Studies in European Economic Law and Regulation 1

Simon Planzer

Empirical Views on European Gambling Law and Addiction

Springer

Studies in European Economic Law and Regulation

Volume 1

Simon Planzer

Empirical Views on European Gambling Law and Addiction

Springer

Simon Planzer
Lecturer in Law
University of St.Gallen HSG
St.Gallen, Switzerland

ISSN 2214-2037 ISSN 2214-2045 (electronic)
ISBN 978-3-319-02305-2 ISBN 978-3-319-02306-9 (eBook)
DOI 10.1007/978-3-319-02306-9
Springer Cham Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013954373

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Foreword

Science, Public Policy and Law: Considering the Case of Gambling

Empirical Views on European Gambling Law and Addiction

Planzer's *Empirical Views on European Gambling Law and Addiction* addresses an important and too often ignored area of study: the intersection of science and law. Gambling, like drugs, holds the potential to adversely influence the public health and welfare. Gambling can affect personal and community activities in both favorable and unfavorable ways. The policies that government, industry, and other stakeholders employ to minimize the adverse consequences and maximize the benefits of gambling are many and diverse. At some point, every member of a community experiences the consequences of public policy and how legislators, lawyers, and judges operationalize these policies into law. This is certainly true for gamblers. However, few people have been sufficiently brave to confront the law directly by challenging how well it advances the public policy goals that guided its original development and purpose.

Policies represent broad grassroots movements or leader-based initiatives that often reflect sociocultural values; laws are legally enforceable rules that often reflect the expression of policies. Policies must observe and obey laws. Policy movements often lead to changes in the law (e.g., civil rights). In this sense, policies are the landscape against which legal architecture develops and evolves. Public policies and the laws associated with such policies hold the promise, if not the obligation, to advance and protect the public health and welfare. Unfortunately, the vast majority of policies and laws are generated in the absence of guiding scientific evidence that can inform stakeholders about the efficacy of the law. This is particularly evident in the area of gambling. For example, jurisdictions that permit gambling increasingly require the purveyors of gambling to develop and offer responsible gaming programs

(e.g., self-exclusion) although the evidence providing support for these programs is mixed.[1]

Increasingly, policy makers, lawmakers, clinicians, and members of the public alike have been demanding more evidence-based practices. Despite this current fascination with evidence-based practice, the relationship between science and the practice of promulgating both policy and law is a curious one. Like their clinician counterparts, the makers of public policy and law tend to trust their instincts more than scientific evidence. Consider clinicians:

> The majority of therapists believe that the way to be a good therapist is to do everything you do intuitively… They do it by the 'seat of their pants'… The same group of people, however, says that the ultimate goal of therapy is for people to have conscious understanding – insight into their own problems. So therapists are a group of people who do what they do without knowing how it works and at the same time believe that the way to really get somewhere in life is to consciously know how things work![2]

Similarly, for example, in the UK, stakeholders have long debated immigration policy. Recently, they have recognized the need for improved evidence as they continue this debate. Critics have noted that there are "data gaps and limitations; analysis gaps and limitations; and uncertainties in the conclusions emerging from the available analysis."[3] These fundamental concerns about the quality of information suggest, perhaps, that like the conduct of therapy, the UK immigration policy debate has been guided more by 'seat of the pants' instinct than by scientific evidence.

In this book, Planzer argues that science and scientific evidence represent fundamental bedfellows that must replace – or at the very least inform – instinct and personal values. Planzer suggests that science can help to guide the development and implementation of public policy through the application of case law. He shows that scientific evidence has direct relevance for legal considerations. Planzer shows that scientific evidence is more than something just nice to have; it is essential for policy makers, lawyers, and lawmakers – and everyone who interprets the law. This is a bold, courageous, and comprehensive undertaking. The implications of his effort are many.

Despite his primary focus on gambling, Planzer's argument about the essential value of science for the law and lawmaking also applies to other areas of human conduct. Gambling, like so many other complicated patterns of human activity, tends to encourage the emergence of conventional wisdoms. Consider the case of alcohol prohibition in the US and its presumed effects and unintended consequences on public

---

[1] LaBrie, R.A., Nelson, S.E., LaPlante, D.A., et al. (2007). Missouri casino self-excluders: Distributions across time and space. *Journal of Gambling Studies, 23*(2), 231–243; Nelson, S.E., Kleschinsky, J.H., LaBrie, R.A., et al. (2010). One decade of self-exclusion: Missouri casino self-excluders four to ten years after enrollment. *Journal of Gambling Studies, 26*(1), 129–144.

[2] Bandler, R., & Grinder, J. (1979). *Frogs into princes: Neuro linguistic programming*. Moab: Real People Press, p. 6.

[3] The Migration Observatory (2011). *Top Ten Problems in the Evidence Base for Public Debate and Policy-Making on Immigration in the UK* (pp. 1–15): University of Oxford.

health.[4] Personal belief systems sometimes rest upon logical expectations and, perhaps, even a kernel of evidence, but, more often, these traditional beliefs are derived from personal bias, anecdote, and folklore. These synergistic influences provide the ingredients necessary for the emergence and easy acceptance of moral judgments that can compromise rigorous inquiry. In many instances, the implicit acceptance of moral judgments can prevent lawyers and scientists alike from testing their assumptions about topics of interest. Some of these conventional ideas – regardless of evidence – have garnered sufficient strength to influence the development and application of public policy. For example, as with drug, alcohol, and driving under the influence (DUI) policies,[5] evidence for effective gambling policy is rare. What makes it so difficult to develop a scientific foundation for developing public policies for gambling?

It is not simple or straightforward to advocate for science-guided public policy – whether gambling-related or otherwise. Policy makers and scientists conceptualize issues very differently. They have different languages, goals, and styles. These differences reflect a wide range of values. For example, policy makers seek relatively immediate, tangible solutions that will endure. Scientists seek advances of almost any size that can move current understanding to a more advanced level. Policy makers seek certainty; scientists value doubt. Policy makers see evidence as concrete and enduring; scientists see evidence as constructed and temporary. Planzer's *Empirical Views on European Gambling Law and Addiction* seeks to bridge these two perspectives and the unique vocabularies common to each.

It is easy to see that policy makers, lawmakers, and scientists consider and apply evidence in very different ways. Further complicating this situation, scientists are more comfortable than lawmakers living in the gray area, marked with uncertainty and doubt. Judges in particular face the difficulty of being obligated to make decisions by applying the law; they cannot enjoy the privilege of the gray area. In turn, scientific doubt gives rise to fresh research questions and new ways to answer them. Lawyers as well as law and policy makers need a system for determining the strength of evidence. For example, scientists are used to evaluating research designs for what these strategies can and cannot accomplish. Cross-sectional studies, for example, cannot inform stakeholders about the incidence (i.e., new cases) of disease or the duration of illness. To gather meaningful evidence about incidence and duration – and therefore the impact of social events – we need prospective longitudinal studies. Unfortunately, these studies take time – often more time than policy makers, lawyers, and judges have available to make their decisions.

Muddling matters, scientists – often in need of research funding – are too willing to enable public policy makers' need for certainty and evidence of any type. Seeking funds more than truth, investigators misguidedly suggest that alternatives to prospective longitudinal research can answer questions about, for example,

[4] Blocker, J.S. Jr. (2006). Did prohibition really work? Alcohol prohibition as a public health innovation. *American Journal of Public Health, 96*(2), 233–243.

[5] E.g., Strang, J., Babor, T., Caulkins, J., et al. (2012). Drug policy and the public good: Evidence for effective interventions. *Lancet, 379*(9810), 71–83.

gambling impact. Policy makers frequently choose the seemingly least expensive alternative (e.g., cross-sectional research design) as a way of providing at least some kind of evidence that will fulfill a legal mandate; the result of this situation is that both policy makers and scientists have limited insight into the very nature and course of gambling-related disorders. Policy makers proudly announce that they are going to fund innovative and comprehensive research; in their quests to garner grant support for their project, scientists offer simple, less expensive, but incorrect designs for the questions of importance. The result of this choreography between funders, scientists, and limited resources is that stakeholders often choose the wrong design and everyone ends up with the same old research, leaving policy makers and the public with the same old questions. This pseudoscience political dance produces a black eye for both scientists and public policy makers alike.

Planzer reminds us that the legal world risks problems – similar to those confronted by science – when it applies the law without examining the evidence that supports the assumptions upon which the law rests. Lawmakers and judges alike can advance the application of law by maintaining a more critical, perhaps even scientific attitude toward their personal beliefs and how these might influence the law.

