

Consultation on a New Legal Framework for Payments in the Internal Market



Position Paper – 13 February 2004

1. Introduction

This position paper by European Lotteries (*EL*) is provided in response to a call for submissions issued by the European Commission (DG Internal Market) in connection with the its consultation paper entitled a new legal framework for payments in the Internal Market¹. *EL* fully acknowledges the importance of this consultation document and welcomes the Commission's initiative to collect information and comments on this important issue.

EL brings together most of the State Lottery and/or Toto companies of the EU Member States as well as the lottery/Toto companies of Albania, Azerbaijan Republic, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Gibraltar, Hungary, Iceland, Israel, Kazakhstan, Kosovo, Latvia, Lithuania, Macedonia, Malta, Moldavia, Norway, Poland, Romania, Serbia- Montenegro, Slovakia, Slovenia Switzerland, Turkey and Ukraine.

This position paper outlines the views of *EL* with regard to the future legal framework for payments in the Internal Market. Before tackling these specific issues, however, the position paper starts in the second section with a description of the specific legal nature of lotteries and gambling. The paper outlines the current legal framework of gambling services in the European Union and summarizes the gambling jurisprudence of the European Court of Justice.

2. Lotteries and gambling: not an ordinary economic activity

2.1 Introduction

There are specific risks inherent to the organisation of lotteries and other forms of gambling. Lotteries and gambling are therefore in principle prohibited in the legal systems of all EU Member States. The main reason for this prohibition is that lotteries and gambling involve a high risk of fraud and abuse for criminal activities such as money laundering.

At the same time, most EU jurisdictions permit exceptions to this prohibition to varying extents. The principal historical reason is that a complete ban has proven ineffective and given rise to illegal, and thus completely uncontrolled, gambling. The EU Member States realized that a better way to control these risks was to allow, by exception, certain games subject to strict governmental regulation. In essence, the state control focuses on three different levels:

¹ Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market, COM(2003) 718 of 2 December 2003.

controls on the gaming operator, the power to determine the type and amount of legal gambling permitted and, finally, the protection of the player and the consumer. An ancillary advantage of state controlled gambling is that the profits can be used for the public good.

2.2 The legal framework of gambling services in the European Union

At the EU summit in Edinburgh of 12 December 1992, the European Council decided not to regulate gambling at the EU level, as it found that gambling, given the principle of subsidiarity, is unsuitable for Community legislation and is better dealt with at a national level. Based on this Edinburgh conclusion, the European Commission withdrew its plans to regulate gambling at the EU level and gambling remained a quasi-exclusive competence of the Member States, subject however to the full respect and observance of the primary principles of EU law.

In the European Union, gambling is regulated, in the absence of EU legislation, at national level. All EU Member States have imposed strict limitations on gambling activities in order to control and to limit the supply of gambling on their territory, to guarantee that gamblers receive a fair treatment when gambling, to protect consumers and especially (potential) vulnerable gamblers and to ensure that revenue of gambling is to a certain extent used for public benefit. An additional motivation to strictly regulate those activities is their vulnerability to various forms of criminal activity including money laundering.

Gambling operations that are offered in EU jurisdiction but which have not received a license in that country are regarded as illegal. Moreover, Member States have the right to prohibit or restrict games offered from other EU jurisdictions, even if provided by means of information society (internet, interactive television, mobile betting, etc.). Article 1.5 of the Electronic Commerce Directive² explicitly excludes gambling activities from its scope of application, with the exception of those gambling activities that are carried out for commercial communications purposes. The Directive does not apply to (Internet) “*gambling activities that involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions*”.

As a result of this exception, the country of origin principle is not applicable to (internet) gambling services. EU Member States are entitled to stop or restrict the cross-border provision of Internet gambling services, even if these services are provided by a gaming operator that is established in another Member State and duly licensed in that Member State.

2.2 Jurisprudence of the European Court of Justice

In its gambling jurisprudence³, the European Court of Justice has investigated to what extent national authorities can impose restrictions on the cross-border provision of (internet) gambling services and whether these restrictions are compatible with the EC Treaty.

² Directive 2000/31/EC of the Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJ 2000 L 178.

³ Case C-275/92, Her Majesty's Customs and Excise v G. Schindler and J. Schindler, 1994 ECR I-1039, Case C-124/97, Markku Juhani Läära, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd. v Kihlakunnansyyttäjä, Suomen Valtio, 1999 ECR I-6067, Case C-67/98, Questore di Verona v Diego Zenatti, 1999 ECR I-7289, Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) v Portuguese State, judgment of 11 September 2003, Case C-243/01, Procuratore della Repubblica v Piergiorgio

In paragraph 60 of the Schindler ruling, the Court considers the particular nature of lotteries. Given the moral, religious or cultural aspects of lotteries, Member States want to restrict or even prohibit gambling activities and want to prevent it from being a source of private profit. Secondly, in the Court's view lotteries involve a high risk of fraud and crime, given the size of the amounts which can be staked and generated. Thirdly, the Court regards lotteries as an incitement to spend which may have damaging individual and social consequences. Finally, although not an objective justification as such, lotteries are an important contributor for the financing of good causes and public interest activities. Having regard to the special features of lotteries and the overriding public interest considerations, the Court found that the UK restrictions on the (cross-border) provision of lottery services were compatible with the EC Treaty. The Court concluded that the national authorities of EU Member States retained a wide latitude as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits.

In Läära, the Court accepted that a "closed" licensing system, with only one or a limited number of State owned and State controlled licensee(s) fulfil(s) all the requirements necessary in order to obtain an exception to the Community freedoms. The Court also pointed out that "given the risk of crime and fraud" there are no alternatives (such as taxation, to ensure that the funds collected are used for the public good) to a non-profit making approach, that are equally effective to ensure "that strict limits are set to the lucrative nature of such activities". The Court added that the mere fact that an EU Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they want to provide.

