction to gambling, than under a non-exclusive legislative framework. Moreover, the Court even considers a model of allocating the proceeds of the state lottery to charitable purposes more favourable than a licensing model with the taxation of profits:

“Although the sums thus received by the State for public benefit purposes could also be obtained by other means, for example through taxation of the various entrepreneurs who would be allowed to carry out the activities in question under a non-exclusive system, the obligation imposed on the licensed body to transfer the proceeds of its business is certainly a more effective means of setting strict limits on the profits resulting from those activities, in view of the risks of fraud and other criminal acts.”

So within a context of controlling gambling in a responsible way and protecting society against crime and illegal gambling, States are permitted to grant the exclusive right holders of Lotteries or other games-of-chance more extensive powers to maximise the return to society. The uncertainty around this issue has been affecting Lotteries in Europe for decades. It is now time to consolidate these fundamental principles in the EU context.

The current discussion on the Future of the EU is providing us an interesting forum to put the role of Lotteries in Europe on the table. Innovation, social justice, access to education, a healthy lifestyle including sport, social rights & employment, protection of cultural heritage, access to broad cultural events, empowerment of diversification, attention to disabled, a greener world and a future-oriented economy based upon the principle of good governance are all themes that require attention in this context and are all within the DNA of the Lotteries.

We can easily provide numerous examples in many states. But let us give just one example each in relation to two European countries, Belgium and France. The French newspaper *Le Figaro* reported in its weekend edition (14/15 May 2022) that the Belgian National Lottery is supporting the festivities in Liège of the famous Belgian/French composer César Franck (born in Liège in 1822). The City of Paris, where he lived most of his life, has also actively contributed to the recognition of the composer of offering a monumental sculpture by a French artist to the city of Liège. This example, and there are many others, brings alive how Lotteries contribute to a common cultural heritage.

Equally important as promoting the values that Lotteries pursue, we need in the near future to consolidate the fundamental principles which Lotteries are based upon.

**It starts with subsidiarity and re-emphasizing that within the context of the EU and its attribution of competen-**



**cies, the States need to remain the ultimate decision makers on the lottery and gambling policy they pursue.**

Strengthening the authority of member states to grant exclusive rights to operate Lotteries and other forms of gambling are fundamental and require a strong focus on market developments to avoid disruption as already caused in many states by the independent development of online gambling.

Of course, states, together with the operators, need to do so in a responsible manner and strongly rely upon the precautionary principle, a pillar always

to be respected when developing a proper gambling policy.

And the list continues!

Implementing rules as foreseen by the Macolin convention of manipulation of sport events and protecting the integrity of sport and betting is crucial as well. The signature and ratification of the Macolin convention should therefore be a priority on every state's agenda.

**Re-iterating the 2010 Declaration for the current discussions at the European level: the contributions from lotteries play a vitally important role for our societies, and this specific role of**

*Lotto Hessen Welcomes EL Membership to Wiesbaden for Industry Days continued from page 12*

it is to have a well-interlocked multi-channel strategy. The terrestrial offer must be flanked by a contemporary, digitally mature offer via the website and the app. Only those who offer the customer a wide range of access-points can deliver the convenience and the individual preference that the customers have come to expect from all merchants. That is vital not just in extraordinary times like the last two years, but necessary to be successful in the long term. Limiting the customer to two "either-or" options has not acceptable for a long time. Other industries with longer experience are certainly further ahead than we are in this respect, but we are all working constantly to catch up and are now increasingly addressing issues such as personalization and customization of our offering for the individual tastes and preferences of our customers in the digital space.

We were fortunate that the contract to update our central software was signed just prior to the beginning of the Corona crisis, positioning us now with the next generation of technology.

**What do you think the most significant long-term change in consumer or shopping behaviour might be?**

**Dr. Sundermann:** On the one hand, the convenience factor will continue to gain in importance which means we need to serve our customers at the spot and in the manner they want. As mentioned above, the dovetailing of sales channels plays a very important role in making our products and services as flexibly accessible as possible to every customer. After all, maximum convenience and flexibility are almost taken for granted today. In addition, a balanced range of products and services will become increasingly important in the future in

order to serve our customers according to their respective preferences within the framework of a responsible gaming offering – regardless of whether they are looking for a the high jackpot, quick luck with a scratch card, or entertainment with a broad variety of online games. Our customers expect an attractive, individualized offer that they can use flexibly across the whole range of channels. Evolving the technologies, the user-interface, and our approach to customer service will also continue to gain in importance.

**How about retail: What do you think the most significant long-term change in land-based retailing might be?**

**Dr. Sundermann:** Of course, the retail sector has to deal with a rapidly growing online market. However, we also see opportunities in this, because we believe that people will continue to want personal encounters when shopping in the future. It will be important that the in-person customer interaction not only impresses with a good product and good service, but also takes place in an environment that makes the purchase a positive experience that, in the best case scenario, will be remembered fondly.

**And work-style: Will workers return to 5 days a week in the office or more likely a hybrid of 2 or 3 days in office and more work being done remotely? Do you feel that productivity is lost for not being together in an office for 45 hours a week?**

**Dr. Sundermann:** In fact, our flexible home office arrangement will also expire at the end of May. We will then offer a model that allows flexible working one day a week, or two days if necessary. I think the past few years have shown how well remote working

**“solidarity” should be factored into our rule-making structure as being just as important as the economic freedoms.**

We have come a long way since the start of the debate in 1992. Lotteries have strengthened their market approach and the quality of their governance. The various associations contributed greatly to these developments, as did some individual Lotteries as well. Let's now work to consolidate our “acquis” – consolidate all that has been agreed upon so everyone can move forward, decisively and for the benefit of society and the good causes supported by Lottery. ■

works and that the individual satisfaction of employees with such a solution certainly does not negatively affect their productivity either. Nevertheless, social cohesion and bonding is lost a little when we do not see each other in person, and perhaps people work more individually and more for themselves – a completely normal side effect. In this respect, I'm looking forward to seeing a full house again starting in June during the last four weeks of my time at LOTTO Hessen.

**Congratulations for your retirement!**

**Is there a player trend towards dividing play over multiple game categories? Or do you see lottery players as continuing to stay loyal to lottery like they always did before the advent of sports-betting and online casino gaming and such?**

**Dr. Sundermann:** We can definitely see that a broader range of different game categories is being positively received by players. A bet on a high jackpot once or twice a week is gladly supplemented by participation in other games that offer a different kind of entertainment or other exciting game mechanics. We also see it as our duty as a state-owned gaming provider to offer our customers an attractive and diversified range of games. After all, this is the only way we can fulfill our channeling mandate.

**Lastly, I recall your preference for stairs over elevators. Were you anxious to return to the office so you could get back to your stair-climbing exercise?**

**Dr. Sundermann:** Apart from vacation days or during the last weeks when I unfortunately caught the corona illness, I was always in the office. So I am in stair-climbing exercise and can only recommend this likewise to each coworker! ■