Planzer's *Empirical Views on European Gambling Law and Addiction* encourages us to take pause and reconsider the relationship between science and law, as well as between the scientist and the lawmaker. This is a rare opportunity indeed that will rattle convention to its core. It offers a vision for a different kind of public policy, informed by a novel kind of science. Planzer's view encourages a new era of cooperation among lawmakers, scientists, and gambling industry executives. To advance an evidence-based system for promulgating gambling-related policy, everyone involved in the manufacture of science and policy will have to agree on target benchmarks and objectives that we can measure and evaluate.[6] The typical tactics used by vested ideological, political, financial, and emotional interests to attack science and limit evidence-based policy (e.g., economic manipulation, delay, hiding identities) will require careful management.[7] Planzer deftly demonstrates that using science can change the gambling playing field as well as how the games are played. No longer can we simply accept gambling policy and law at face value; now is the time to use science to challenge assumptions and assure that we establish and interpret the law in ways consistent with the best available evidence.

For example, many years ago, my colleagues and I described the fundamental elements of Responsible Gambling programs.[8] Now it is time to evaluate the prevalence and efficacy of these suggestions to determine their value to the public health and welfare. Too often jurisdictions and companies call for features of a responsible gambling program that have yet to demonstrate benefit, especially in

[6] E.g., Bogenschneider, K., & Corbett, T. (2010). *Evidence-based policymaking: Insights from policy-minded researchers and research-minded policymakers*. New York: Routledge.

[7] Rosenstock, L., & Lee, L.J. (2002). Attacks on science: The risks to evidence-based policy. *American Journal of Public Health, 92*(1), 14–18.

[8] Blaszczynski, A., Ladouceur, R., & Shaffer, H.J. (2004). A science-based framework for responsible gambling: The Reno model. *Journal of Gambling Studies, 20*(3), 301–317.

consideration of associated costs and burdens.[9] Today we see a similar situation as the European Union debates policies designed to minimize harm related to Internet gambling despite having limited evidence about the extent of gambling-related problems and the determinants responsible for these difficulties.[10]

Ultimately, Planzer's book encourages the development of science-minded policy makers and policy-minded scientists[11] who are willing to fly less by the 'seat of their pants' and more by using the guidance that science can provide to help establish the questions of importance and the methods by which we can evaluate them. Unfortunately, the genie is out of the bottle: gambling has expanded worldwide, law and policy makers are trying to catch up, and scientists are lagging behind policy makers. Planzer's work inspires a different strategy. The question now is whether policy makers, lawyers, judges, and scientists will have the mettle and determination to follow his lead.

Harvard Medical School, Boston Howard J. Shaffer
Division on Addiction, The Cambridge Health Alliance
June 17, 2013

Dr. Shaffer is an Associate Professor at Harvard Medical School and the Director of the Division on Addiction at the Cambridge Health Alliance, a teaching affiliate of Harvard Medical School. I would like to thank Dr. Heather Gray for her helpful and wise comments regarding earlier versions of this foreword.

[9] E.g., Gostin, L.O. (2000). Public health law in a new century. Part III: Public health regulation: A systematic evaluation. *Journal of the American Medical Association, 283*(23), 3118–3122.

[10] Planzer, S., Gray, H.M., & Shaffer, H.J. (2014). Associations between national gambling policies and disordered gambling prevalence rates within Europe. *International Journal of Law and Psychiatry, 37*(2), advance online publication 23 December 2013.

[11] Bogenschneider, K., & Corbett, T. (2010). *Evidence-based policymaking: Insights from policy-minded researchers and research-minded policymakers*. New York: Routledge.

Acknowledgments

This book is the culmination of work that was completed in view of a Ph.D. dissertation at the University of St.Gallen HSG. Most of the research was conducted during research stays at Harvard University and the European University Institute. The research was supported by a scholarship of the Swiss National Science Foundation and the Research Commission of the University of St.Gallen; I am most grateful for their generous support.

Why gambling? During my trainee clerkship at the EFTA Court, two gambling cases were pending before that court. Gambling comes with a number of highly interesting questions. The more I immersed myself in the topic, I came to realise that the legal questions I wished to address could only find satisfying answers if informed by empirical research. The chosen empirical perspective on gambling law made for a luscious research recipe. Why gambling? That is why.

Pursuing research at the intersection of normative law and empirical sciences was intellectually challenging and enriching at once. On this path, I was fortunate to enjoy the company of brilliant scholars and colleagues. Their support assured that the outcome of the long-lasting research did not become a gamble.

My first 'thank you' goes to my dissertation supervisors, Professor Carl Baudenbacher and Professor Urs Gasser. I thank them for their helpful guidance and for giving me the opportunity to write on a highly fascinating topic from an angle of my preference. Working with EFTA Court President Baudenbacher for several years enhanced my understanding of European economic law and the larger context in which it takes place. I thank Professor Urs Gasser and Professor John Palfrey for their support at Harvard Law School.

I am greatly indebted to my supervisors at the Division on Addiction at Harvard Medical School. Professor Howard Shaffer, the Director of the Division, and Dr Richard LaBrie proved to be true mentors. If the present book succeeds to bridge the legal and empirical perspectives on gambling, it is thanks to their support in connecting my lawyer's brain with the world of addiction research.

I am then grateful to many other scholars who generously lent time and advice. I wish to mention all my colleagues at the Division on Addiction, in particular Doctors Debi LaPlante, Sarah Nelson, Heather Gray and Ryan Martin. At Harvard

Law School, I thank Professors Charles Nesson, Rachel Brewster, Mattias Kumm, Joseph Singer and William Alford. I also treasure many great teachers and colleagues at the College of Europe, the Academy of International Trade Law, the European University Institute and the University of St.Gallen HSG. A special and cordial 'thank you' goes to Professor Alberto Alemanno.

I owe a great debt to many colleagues and friends who proved to be there when their assistance was needed. For careful and committed language revision and endnote program support, I would like to express my gratitude to Jo Potter, Sunny Lee, Scott Hirst, Christina Williamson, Lawrence Reid, Doctors Andrea Müller Reid, Sinead Ring, Steven King and Sebastian Schnorf as well as Sara Burri and Sonny Meyer. I would like to thank everybody at Springer for their professional and swift service.

Writing the present book required endurance: I say thanks to my highly esteemed friends and family for simply being the great and reliable persons they are.

Finally, my thoughts are with two dear personalities. One did not get to see this book, but her legacy will always be inspiring for me. And the other proved to be an invaluable pool of infinite patience and support; I owe her *tusind tak*!

August 2013 Simon Planzer

State of Research

The book considers law and literature up to 1 August 2013. Unless otherwise specified, electronic resources were last visited on that date.

Contents

Abbreviations

AB	Appellate Body (WTO)
AIDS	Acquired Immune Deficiency Syndrome
Art./Arts	Article(s)
ATF	Arrêts du Tribunal fédéral
BGE	Entscheidungen des Schweizerischen Bundesgerichts
CEN	European Committee for Standardization
Cf.	Confer
Chap./chaps.	Chapter(s)
CJEU	Court of Justice of the European Union ('the Court of Justice'; 'the Court')
DG	Directorate General
DSM	Diagnostic and Statistical Manual of Mental Disorders
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Ed./eds.	Editor(s)/edition(s)
EEA	European Economic Area
EFTA	European Free Trade Association
E.g.	*Exempli gratia*
ESA	EFTA Surveillance Authority
Et seq.	*Et sequetur*
EU	European Union
European High Courts	CJEU, EFTA Court and ECtHR
Fig.	Figure
Fn/fns	footnote(s)
GATS	General Agreement on Trade in Services
HIV	Human Immunodeficiency Virus
Ibid.	*Ibidem*
ICD	International Statistical Classification of Diseases and Related Health Problems
I.e.	*Id est*

I.f.	*In fine*
I.i.	*In initio*
Internal Market Courts	CJEU and EFTA Court
No	Number
P./PP.	Page(s)
Para./paras	Paragraph(s)
PMU	Groupement d'Intérêt Economique Pari Mutuel Urbain
SARS	Severe Acute Respiratory Syndrome
Sect./sects.	Section(s)
SR	Systematische Rechtssammlung
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
US	Unites States of America
WHO	World Health Organization
WTO	World Trade Organization

List of Figures

List of Table

Chapter 1
Introduction

1.1 Gambling: A Reality of Life

The term '*gambling*' can cover manifold types of games. In its broad sense, it can be defined as wagering something of value on an uncertain outcome. Gambling relates to '*games of chance*': games whose outcome predominantly depends on chance rather than skill. Games of chance necessarily involve the elements of consideration, chance and prize.[1]

Gambling is a well-documented and old phenomenon throughout history, different cultures and tribal mythology.[2] In the occident, the ancient Greeks and Romans engaged in various forms of gambling. Sports betting was particularly popular and the Romans knew an early form of a casino, the so-called *aleatorium*, which was mainly used for hugely popular dice games.[3] Similarly, the Roman authorities also knew early forms of gambling regulation. The *Corpus Iuris Civilis* addressed excessive gambling. Titius, Publicius and Cornelius limited dice game opportunities to the festivities of *Saturnalia* in December.[4] Excessive gambling could result in

[1] For definitions and the factors chance and skill, cf. e.g. Kalt, K., *Zettel*, *Zahl und Zufall – Glück und Glücksspiel am Beispiel des Schweizer Zahlenlottos*, Zürcher Beitrage zur Alltagskultur, vol. 13, Zürich: Volkskundliches Seminar der Universitat Zürich, 2004, at 21–38. In North America, the notion 'gaming' is often used instead of 'gambling', in particular among practising lawyers; cf. e.g. Rose, N., *Gambling and the Law*, Hollywood, CA: Gambling Times Incorporated, 1986, at 75.