The following bullet points are a summary of the Court's gambling case law:

- The European Court has consistently accepted that a national legislation that confers exclusive rights to certain undertakings to offer gambling services does, as such, not constitute a violation of the EC Treaty, as long as this legislation is justified by objectives of social policy and consumer protection aimed at limiting the harmful effects of gambling activities and if the restrictions are non-discriminatory and proportionate to these objectives.
- However, the raising of money for good causes or for the State, cannot in itself justify a restrictive policy. National gambling restrictions are only acceptable if they reflect a concern to bring about a genuine diminution in gambling opportunities and if the financing of good causes or the state constitutes an incidental beneficial consequence.
- In the light of the specific social and cultural features of each Member State, national authorities must have a sufficient degree of latitude to regulate gambling activities and to determine what is required to protect the players.

Gambelli, judgment of 6 November 2003 and Case C-42/02, Diana Elisabeth Lindman v Skatterättelsnämnden, judgment of 13 November 2003.

- Member States enjoy a large discretionary power in regulating games of chance (number and type of operators and the right to decide about the type and volume of games). This discretionary power is not limited by the fact that other Member States have regulated games of chance in a more liberal manner.

Hence, if these conditions are being complied with, national gambling monopolies and exclusive licenses do not violate the EC Treaty provisions. Accordingly, Member States are, in the absence of harmonisation, entitled to prohibit or restrict gambling activities offered from other EU jurisdictions.

3. Communication on a New Legal Framework for Payments in the Internal Market

On 2 December 2003, the European Commission has published a consultative document on the steps required to create a "Single Payment Area" in the European Union. The document suggests that whilst Regulation 2560/2001/EC on cross-border payments in euro has contributed to a considerable reduction in the price for cross-border payments in the Internal Market, further progress needs to be made, as technical and legal barriers still prevent EU citizens, companies and payment services providers from reaping the full benefits of a truly integrated area for non-cash payments.

Remote gambling requires a payment by means of a remote payment delivery. The most common methods used by punters to fund accounts are credit cards, electronic transfers, wire transfers or cheque deposits. An increasing number of financial institutions and credit card companies including those in the United States are currently blocking credit card transactions related to illegal remote gambling services. There are also examples available in the European Union. In Denmark e.g., the Report of a Working Group prepared for the Danish Ministry of Taxation recommended that the new Danish gaming legislation should require issuing banks to block Internet credit card payments coming from foreign illegal gambling providers⁴.

It is stated in **Annex 1** of the Commission's Communication that one of the solutions to regulate payments services would be to apply the Internal Market principle of mutual recognition to all kinds of payment activities in the EU.

EL regards this solution as not feasible as applying the principle of mutual recognition would endanger the national public policies on gambling and lotteries. If an EU Member State would not be entitled to restrict international transfers and payments relating to gambling and lottery services offered by unlicensed lottery and gambling providers, this would jeopardize the national public policies on gambling and it raises a number of consumer and public order concerns, such as underage gambling, problem gambling and money laundering.

As described above, Member States are allowed to restrict the cross-border provision of gambling and lottery services on their territory⁵. *Mutatis mutandis*, Member States can also

⁴ In 2001, the Working Group, established by the Danish Ministry of Taxation, has published its conclusions and recommendations in the Report "The Future of Gaming in Denmark – the need for unified gaming legislation".

⁵ Gambling services are currently also (temporarily) excluded from the country of origin principle, as envisaged by the proposed Services Directive. If gambling services legally organized in one Member State must be accepted, based on the country of origin principle, in all other Member States, this would destroy the discretionary power of the national authorities and there would no longer exist a limitation of supply of gambling

restrict international transfers and payments relating to gambling and lottery services. If the provision of gambling services can be restricted, it is logical that the payment of these services can also be subject to restrictions. In this regard, Member States could, for example, oblige financial institutions and/or credit card companies to identify and, if necessary, to disallow the use of credit cards for unlicensed online gambling and lottery transactions.

On 21 November 2003, the European Commission adopted its first report⁶ on the application of the E-commerce Directive⁷. The Report announced that the Commission will launch a study to provide the information required to examine the need for and scope of a possible new Community initiative in relation to remote gambling services. Having regard to the close interrelation between the regulation of remote gambling services at EU level and the regulation of the payment systems of these services, *EL* urges the Commission to carefully analyze the results of the study made in the context of the E-commerce Directive before launching a new legal framework for payment services.

4. Conclusion

For the reasons set forth above, *EL* recommends that the future legal framework for payments in the Internal Market does not adversely affect Member States' discretionary power in regulating games of chance. In line with the jurisprudence of the European Court of Justice, Member States should remain entitled to determine the extent of the protection to be afforded on their territory with regard to gambling services. Member States must therefore be allowed to restrict international transfers and payments relating to gambling and betting services if these restrictions are justified by public order concerns.

If you would have any comments or if you would like to receive some additional information, please do not hesitate to contact our legal advisers, i.e. Vlaemminck & Partners by post (Gebroeders Vandeveldestraat 68, 9000 Gent, Belgium), by mail (office@vlaemminck.com) or tel. (32) 9 265 76 20.

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services. Hence, it would no be longer possible to maintain a restrictive gambling policy at national level, which could entail an increase in the level of problem gambling. See Proposal for a Directive of the Council and the European Parliament on Services in the Internal Market, COM(2004) 2 of 13 January 2004.

⁶ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, COM (2003) 702 of 21 November 2003.

⁷ Directive 2000/31/EC of the Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJ 2000 L 178.

