

# The NEED for a 'SAFE HARBOR' protecting public lotteries in the face of regulatory disruption and aggressive online gambling operators

By Philippe Vlaemminck, and Valentin Ramognino<sup>1</sup>

**T**he EU has evolved from an economic community (Treaties of Rome 1957) into a true union of citizens with a strong social dimension (as highlighted by former EU

Council President Von Rompuy at the Charlemagne Prize ceremony in Aachen 2014).

This shared European culture and social heritage are now embedded in the Treaties (article 167 TFUE). Within this common cultural framework, games of chance were common in ancient Greece, Rome or in Egypt, while the unique concept of lotteries found its origins in Bruges when the first 'lottery' named 'Lotinghe' (meaning lot or "taking fate into you own hands") was created.

Lotteries are indeed part of the social fabric of the EU, thanks to its model of offering low risk games with small stakes for potential big prizes played by a large community of adult citizens. Beyond entertainment, lotteries contribute significantly to the non-economic values of society, channeling funds to good causes that serve the public interest.

**However, this societal role of lottery is in danger in a more digitalized and competitive environment. That is why, today, lotteries need to be protected at the EU Treaty level.**



Philippe Vlaemminck and Valentin Ramognino

Nearly 600 years after the first lottery, lotteries in Europe and beyond are based on the same model: a large group of citizens who participate in a public and transparent draw. They do so for a very affordable stake, hoping to win a prize but also support the idea that the proceeds are used to fund causes that benefit society as a whole and are close to anyone's hearts.

Lottery now represents a common cultural heritage on a world scale. In some countries, the **role of lotteries is enshrined in the state Constitution** (e.g., Switzerland, India and several states in the U.S.). This should be the same in the EU.

As early as in 1994, the **role of lotteries in this historical and social context was outlined:**

*"Given the peculiar nature of lotteries, which has been stressed by many Member States, those considerations are such as to justify restrictions, which may go so far as to prohibit lotteries in a Member State. (...) A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such*

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***as social works, charitable words, sport or culture”***

In 2024, the European Court of Justice recalled (in ruling Chaudfontaine C-73/23) that **cultural factors** and **differences** relating to minimum and maximum stakes and winnings, as well as the chances of winning, **create a distinction**, in the eyes of the average consumer, between lottery and other games of chance or gambling.

However, in recent years, online operators have also proposed look-a-like games as lottery games contesting even though these are lottery games. Some of them try to target the lottery customer (the “carrot” policy) before steering them to high-risk games. These operators are typically based in classic ‘offshore’ countries that shelter illegal online gambling operators, many of whom offer “parasitic” betting on lotteries, whereby consumers bet on the outcome of legitimate legally-operated lotteries. Consumers often do not even realize they are playing on an illegal gambling website and not the authorized state lottery.

Even if online development and innovation were considered to be a fair part of a legitimate economic competition between operators, the fact that some operators or even regulators blur the line between authorized lottery games and other, higher-risk types of games of chance, is risky for the very reason of the historical, universal and societal role of lottery gaming.

In Europe and in the world, the debate is thus growing around fragmentation of regulations or harmonization and opening or controlled approaches (monopoly system). The European Court of Justice, however, always emphasizes that consumer protection is the key to any national gambling regulations and allows discretion in regulating gambling in the absence of harmonisation.

Indeed, the games of chance sector has contributed to the development of the Court’s case law on the four fundamental freedoms (movement, goods, services and capitals) enshrined in the Treaty.

This case law showed that restrictions on

lotteries and other games of chance have influenced the Court’s interpretation of the Treaty provisions on those fundamental freedoms, taking into account the **cultural, religious** and **moral** differences at stake in this area. The Court applies a more **deferential standard of legal control** but ensures that the objective underlying the restriction of any of these four fundamental freedoms in a gambling context is pursued in a consistent and systematic manner, and that the **proportionality principle** is respected.

The Court of Justice has judged that a policy whereby more dangerous games are largely available through many operators while low-risk games are controlled under a monopoly is not consistent. The Court has specified that the policy adopted by a Member State must take account of the different risks for the consumer according to the type of games involved, and lotteries are less dangerous than betting or casino games<sup>2</sup>.

In particular, the caselaw of the European Courts requires that Member States uphold a consistent gambling policy. As such a “policy of **controlled expansion of gambling activities** may be consistent with the objective of channeling them into controlled circuits by drawing gamblers away from clandestine, prohibited betting and gaming to activities which are authorised and regulated.” (Placanica, C-338/04, para.56)

The fact that two categories of operators may appear to share the same objective (consumer protection) does not mean that their situations are comparable in terms of a given policy. The **structural, legal** and **functional** differences between lotteries and other games of chance justify the application of separate arrangements to them, which need to be explained at all levels (national, European and beyond).

***The European Court of Justice and the EFTA Court both recognized that a monopoly system is compatible with EU law and can even be considered more ‘effective’ in ensuring the protection of national objectives***<sup>3</sup>. The Courts always state that a monopoly can be justified only

in order to ensure a particularly high level of consumer protection, with means of a supply that is quantitatively measured and qualitatively planned to achieve this objective and subject to strict control by the public authorities.

Finally, the Court ruled that **online is recognised as more dangerous and not as just another form of distribution of games**. Moreover, according to the European Commission SNRA, with regard to the risks of money laundering (ML), online gambling is considered to be at level 4, the highest risk; while lotteries are at level 2 (low risk).

Therefore, it is very important to be able to defend at the national level, and in the European context, the **legal, conceptual** and **social uniqueness** of lotteries, including its low-risk approach.