[2] Schwartz, D.G., *Roll the Bones*: *The History of Gambling*, Gotham Books, 2006; Gabriel, K., *Gambler Way*: *Indian Gaming in Mythology*, *History*, *and Archaeology in North America*, Boulder, CO: Johnson Books, 1996.

[3] 'Alea', Latin for die. Cf. for dice games, Hattler, C., "<… und es regiert der Würfelbecher> – Glücksspiel in der Antike" in *Volles Risiko*! – *Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 26–34.

[4] Maass, M., "Wie haben die Griechen und Römer gewettet? – Zur antiken Sportwette" in *Volles Risiko*! – *Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 148–152, at 148.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_1,

debt: the term 'addictus' described a debtor in the state of servitude to his creditor as a result of failure to pay the debt.[5]

Why has gambling been so popular throughout history and cultures in spite of the fact that gamblers are more likely to lose money than to make money? Walker et al. advocate that the core motivation to gamble is to win money. But if people are rational, they should know that they are more likely to lose than to win. One explanation is that many individuals hold mistaken views about the likelihood of winning; these erroneous beliefs may be further reinforced by (occasional) large wins.[6]

However, there are more motivational factors for gambling than just the persuasion to win. Some people may find escape from their daily lives; this is a motivation that is often found among gambling addicts. However, the *social setting of gambling* is not to be underestimated either.[7] Some people enjoy the company of others and the excitement about the uncertain outcome of a bet, a card play or the spin of the roulette wheel. One should also consider that the *erroneous belief* that one will win with continued play is not the same as the *mere hope* of winning. Finally, a very fundamental motivation for gambling is often forgotten: for many players, gambling simply means *pleasure*.

The idea of pleasure finds support when gambling is considered in the greater category of *playing*. All animals with a complex central nerve system engage in some forms of playing (capering with conspecifics, exploring new things by deconstructing them and so forth).[8] Similarly, children unlock the world by playing, which is a very effective way of learning.[9] Huizinga noted in *Homo ludens* that the presence of playing is not dependent on a certain level of civilisation and that it finds its ultimate justification simply in the *fun factor* inherent to it.[10] The social setting of the game may also involve other forms of amusement: the Roman poet Ovid describes betting during gladiator battles in his *De Arte Amandi* as an excellent

[5] Raikhel, E., and Garriott, W., "Introduction" in *Addiction Trajectories*, Raikhel, E., and Garriott, W. (Eds.), Durham/London: Duke University Press, 2013, pp. 1–35, at 11; de Ste. Croix, G., *The Class Struggle in the Ancient Greek World*, Ithaca: Cornell University Press, 1981, at 167 *et seq*.

[6] Walker, M., Schellink, T., and Anjoul, F., "Explaining Why People Gamble" in *In the Pursuit of Winning – Problem Gambling Theory*, *Research and Treatment*, Zangeneh, M., Blaszczynski, A., and Turner, N.E. (Eds.), New York: Springer, 2008, pp. 11–31, at 11. Cf. also Mazur, J., *What's Luck Got to Do With It*? *The History*, *Mathematics*, *and Psychology Behind the Gambler's Illusion*, Princeton, NJ: Princeton University Press, 2010.

[7] Zinberg, N.E., *Drug*, *Set*, *and Setting*: *The Basis for Controlled Intoxicant Use*, New Haven (Connecticut): Yale University Press, 1984.

[8] Buland, R., "Die Kultur des Spiels – Einige Aspekte zur Einführung" in *Volles Risiko*! – *Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 10–12, at 11.

[9] Schädler, U., "Preface" in *Spiele der Menschheit*: *5000 Jahre Kulturgeschichte der Gesellschaftsspiele*, Schädler, U. (Ed.), Original version in French: Editions Slatkine Geneva, Darmstadt: Wissenschaftliche Buchgesellschaft, 2007, at 7.

[10] Huizinga, J., *Homo ludens*: *Versuch einer Bestimmung des Spielelements der Kultur*, Cologne: Verlagsanstalt Pantheon, 1938, at 4–5. Cf. also Scheule, R.M. (Ed.), *Spielen*: *Philosophisch-theologische Annäherung an einen menschlichen Grundvollzug*, Fuldaer Hochschulschriften, Disse, J. (Ed.), Würzburg: Echter Verlag GmbH, 2012.

opportunity to flirt with girls. The setting allows the man to compare his own suffering to that of the gladiators in the arena.[11] Accordingly, there are *various motivational factors* for gambling that have been described by authors of different fields. Money itself does not seem to be the motivation but rather the gaz that keeps the player's engine running.[12] In spite of parallels with other forms of playing and with parallels in fauna, it seems that only humans play games of *chance*.[13]

Gambling is as old as the *pleasures and problems* associated with it. The problems namely relate to gambling addiction and criminal activities. The latter traditionally involve forms of fraud (cheating with loaded dice, extra cards, match fixing and so forth)[14] and money laundering. This book takes a closer look at the other category of problems: *the addiction to the game*. Epidemiological studies show that the large majority of people do not gamble excessively, but a minority experience severe problems that are recognised as a *mental health disorder* (see Sect. 9.1).

Similar to gambling itself, the addiction to games of chance is an old phenomenon too that has been documented in different cultures and periods of time.[15] The dark side of the game has found its way into many *novels*. Iffling presents gambling as a vice in *Der Spieler* and the main character as a lamentable person. In Balzac's *La peau de chagrin*, a character is almost led to suicide due to a continuous streak of bad luck. The excessive gambling behaviour is symbolised by players who leave the table in the early morning hours with nothing but their bare cloths.[16]

---

[11] Maass, "Wie haben die Griechen und Römer gewettet? – Zur antiken Sportwette", at 149.

[12] Planzer, S., *Mythen und Fakten zur Glücksspielsucht*: *Annahmen über die Regulierung des Glücksspiels im Lichte der Forschung*, forthcoming. Concurring, *inter alia*, Binde who himself suggested a model that comprises five motivational dimensions: the dream of hitting the jackpot and transforming one's life, social rewards, intellectual challenge, mood change induced by playing and the chance of winning. Binde, P., "Why People Gamble: A Model with Five Motivational Dimensions", *International Gambling Studies*, advance online publication (2012), 1–17. Cf. also Thompson, W.N., *The International Encyclopedia of Gambling*, 1, Santa Barbara: ABC-CLIO, 2010, at 71 *et seq*. Dissenting: Advocate General Mengozzi who had "little doubt that the main attraction of a game of chance is linked to the amount of potential winnings." Opinion in C-153/08 Commission v Spain [2009] ECR I-9735, para. 85.

[13] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 11.

[14] Gogol describes in his novel *The players* ('*Igróki*') a group of cardsharpers who used techniques such as loaded cards; cf. Strejcek, G., "Lotto und andere Glücksspiele im Spiegel der Weltliteratur" in *Lotto und andere Glücksspiele – Rechtlich, ökonomisch, historisch und im Lichte der Weltliteratur betrachtet*, Strejcek, G. (Ed.), Vienna: Linde Verlag, 2003, pp. 171–278, at 244. For a historical view on loaded cards, cf. Seim, A., ""Mit gezinkten Karten" – Einige Aspekte des Falschspiels" in *Volles Risiko*! *– Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 255–267; cf. also Koger, A., "Spielkarten und Glücksspiel" in *Volles Risiko*! *– Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 62–84.

[15] Cf. Ferentzy, P., and Turner, N.E., "The History of Problem Gambling: Temperance, Substance Abuse, Medicine, and Metaphors" New York: Springer 2013. Ancient sources testifying of compulsive gambling include for instance the Hindu book of Rig Veda: Thompson, *The International Encyclopedia of Gambling*, at. 171.

[16] Strejcek, "Lotto und andere Glücksspiele im Spiegel der Weltliteratur".

The addiction to the game found particular attention in Russian literature. Alexander Pushkin, himself a passionate card player living in uncertain financial circumstances, addressed gambling in his novels. Pushkin's *Pique Dame* ('*Pikowaja Dama*') was transformed into an opera by Peter and Modest Tchaikovsky. The novel portrays decadent nobility.[17] More interestingly, it shows an important motivation for problem gambling: *escape*. Some characters become addicted to the game as it offers escape from their lives marked by unfulfilled love and passion. Arguably the best-known novel, in which gambling problems play a central role, is Fyodor Dostoyevsky's *Player* ('*Igrók*'). Dostoyevsky wrote this novel under pressing financial needs, and he knew the topic of this novel very well: during a difficult period of his life, Dostoyevsky himself searched for relief in casinos and gambled away the advance payment for his novel.[18]

Finally, games of chance play a central role in Arthur Schnitzler's *Spiel im Morgengrauen*.[19] Similar to other authors, Schnitzler himself enjoyed gambling, and two interesting phenomena were associated with his gambling that will be elaborated in this book too: a *predisposition in the family* and a *particular vulnerability during adolescence* (see Sect. 9.1.3.5).[20]

Gambling-related problems led public authorities to regulate gambling as illustrated as early as in the *Corpus Iuris Civilis*. Pragmatic as the Romans were, they allowed gambling while trying to regulate it; dice games were restricted to certain festivities, and there were attempts to protect consumers.[21] Post-antiquity, the regulation of gambling became heavily influenced by religious convictions. While other religions were less disapproving of gambling or less categorical about it,[22] *Christian leaders* despised gambling and made the regulation of gambling a *religious issue*. Venetia supposedly holds the oldest gambling ban, enshrined at a church's wall.[23] Protestant leaders held particularly strong views against gambling. In Luther's worldview, gamblers were people who did not understand that God alone was steering their fortune. Gambling was therefore a form of challenging

[17] Regarding the attack on aristocratic vices, cf. Andrew, D.T., *Aristocratic Vice*: *The Attack on Duelling*, *Suicide*, *Adultery*, *and Gambling in Eighteenth-Century England*, New Haven: Yale University Press, 2013.

[18] Strejcek, "Lotto und andere Glücksspiele im Spiegel der Weltliteratur". Cf. also Tepperman, L., Albanese, P., Stark, S. et al., *The Dostoevsky Effect*: *Problem Gambling and the Origins of Addiction*, Don Mills, ON: OUP Canada, 2013.

[19] For gambling in the German-speaking literature, cf. Gerrekens, L., and Küpper, A., *Hasard*: *Der Spieler in der deutschsprachigen Literaturgeschichte*, Würzburg: Königshausen & Neumann, 2012.

[20] Strejcek, "Lotto und andere Glücksspiele im Spiegel der Weltliteratur".

[21] Maass, "Wie haben die Griechen und Römer gewettet? – Zur antiken Sportwette", at 148.

[22] For the situation under Jewish law, cf. Abrahams, G., "Cards and Cardplaying" in *Encyclopaedia Judaica*, Berenbaum, M., and Skolnik, F. (Eds.), 2nd ed., Detroit: Detroit Macmillan Reference, 2007, 467–468. For other religions, cf. e.g. Shinn, L.D., "International Society for Krishna Consciousness" in *Encyclopedia of Religion*, Jones, L. (Ed.), vol. 1, 2nd ed., Detroit: Macmillan Reference, 2005, pp. 4521–4524, at 4522.

[23] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 10.

God's authority.[24] Moreover, games of chance and playing in general were seen as idle and unproductive behaviours, which contrasted strongly with the *protestant ethos of assiduous work*, *order and frugality*.[25] Protestant churches also invented the literature genre 'books of devils' in the sixteenth century. Each book portrays a devil (drinking, harlotry, gambling), his followers and their deeds. In relation to gambling, the associated deeds consisted of cursing, cheating, beating, murdering and so forth. The regulatory strategy was to completely ban godless activities before they escalated.[26] The fact that the New Testament describes how Roman soldiers gambled over Jesus' undergarments by drawing lots certainly did not cast a good light on the concept of 'trying one's luck' from a Christian perspective.[27]

Buland argues that the prohibitive approach was only softened when authorities realised that the organisation of games of chance was a great *source of revenues*. Early examples included the public lottery in sixteenth century Venetia (combined with a ban on other organisers) as well as the oldest continuously operated lottery, the Austrian lottery introduced by the Empress Maria Theresia in 1752.[28]

In the last two decades, Europe has seen fiercely led legal struggles over gambling. Private operators have tried to break up national gambling markets while Member States' governments have tried to defend their national regulatory approaches towards gambling. Numerous judgments on gambling services have been handed down by the *European High Courts*.[29] One of the central arguments to justify national gambling regimes has been the *protection of consumers from gambling addiction*. Opponents of monopolistic regulatory models have argued in turn that the real motivation for an exclusive right model was its role as an easy source of public revenues. The struggles have been intensified by the mediatised economic success of poker in recent years. Even more important has been the quick spread and economic success of online gambling. These forms of games have raised fears of an uncontrollable spread of gambling addiction.[30] Due to the *inherent cross-border*

[24] Ibid.

[25] Zollinger, M., *Geschichte des Glücksspiels*: *Vom 17. Jahrhundert bis zum Zweiten Weltkrieg*, Vienna/Cologne/Weimar: Böhlau Verlag, 1997, at 283.

[26] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 11. Cf. also Schumacher, D.M., ""Des Teufels Spiel" – Glücksspiel in Mittelalter und früher Neuzeit" in *Volles Risiko*! – *Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 85–93.

[27] For this aspect, cf. Jung, C., "Losen unterm Kreuz" in *Volles Risiko*! – *Glücksspiel von der Antike bis heute*, Badisches Landesmuseum Karlsruhe (Ed.), Karlsruhe: Braun Buchverlag, 2008, pp. 35–41.

[28] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 11–12.

[29] In this book, the term 'European High Courts' describes the two 'Internal Market Courts' – the Court of Justice of the European Union ('CJEU') and the EFTA Court – as well as the European Court of Human Rights ('ECtHR'). Most cases were decided by the CJEU; the EFTA Court handed down two judgments. The ECtHR has rarely dealt with gambling services.

[30] Cf. e.g. in relation to the introduction of a licensing model for online operators in the UK, Light, R. (2007). "Gambling Act 2005: Regulatory Containment and Market Control", *Modern Law Review, 70*(4), 626–653; Adams, P.J., Raeburn, J., and De Silva, K. (2009). "A Question of Balance: Prioritizing Public Health Responses to Harm from Gambling", *Addiction,*

nature of the Internet and consequent Internet gambling offers, the business activities of online gambling operators quickly clashed with gambling laws that are still defined along national borders.[31] Operators have relied on the *fundamental freedoms* enshrined in European Internal Market[32] law while Member States have argued *public interest grounds* like consumer protection.

Some of these themes, like online gambling, are indeed new. But in the midst of the heated debate, it is helpful to consider that other themes have represented a reality of life for centuries and millennia: gambling, the pleasures and problems relating to gambling, gambling addiction, gambling as source of public revenues and attempts to regulate gambling.

1.2 Overview

This book consists of two parts. After the general introduction (Chap. 1), Part I presents the *legal framework* in which gambling services take place in Europe. First, the various *national*, *international and European constraints*, which impact national gambling regulation, are briefly outlined (Chap. 2). Subsequently, the *general law on the fundamental freedoms* and the conditions under which these freedoms can be restricted are presented (Chap. 3). For the sake of completeness, Part I is concluded with a presentation of other relevant provisions of *EU primary and secondary law* (Chap. 4). Finally, the results of Part I are summarised (Chap. 5).

Part II *analyses the case law* on gambling services of the Court of Justice whose approach is contrasted with that of the EFTA Court throughout this book. The structure of Part II follows the classic judicial test (scope of application, justification grounds, margin of appreciation and principle of proportionality). Chapter 6 explains under which conditions facts relating to games fall within the *scope of application* of EU law and, more specifically, within the case law on gambling. Chapter 7 critically reviews the *justification grounds*, which have been pleaded in the gambling cases. A central justification ground is *consumer protection*, in particular the regulatory ambition to protect consumers from gambling-related harm. The chapter also inquires whether *public morality* is an adequate justification ground in the field of games of chance.

The related Chaps. 8 and 9 form the central piece of this book. They address the research questions that are essential to the present work. Chapter 8 takes a close look at *the use of the margin of appreciation*. First, the *principles and criteria*, which are supposed to steer the use of the margin of appreciation, are presented. It

104(5), 688–691; Orford, J. (2005). "Disabling the Public Interest: Gambling Strategies and Policies for Britain", *Addiction, 100*(9), 1219–1225. Orford, J., *An Unsafe Bet? The Dangerous Rise of Gambling and the Debate We Should Be Having*, Chichester/Malden: Wiley-Blackwell, 2011.