***If we want to protect the future of Lotteries and their broad societal role, we need to create a constitutional “safe harbor”, to guarantee the exclusive right model even in an otherwise less consistent environment so that Lotteries can continue to play an important societal role.***

Lotteries are not only operating low risk games for the benefit of society, they also do so to provide consumers with a safe, low risk and entertaining alternative for high-risk “hard” games.

As the President of the Court of Justice of the EU said: Lotteries are not only part of our cultural heritage, but they also belong to our “social fabric”.

***In the European Union area, it is long recognized that competition is detrimental in the gambling sector. Since the Advocate General opinion in Schindler (and later re-affirmed by other AGs and the Court), it is clear that competition does not benefit consumers but leads to overheating of the market which means more problem gambling and addiction.***

In practice, online operators can only compete if they use tools and methods that tend to create problems (aggressive advertising, incentives to play like bonuses, VIP treatment, etc.).

<sup>2</sup>The primary risks are those linked to the behaviour of the player, and depend on the types of game: see Advocate General Bot’s opinion in Case C-347/09 of 31 March 2011, Dickinger and Omer, paras. 127 to 130 and Carmen Media, C-46/08, para 100. It is also recently stated in Chaudfontaine Loisirs C-73/23, para 44.

<sup>3</sup>Judgment of 20 September 1999, Läära, C-124/97, para. 42 Case E-1/06 EFTA v. Norway

However, because of their societal role and contributions, lotteries are not just gambling services like other gaming operators. The societal role of a lottery has two key components:

The first societal objective is to bring low-risk games to a large community of players providing entertainment and dreams of big prizes, which attracts and channels people to low-risk alternatives and away from high-risk games, which in turn makes society less dependent on high-risk games and less vulnerable to health problems.

The second objective is to return substantial amounts to non-economic parts of society (building civil society including education, sport, fight against poverty, development aid, culture & cultural heritage, R&D, scientific research, etc.), as recognized by the European Court of Justice 30 years ago in the Schindler case.

Both those components form part of the societal role of lotteries in the EU.

In 2010, in its December conclusions, the EU Council took a step further and officially endorsed the societal role of lotteries, specifically for their role in the funding of good causes. The Council 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.”* (Council document 16884/10).

This was not followed by the political actions needed for it to take effect. In recent years we see this traditional role of lotteries generating funds for good causes to be under threat as the online gambling industry is aggressively advocating for liberalization, aggressive marketing strategy and diversity of games in spite of the growing problem of illegal gambling. This is, of course, the wrong answer. **More liberalization only leads to more problem gambling.** A strict regulatory approach (the controlled expansion theory) with a strong emphasis on responsible gambling as promoted by the Lottery associations like EL, combined with effective law enforcement, is the only way forward. However to be successful it is vital to give lotteries the support and the room they need to grow

and prosper for the benefit of society.

Indeed, it is time for Lotteries to be legally safeguarded within a policy that recognizes that high-risk games are already under-regulated and too accessible, and that lotteries should not just be subjected to the rules of the market and normal exceptions to economic freedoms (so not tested against consistency). Otherwise,

This calls for creating **constitutional safe harbor.**

This can be made by integrating the protection of lotteries in a Protocol to the TFEU (cultural heritage of lotteries and contributing to non-economic values/ social construction of EU, based on both article 3 TUE and article 167 TFEU).

The protection of lotteries in the EU, or elsewhere, is even a benefit for other (gambling) actors as it provides clarity and sustainability.

Lotteries will find themselves in a competitive environment which is in no way good from a consumer protection and public order perspective. Lottery games are even at risk of becoming irrelevant (especially mass parimutuel type of games which require maximum playership which is only possible through exclusive rights to operate the games.)

The concerns created by illegal gambling operators (operating mainly from Malta) have been in the spotlight recently at the Court of Justice, especially by a recent AG Opinion in the Wunner case (C-77/24). It is sometimes estimated, even at the European Parliament, that almost 70% of online gambling takes place on unlicensed (illegal) platforms. However, the real size of the illegal market is difficult to assess.

**The European Court of Justice has already confirmed, in 2010, that the responsibility for an effective enforcement system and the fight against illegal online gambling lies with the Member States (C-46/08).** Indeed, the analysis by regulators of illegal gambling being offered in EU countries demonstrate that

there is a **concentrated foreign origin of illegal operators:** 50% of illegal websites are based in Curaçao and 20% in Malta or Cyprus. Also, as established by the scientific community, illegal online gambling presents major risks in terms of public health and gambling addiction.

Even in this context, **states can still address illegal gambling in an effective way**, by monitoring the illegal market, by improving legislation and law enforcement, implementing geo-blocking (e.g. in Austria, France, Belgium) and payment blocking where necessary (the Netherlands), and developing a controlled expansion policy for operators to be legally taxed and regulated.

Some online operators advocate for expanding the regulated market, buy which they mean licensing more and more private operators, contending that this is the best way to combat illegal gambling. This is never the case. In countries who adopted this strategy (the Netherlands, Germany), we see a serious threat for the way lotteries operate, a rise of gambling addiction and not even necessarily a decline of illegal gambling. Indeed, unless there are serious limitations, the granting of more online operator licenses only makes it legally more difficult to argue that lotteries should retain their monopoly of low-risk games while hard-risk games are freely available.

**The role of lotteries to channel players to legal, safe and responsible gaming,** requires reflection on their specific role in society and the legal protection for it. This reflection focuses on the need to protect legal lotteries, as opposed to illegal or ‘parasitic’ ones, and to effectively regulate other games of chance, in order for lotteries to continue to contribute to the social fabric of the EU (by financing good causes) and to promote legal, safe and moderate gambling that puts consumer protection first.

Lotteries have been around for 600 years and are not going to disappear, but their role will be weakened if regulators and policy-makers fail to act against overly aggressive competition from illegal online operators. ■