[31] For an overview, cf. Hörnle, J., *Cross-Border Internet Dispute Resolution*, Cambridge: Cambridge University Press, 2009.

[32] The terms 'Internal Market' and 'Single Market' are used as synonyms.

is then assessed whether the Court of Justice followed these criteria in its gambling jurisprudence. The rich and detailed jurisprudence of the *ECtHR* on this doctrine informs the analysis. Subsequently, Chap. 9 examines the *proportionality review* in the gambling case law. This chapter in particular is strongly informed by an empirical perspective and presents the *state of research on gambling addiction*. Chapter 9 first inquires whether gambling addiction is of a peculiar nature. It is then assessed to which extent the views of the Court of Justice find support in empirical evidence.

Chapters 10 and 11 constitute two excursions in the sense that the potential roles of the *precautionary principle* (Chap. 10) and *EU fundamental rights* (Chap. 11) are inquired.

An epilogue concludes with a brief *account of the gambling* case law and revisits some of the main findings of the book (Chap. 12).

By its concern, the present book is driven by a perspective from empirical disciplines of medicine, psychology, neurobiology and related fields. It offers 'Empirical Views on European Gambling Law and Addiction'. The book takes the strong normative stance that courts should follow an evidence-informed approach in their jurisprudence on gambling. Ultimately, it places the *consumers and their protection from gambling-related harm* at the centre of reflection. As a consequence, while a traditional legal *methodology* is applied, namely with regard to the *structure*, the book uses different analytical modes (inductive, deductive).

Part I
Gambling in the EU: Legal Framework

Part I presents the *legal framework* within which gambling services take place in Europe. It inquires the *various constraints that impact national gambling regulation* (Chap. 2). The subsequent chapter outlines the *general law on the fundamental freedoms* and describes the conditions under which they can be restricted (Chap. 3). Particular attention is given to the *doctrine of the margin of appreciation* (Sect. 3.4). Finally, Chap. 4 briefly examines to which extent other provisions of *EU primary and secondary law* may be applicable to gambling issues.

Chapter 2
National Gambling Regulation: National, International and European Constraints

2.1 Sectorial Quasi-Exemption or Liberalisation?

Publications on European gambling issues often take either the side of state monopolies or that of private operators. Haltern accurately noted that most of the literature on this topic has been produced by lobbyists and practitioners, and therefore has not necessarily enhanced the quality of the debate and thoroughness of argumentation.[1] Furthermore, ideological views or economic ties regularly colour the drafting of contributions of the debate or of comments on judgments. Commentators often advocate that courts either grant a sectorial *quasi-exemption* of national gambling regulation from EU law or a *liberalisation* of gambling markets based on the supremacy of EU law.[2]

The heat of the debate is not surprising given the *significant monetary stakes* for both private and state operators. A broader view reveals that the controversial nature of this debate is not specific to gambling. It is to be expected that economic regulation in areas involving high stakes is controversial and that stakeholders in such areas aggressively defend their own interests. The sectors of energy and telecommunication are good examples.[3]

[1] Haltern, U., *Gemeinschaftsrechtliche Aspekte des Glückspiels,* Schriften zum europäischen Recht, vol. 129, Magiera, S., Merten, D., Niedobitek, M., et al. (Eds.), Berlin: Duncker & Humblot, 2007, at 9.

[2] Concurring: Fink, M., and Rübenstahl, M. (2007). "Placanica & Co. – "Rien ne va plus" – Das Ende der Anwendbarkeit von § 284 StGB und der Abschied vom Sportwettenmonopol?", *European Law Reporter, 7–8*, 275–290, at 275.

[3] Larouche, P., "Introduction – A View From the Outside" in *The Regulation of Gambling: European and National Perspectives*, Littler, A., and Fijnaut, C. (Eds.), Leiden: Martinus Nijhoff Publishers, 2007, pp. 1–7, at 1. For a discussion of parallels between the energy and gambling sectors, cf. Kramer, T. (2007). "Gambling and Energy in the Internal Market", *ERA Forum, 8*(3), 1–8.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_2,

It may be tempting to consider European Union law and national law as antagonistic – as if the application of one excluded the other.[4] Therefore, it is necessary to move past the apparent controversy and consider the actual legal bases, which come from primary and secondary EU law and case law. Gambling services are an economic activity to which the Treaties apply,[5] in particular the Internal Market provisions. According to the Treaty on the Functioning of the European Union ('TFEU'), Internal Market issues are one of the areas in which *shared competences* apply.[6] Considering this division of powers, conflicts over the 'right balance' between Union and Member States' interests are unsurprising. Apart from this interaction at European level, gambling regulation involves constraints from further legal orders.[7]

2.2 Constraints Under National Law

As EU law currently stands, European gambling law is foremost a matter for *national law*. National legislators in Europe have opted for very different gambling regimes, ranging from the total prohibition of certain games to liberal licensing systems.[8] Nevertheless, their regulatory choices are subject to certain constraints, which apply irrespective of those from EU law. National gambling laws must respect the *national constitutional order*. Constitutional provisions and their interpretation by the courts generally recognise certain fundamental principles and fundamental rights. The principle of proportionality is one such principle. While legislators are generally free to choose the goals of state activities, many European constitutional orders adhere to the idea that the means to reach these goals must be proportionate.[9] In addition, modern democracies also protect a number of

[4] For a contribution that seems to suggest an antagonistic constellation in WTO law, cf. Ruse-Kahn, H.G., "'Gambling' with Sovereignty: Complying with International Obligations or Upholding National Autonomy" in *Economic Law and National Autonomy*, Kolsky Lewis, M., and Frankel, S. (Eds.), Cambridge/New York: Cambridge University Press, 2010, pp. 141–166.

[5] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 35.

[6] Art. 4(2)(a) TFEU.

[7] For the aspect of conflicting laws, cf. Hörnle, J., and Zammit, B., *Cross-Border Online Gambling Law and Policy*, Cheltenham UK/Northampton, MA: Edward Elgar, 2010.

[8] For an overview of national gambling regulations, cf. GamblingCompliance, *Market Barriers: A European Online Gambling Study 2012*, 2012; Gambling Compliance, *Market Barriers: A European Online Gambling Study*, Gambling Compliance 2009; Planzer, S. (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045073, 2011; Littler, A., and Fijnaut, C., *The Regulation of Gambling: European and National Perspectives*, Leiden: Martinus Nijhoff Publishers, 2007.

[9] Cf. e.g. Federal Constitution of the Swiss Confederation of 18 April 1999, 'Swiss Federal Constitution', SR 101, Art. 5(2): "State activities must be conducted in the public interest and be proportionate to the ends sought."

fundamental rights. Governments can limit these rights only under certain conditions. Limitations must usually have a legal basis, be justified by a legitimate public interest and be proportionate.[10]

Accordingly, the wish of gambling operators to offer gambling services and of gambling consumers to use these services may be protected to some extent under the national constitutional order. As a matter of fact, constitutions regularly protect under various different notions the fundamental right to *choose an occupation* and to *pursue an economic activity*.[11] National gambling regulation needs to take into account these safeguards of individual rights. This illustrates that even under mere national law, governments and parliaments are not completely free in their regulatory choices and administrative decisions but bound by legal obligations stemming from constitutional law.[12] The well-known judgment of the *German Constitutional Court* regarding the unconstitutionality of the Bavarian gambling monopoly is an illustrative example.[13] Often, these constitutional guarantees run in parallel to EU law. Ennuschat correctly noted the commonality between the judicial test of the Court of Justice regarding EU law aspects and the judicial test of the German Constitutional Court regarding constitutional law aspects.[14]

---

[10] For example Art. 36 ibid.:

"1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

3 Any restrictions on fundamental rights must be proportionate.

4 The essence of fundamental rights is sacrosanct."

[11] For example Art. 27 ibid.:

"1 Economic freedom is guaranteed.

2 Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity."

[12] Art. 5 ibid.: "1 All activities of the state shall be based on and limited by law."

[13] BVerfG, 1 BvR 1054/01, Verfassungsmässigkeit des deutschen Sportwetten-Monopols, Judgment of 28 March 2006.

[14] Ennuschat, J., "Aktuelle Entwicklungen in der Rechtsprechung von EuGH und BVerfG" in *Gesellschafts – und Glücksspiel: Staatliche Regulierung und Suchtprävention – Beiträge zum Symposium 2005 der Forschungsstelle Glücksspiel*, Becker, T., and Baumann, C. (Eds.), Schriftenreihe zur Glücksspielforschung, Frankfurt am Main: Peter Lang Europäischer Verlag der Wissenschaften, 2006, pp. 69–74, at 74. Moreover, national law may allocate the power to regulate gambling at the *national (federal), regional (state) or local (municipal) level*. In Germany and Spain for instance, the regional authorities have far-reaching competences in relation to gambling ('Länder', 'comunidades autónomas'); cf. for Germany: Hofmann, J., and Spitz, M., "Germany" in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 107–119; cf. for Spain: Asensi, S., and Serebrianskaia, A., "Spain" in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 303–314. In the UK, city councils can license casino operations: Littler, A. (2007). "The Regulation of Gambling at European Level: The Balance to be Found", *ERA Forum, 8*(3), 357–371, at 359; cf. also Harris, J., and Hagan, J., "United Kingdom" in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 331–346. Similarly, games of chance in Switzerland fall mostly under the competences of the federal authorities

2.3 Constraints Under Public International Law

The regulatory choices of national authorities are further affected by obligations under international law.[15] In addition to the compulsory rules of public international law (*ius cogens*), states enter further obligations by ratifying bilateral or multilateral agreements. In relation to the regulation of gambling, treaties from two fields of law can contain provisions that may impact national gambling regulation: *trade* agreements and *human rights* treaties. With regard to the EU and EEA Member States, the relevant trade-related obligations mainly stem from EU and EEA law and WTO law, in particular the *GATS*.[16] Relevant human rights obligations primarily stem from the *European Convention on Human Rights ('ECHR')*. This book focuses on the case law under the EU Treaties and the EEA Agreement (see Sect. 3.4.5 *i.f.*). However, the experience of a limitation of national choices in regulating gambling is not specific to the Internal Market as WTO proceedings against the United States showed.[17]

2.4 Interplay of EU Law and National Gambling Regulation

According to the TFEU *shared competences* apply in Internal Market affairs.[18] This also applies to gambling services, which constitute an economic activity falling within the scope of the Treaties.[19]

---

whereas lotteries, sports betting and games of skill fall under the competences of cantonal authorities; cf. the recently amended Art. 106 of the Federal Constitution of the Swiss Confederation of 18 April 1999; for a contribution, cf. Pérrard, L., *Monopole des loteries et paris en Suisse: État des lieux et perspectives – Remise en question du monopole détenu par les operateurs de loteries et paris,* Cahier de l'IDHEAP, vol. 236/2008, Chavannes-Lausanne: Institut de hautes études en administration publique, 2008.

[15] For example Art. 5(4) Federal Constitution of the Swiss Confederation of 18 April 1999: "The Confederation and the Cantons shall respect international law."

[16] For a comparison of gambling services under EU and WTO rules, cf. Geeroms, S.M.F., "Cross-Border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?" in *Cross-Border Gambling on the Internet – Challenging National and International Law*, Swiss Institute of Comparative Law (Ed.), Zurich/ Basel/Geneva: Schulthess, 2004, pp. 143–180 as well as Diaconu, M., *International Trade in Gambling Services,* Global Trade Law Series, Alphen aan den Rijn: Kluwer Law International, 2010.

[17] AB-2005-1 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R. For a brief introduction to the implications of WTO law for national gambling regulation, the proceedings against the US and the regulatory regime of Antigua, cf. Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 69 *et seq*. and 175 *et seq.* For the broader context of the battle between the US and online gambling jurisdictions, cf. Cooper, A.F., *Internet Gambling Offshore: Caribbean Struggles Over Casino Capitalism*, Houndmills/Basingstoke/Hampshire: Palgrave Macmillan, 2011.

[18] Art. 4(2)(a) TFEU.

[19] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 19 and 30.

Article 2(2) TFEU notes regarding this constellation:

> "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

It follows that EU Member States can exercise their legislative competence regarding the regulation of gambling. As Union law stands, it is still almost exclusively national law that directly regulates gambling (see Sect. 4.2). However, due to the *supremacy of EU law* and the requirement that Member States ensure fulfilment of their obligations arising from the Treaties, national law must be in line with the Treaty obligations, in particular the fundamental freedoms.[20] Consequently, the question is not which set of law applies – national or European – but rather *how the two sets of laws interact, and how the constraints of EU law impact national laws*.[21] If national law conflicts with EU fundamental freedoms, the Member State concerned must show that its conflicting law serves a legitimate *public interest objective*. Moreover, the public interest must be *balanced* with the interest in an effective implementation of EU law (namely, proportionality). The answers to this balancing exercise cannot be found in the Treaties but in the case law, which is briefly outlined in the next chapter.

[20] Art. 4(3) TEU.

[21] For the impact of EU law on national gambling regulation in France and Germany, cf. Heseler, F., *Der Einfluss des Europarechts auf die mitgliedstaatliche Glücksspielregulierung : Frankreich und Deutschland im Vergleich,* Schriften des Europa-Instituts der Universität des Saarlandes. Rechtswissenschaft, Baden-Baden: Nomos, 2013.

Chapter 3
The General Law on EU Fundamental Freedoms and the Conditions of Their Restrictions

The Internal Market Courts[1] have dealt with gambling issues as a matter of fundamental freedoms. Before the gambling case law can be analysed (Part II), this chapter must first present the general law on the fundamental freedoms. The fundamental freedoms are outlined (Sect. 3.1) and the conditions under which they can be restricted according to the case law. This involves a presentation of the Treaty derogations and further derogations recognised in the case law (Sect. 3.2). The principle of proportionality is briefly outlined (Sect. 3.3). Special attention is given to the doctrine of the margin of appreciation as it has played a crucial role in the gambling case law (Sect. 3.4). Finally, the results are summarised (Sect. 3.5).

3.1 Fundamental Freedoms

Since the signing of the Rome Treaties in 1957, the implementation of the Internal Market has been the main focus of EU legislation. Jean Monnet and other architects of the Internal Market saw it as the key instrument to achieve the main goals of European integration: peace and prosperity in Europe.[2] Ensuring the functioning of the *Internal Market* still is the key area of the Union's regulatory activities and is *ranked first among the Union's policies*.[3] The TFEU provides that the fundamental freedoms relating to goods, persons, services, establishment and capital shall be ensured in an area without internal frontiers.[4]

An overriding principle of the Treaties is that the factors of production should be able to move freely within the Internal Market. The TFEU mentions this principle

[1] In this book, the term 'Internal Market Courts' refers to the CJEU and the EFTA Court.

[2] The TFEU now mentions in Art. 3(1) the aim "to promote peace, [the Union's] values and the well-being of its peoples."

[3] Arts 3(3) TEU and 26(1) TFEU.

[4] Art. 26(3) TFEU.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_3,

for goods,[5] persons (workers),[6] establishment,[7] services[8] and capital.[9] However, this principle has limits. Under certain conditions, Member States may restrict fundamental freedoms. According to the case law of the Court of Justice, two tracks are open to justify derogations from the fundamental freedoms: the first track was introduced by the Treaties; the second was recognised in the Court's case law.

3.2 Justification Grounds

3.2.1 Derogations in the Treaties

The provisions enshrining the fundamental freedoms share an identical structure: first, the principle is established (fundamental freedom), followed by the grounds that may serve to justify derogations from the principle. While the exact wording of these grounds varies from one fundamental freedom to another, the grounds that serve as justifications are essentially the same: *public policy, public security and public health*. The provisions relating to persons, establishment and services refer (solely) to these justification grounds.[10] In this context, it can already be noted that the gambling jurisprudence has almost exclusively touched upon services and

[5] Art. 34 TFEU: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

[6] Art. 45(1)–(2) TFEU:

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

[7] Art. 49 TFEU: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

[8] Art. 56(1) TFEU: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

[9] Art. 63 TFEU:

"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

[10] Arts 45, 52 and 62 TFEU. Art. 62 TFEU renders Arts 51–54 TFEU applicable to the freedom to provide services. As an additional exemption, those freedoms do not apply to functions that require a particular degree of loyalty to the state (cf. Arts 45(3), 51 and 62 TFEU; for an application in the case law, cf. C-149/79 Commission v Belgium [1982] ECR 1845).

establishment. By contrast, the chapter on the free movement of capital does not list public health as a justification ground but outlines additional grounds that are specific to capital.[11] Finally, the chapter on goods refers to health in the form of "the protection of health and life of humans, animals or plants."[12] It is also the only fundamental freedom to expressly list public morality as justification ground. Moreover, additional grounds are mentioned that necessarily relate to goods.[13]

3.2.2 Derogations in the Case Law

In addition to this express catalogue of justification grounds, the Court of Justice has approved of further grounds in its jurisprudence that may serve to justify derogations from the fundamental freedoms. In *Cassis de Dijon*, it introduced the so-called *'rule of reason'* or as the Court named it the concept of *'mandatory requirements'*[14] that can serve to justify restrictions too.[15] The judge-made concept can be seen as a move to counterbalance the very broad definition that the Court had given to "measures having an effect equivalent to quantitative restrictions" in *Dassonville*.[16] It was also the judicial recognition that the Treaty system contained *lacunae*, namely that there were *public interests whose protection was not assured* by the limited catalogue of Treaty derogations and that, under certain conditions, the protection of these public interests did not jeopardise the aim of an Internal Market.[17]

---

[11] Art. 65(1) TFEU:

"1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."

[12] Art. 36 TFEU.

[13] Art. 36 TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[14] C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') [1979] ECR 649, para. 8.

[15] For a detailed discussion of the rule of reason, cf. *The Rule of Reason and its Relation to Proportionality and Subsidiarity*, The Hogendrop Papers, Schrauwen, A. (Ed.), Groningen: Europa Law Publishing, 2005.

[16] C-8/74 Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR 837, para. 5.

[17] Emiliou, N., *The Principle of Proportionality in European Law – A Comparative Study*, The Hague/London/Boston: Kluwer Law International, 1996, at 237.

The Court of Justice has given varying labels to the category of mandatory requirements. In its jurisprudence on gambling, the Court has generally relied on wording similar to the one established in *Gebhard*. That case involved, as most of the gambling cases, the freedom to provide services and the freedom of establishment:

> It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by *imperative requirements in the general interest*; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[18]

The Court of Justice may refer to varying notions such as 'mandatory requirements', 'imperative requirements in the general interest', 'imperative reasons relating to the public interest'[19] or 'overriding reasons relating to the public interest'[20] – ultimately, they all relate to *legitimate public interest objectives* that are not of an economic, fiscal or protectionist nature. Even though the concept was introduced in relation to the free movement of goods (*Cassis de Dijon*), the Court subsequently extended it to all fundamental freedoms and accepted a long list of public interest objectives as mandatory requirements. Such interests can justify a measure if the latter is indistinctly applicable and proportionate to the interest pursued, namely suitable and necessary.

In its jurisprudence on games of chance, the Court of Justice has not been rigid in distinguishing between the two tracks.[21] It has generally relied on the overriding reasons relating to the public interest rather than on the express Treaty derogations.[22] Similarly, it has not referred to the general prohibition to discriminate on grounds of

[18] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37. Italic emphasis added.

[19] C-76/90 Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221, para. 15.

[20] C-154/89 Commission v France [1991] ECR I-659, para. 15.

[21] This point was also noted by Advocate General Mengozzi in his opinion in C-153/08 Commission v Spain [2009] ECR I-9735, paras 80–81.

[22] Exceptionally, the CJEU mentioned the Treaty derogations in general terms, however, only to nevertheless assess the measures from the angle of mandatory requirements: cf. e.g. C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51; C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, para. 20. Only were the national measures were found to be discriminatory, the CJEU had to rely on the Treaty derogation: cf. e.g. C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 79; C-153/08 Commission v Spain [2009] ECR I-9735; cf. also the opinion of Advocate General Mengozzi in the latter case who assessed the gambling addiction concerns under the Treaty derogation of 'public health' (paras 84 and 94). In C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, the CJEU did not even discuss the Treaty derogations but simply noted that the justifying reasons needed to be "accompanied by an analysis of the appropriateness and proportionality of the restrictive measure" (para. 25).

nationality contained in Article 18(1) TFEU.[23] In any event, the requirement of an indistinct application of restrictive measures is integral part of the *Gebhard* formula.[24]

3.2.3 Differences Between the Two Tracks

According to the jurisprudence of the Court of Justice, a difference between the two tracks exists in that mandatory requirements *can only justify non-discriminatory ('indistinctly applicable') measures*.[25] By contrast, the Treaty exceptions can justify both discriminatory ('distinctly applicable') measures[26] and non-discriminatory ('indistinctly applicable') measures.[27] The distinction has been criticised as superfluous, most notably by Advocate General Jacobs,[28] and the *EFTA Court has*

[23] Art. 18(1) TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

[24] Discriminatory measures have rarely played a role in the case law on gambling. Cf., however, C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185.

[25] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

[26] Opinions of Advocates General Fennelly in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 25, and Stix-Hackl in C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, para. 70, and, *ex multis*, judgment of the CJEU in C-288/89 Stichting Collectieve Antennevoorziening Gouda et alii v Commissariaat voor de Media [1991] ECR I-4007, para. 11. For a similar statement in a gambling case, cf. C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51.

[27] C-76/90 Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221, para. 12:

"Article [56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."

[28] Opinion of Advocate General Jacobs in C-136/00 Rolf Dieter Danner [2002] ECR I-8147, para. 40:

"As to which grounds of justification may be invoked, I think it is inappropriate to have different grounds depending upon whether the measure is discriminatory (directly or indirectly) or whether it involves a non-discriminatory restriction on the provision of services. Once it is accepted that justifications other than those set out in the Treaty may be invoked, there seems no reason to apply one category of justification to discriminatory measures and another category to non-discriminatory restrictions. Certainly the text of the Treaty provides no reason to do so: Article [56 TFEU] does not refer to discrimination but speaks generally of restrictions on freedom to provide services'. In any event, it is difficult to apply rigorously the distinction between (directly or indirectly) discriminatory and non-discriminatory measures. Moreover, there are general interest aims not expressly provided for in the Treaty (e.g. protection of the environment, consumer protection) which may in given circumstances be no less legitimate and no less powerful than those mentioned in the Treaty. The analysis should therefore be based on whether the ground invoked is a legitimate aim of general interest and if so whether the restriction can properly be justified under the principle of proportionality. In any event, the more discriminatory the measure, the more unlikely it is that the measure complies with the principle of proportionality. Such a solution would be consistent with

abstained from relying on this differentiation. The flexible interpretation of the principle of homogeneity by the EFTA Court (see Sect. 3.4.5 *i.f.*) has been referred to as 'creative homogeneity' by a judge of the Court of Justice.[29] The Court of Justice, however, has continued to practise the distinction. In practice, the difference does not appear to be significant. Under the Treaty derogations, a direct discrimination based on grounds of nationality is hard to justify for a Member State. Even in the case of indirect discrimination, such measures are reviewed very closely by the Court and can only be justified by objective circumstances.[30]

Another difference consists between the *strict interpretation of the Treaty derogations* and the *flexible recognition of mandatory requirements*. The Court of Justice generally practises a strict interpretation of the Treaty derogations: 'public policy' and 'public security' can only be relied on "if there is a genuine and sufficiently serious threat to a fundamental interest of society."[31] With regard to 'public morality', the Treaty lists this justification ground only in relation to goods. The Court has accommodated public morality concerns under the heading of 'public policy' in relation to the other fundamental freedoms but only to secure central values of a society. 'Public health' may be more frequently invoked. In general, the Court emphasises the role of the proportionality test, demands a thorough risk assessment and underlines the role of best international science.[32]

In sharp contrast to the strict practice in relation to the Treaty exceptions, the Court of Justice *has accepted a wide array of justification grounds as 'mandatory requirements'*. It virtually accepts any public interest objective as legitimate, from media pluralism to traffic security, except for interests of a purely economic, fiscal or protectionist nature.[33] By way of exception, 'economic' concerns may nevertheless qualify in relation to public health services where the economic

---

the Court's implicit approach in most of the recent cases on freedom to provide services. I would add that the same solution may be appropriate for the free movement of goods. That solution would meet the need to give equal weight, when assessing restrictions on the free movement of goods, to interests no less vital that those set out in Article [36 TFEU], notably the protection of the environment."

[29] Timmermans, C. (2006). "Creative Homogeneity" in *A European For All Seasons: Liber Amicorum in Honour of Sven Norberg*, Johansson, M., Wahl, N., and Bernitz, U. (Eds.), Brussels: Bruylant, pp. 471–484.

[30] Confirmed by the CJEU in the gambling case C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51.

[31] C-54/99 Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister [2000] ECR I-1335, para. 17; cf. in relation to public policy already C-30/77 Régina v Pierre Bouchereau [1977] ECR 1999, para. 35.

[32] Chalmers, D., Davies, G., and Monti, G. (2010). *European Union Law: Text and Materials*, Cambridge University Press, at 902.

[33] Ibid., at 70–75. The Court speaks of 'settled case-law': C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 52. For a list of 'imperative requirements' recognised in the case law of the CJEU, cf. Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Report prepared for the European Commission, available at http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf. 2006, Chap. 2, at 971, *i.i.*: "Consumer protection, protection of creditors, protection from unfair competition, enforcement of

effects of unlimited patient migration *threaten the health care system as such*. In view of a balanced medical and hospital service, these concerns qualify as 'public health' derogation.[34]

3.3 Proportionality

It was shown that national measures restricting fundamental freedoms can be justified either based on express Treaty derogations or mandatory requirements. In a next step, the Court of Justice examines the proportionality of the measures, that is, whether the measures can be considered *proportionate in relation to the objective* pursued by the Member State. The express Treaty reference to the principle of proportionality was only introduced by the Maastricht Treaty and relates to EU actions exclusively.[35] The Court of Justice has nevertheless practised a proportionality review since the early days,[36] applying it very broadly as a *general principle of EU law*.[37]

In an attempt to generalise the Court's approach towards proportionality review, it is argued in the literature that the review consists of three elements: suitability, necessity and proportionality *stricto sensu*.[38] While it is true that allusions to a

tax laws, functioning of the law, protection of health, environmental protection, media pluralism, important threat to the financial stability of the social security system, traffic security."

[34] C-158/96 Raymond Kohll v Union des Caisses de Maladie [1998] ECR I-1931, paras 50–51. For this point, cf. also the EFTA Court judgment in *Rindal* in which the risk of seriously undermining the financial balance of the social security system was recognised as an 'overriding general-interest reason': E-11/07 and E-1/08 (Joined Cases) Olga Rindal and Therese Slinning, Represented by Legal Guardian Olav Slinning v Norway, Represented by the Board of Exemptions and Appeals for Treatment Abroad [2008] EFTA Court Report 320, para. 55.

[35] Art. 5(4) TEU.

[36] Emiliou notes that the principle made an early debut already in the jurisprudence relating to the European Coal and Steel Community: Cf. C-8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community [1956] ECR English special edition 245, and Emiliou, *The Principle of Proportionality in European Law – A Comparative Study*, at 134.

[37] *Ex multis*, C-562/08 Müller Fleisch GmbH v Land Baden-Württemberg [2010] ECR I-1391, para. 43; Emiliou, *The Principle of Proportionality in European Law – A Comparative Study*, at 134 *et seq.* Similarly, proportionality was expressly recognised as a principle of EEA law by the EFTA Court: E-4/04 Pedicel AS v Sosial- og helsedirektoratet [2005] EFTA Court Report 1, para. 56.

[38] Harbo, T.-I., *The Function of Proportionality Analysis in European Law,* Ph.D. Thesis submitted at the EUI, Florence: European University Institute, 2010; Lilli, M., *The Principle of Proportionality in EC Law and Its Application in Norwegian Law,* LL.M. Thesis submitted at the EUI, Florence: European University Institute, 1997; Pollak, C., *Verhältnismässigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs,* Schriftenreihe Europäisches Recht, Politik und Wirtschaft, Schwarze, J. (Ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1991.

tripartite test can be found in the Court's jurisprudence,[39] the Court nevertheless significantly adjusts its review practice from one area to another and emphasises those aspects, which it finds most appropriate to describe the case at hand.[40] Moreover, the Court of Justice interprets the principle of proportionality *autonomously* and does not feel bound to the tripartite doctrine that has traditionally been suggested by German scholarship.[41] Where the Court deals with *mandatory requirements*,[42] it regularly uses a wording that is – expressly or in substance – reminiscent of the aforementioned *Gebhard formula*. Accordingly, the Court reviews whether the national measures are *suitable* and *necessary* to attain the pursued objective.[43]

In a first step, the Court of Justice assesses whether the national measures are *suitable*, that is, whether they are capable of attaining the declared public interest objective. Therefore, there must be a (at least potentially successful) *causal relationship* between the means and the end. Unsurprisingly, national measures often pass this first subtest since a government will generally try to adopt measures that it considers capable of attaining the objective.

In a second step, the Court assesses whether the national measures are *necessary* to achieve the declared objective. In relation to this criterion, the Court generally inquires whether there are 'less restrictive measures' available, or alternatively, whether the government relied on the 'least restrictive measure'.[44] As briefly

[39] *Ex multis*, cf. the *Fedesa* case:

"The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"

(C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et alii [1990] ECR I-4023, para. 13).

[40] Hoffmann, L., "The Influence of the European Principle of Proportionality upon UK Law" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 107–115, at 107; Tridimas, T., "The Rule of Reason and its Relation to Proportionality and Subsidiarity" in *Rule of Reason – Rethinking Another Classic of European Legal Doctrine*, Schrauwen, A. (Ed.), The Hogendorp Papers, Groningen: European Law Publishing, 2005, at 112.

[41] Lord Hoffmann speaks of "the standard tripartite definition used by German writers" and concisely notes the focus on the tripartite structure: "[Academic writers] have seemed much more interested in dissecting the principle [of proportionality] itself and allocating cases to the various categories of suitability, necessity and Verhältnismässigkeit im engeren Sinn than in discussing what seems to me the all-important question of the extent of the margin of appreciation and the grounds upon which it is allowed"

(Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law", at 107 and 112).

[42] Mandatory requirements have been relevant *inter alia* in the gambling jurisprudence.

[43] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

[44] For the former formula, cf. e.g. the *de Peijper* case: "can [be] as effectively protected by measures which do not restrict intra-Community trade so much" (C-104/75 Adriaan de Peijper,

illustrated with the following two judgments, the Court has established a *prudential practice of the necessity criterion*, carefully considering both market integration interests as well as national public interest objectives. The formula used in *Rau* is commonplace in the jurisprudence on fundamental freedoms and relevant in that this case, comparable to the gambling case law, regarded *mandatory requirements relating to consumer protection concerns, in the absence of harmonised rules:*

> If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods.[45]

The Court regularly understands the notion 'necessary' as *relating to the protection level chosen* by the respective Member State. Accordingly, "[t]he fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law."[46] The opinion of Advocate General Jacobs, adopted by the Court, in *Alpine Investments* well illustrates this approach:

> where no harmonization measures have been introduced, the rules of a Member State cannot be held contrary to the principle of proportionality merely because another Member State applies less strict rules. […] As already stated, the Directive on Investment Services does not harmonize national rules concerning the marketing of investments. […] It is clear therefore that, in the absence of harmonization rules, each Member State enjoys some discretion in determining the level of investor protection in its territory. Otherwise, it would follow that, in the absence of harmonization rules, Member States would need to align their legislation with that of the Member State which imposed the least onerous requirements. That might have the effect of undermining, rather than promoting, investor confidence.[47]

The Court's approach towards the notion of 'necessity' should not be confused with an all too lenient or even arbitrary proportionality review.[48] While it is for the Member State to define the protection level, it is for the Court of Justice and the national courts to review the necessity of the measures *in the light of the protection level chosen by the Member State.* This approach is prudential in that it respects differences in national protection levels, while still reviewing the necessity of the measures.

The Court of Justice appears to be very cautious about reviewing the proportionality *stricto sensu* in fundamental freedom cases,[49] or alternatively, implicitly includes

---

Managing Director of Centrafarm BV [1976] ECR 613, para. 17). For a discussion whether one formula represents a stricter standard than the other, cf. Harbo, *The Function of Proportionality Analysis in European Law*, at 36–38.

[45] C-261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 3961, para. 12.

[46] C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141, para. 51.

[47] Opinion of Advocate General Jacobs in ibid., paras 88–90.

[48] Concurring: Harbo, *The Function of Proportionality Analysis in European Law*, at 41.

[49] Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at. 19; Jans, J. (2000). "Proportionality Revisited", *Legal Issues of Economic Integration, 27*(3), 239–265, at 248. According to the latter author, the CJEU proceeds only in exceptional circumstances to a review of the proportionality *stricto sensu* such as in the case relating to the British Sunday trading legislation: C-169/91 Council of the City of Stoke-on-Trent and Norwich City Council v B & Q Plc [1992] ECR I-6635.

this aspect within the necessity review.[50] References in the literature to fundamental freedom cases, where the Court of Justice supposedly reviewed this third subtest, are often unfounded.[51] In any event, the aforementioned *Gebhard* formula does not mention the third subtest. The essence of the third subtest is indeed different to the first two subtests. While suitability and necessity are *means-end tests*,[52] proportionality *stricto sensu* is a delicate *balancing test* involving competing values. It identifies the relevant interests at stake and tries to establish a *fair balance* between them.[53] In this context, the procedural dimension must not be neglected. In preliminary ruling cases, the Court of Justice does not dispose of all *facts* and often leaves the (at times) complex balancing exercise to the referring court.[54] The *importance of this subtest* of the proportionality review should not be underestimated. It serves as a guarantee that an independent court considers, first, the negative consequences for the individual/undertaking, and second, in case they are found excessive, strikes the measure down as disproportionate.[55]

3.4 Margin of Appreciation

A brief presentation of the general law on the fundamental freedoms could usually be limited to the aforementioned aspects of fundamental freedoms, justification grounds and proportionality. While related to the principle of proportionality, the

[50] Harbo, *The Function of Proportionality Analysis in European Law*, at 48.

[51] Cf. e.g. Pollak, *Verhältnismässigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs*, at 139. This author mentions the *Groener* case as an example of a proportionality *strito sensu* review. Yet, the CJEU hardly reviewed the measure at all. It limited itself to referring to the general formula that "the requirements […] must not […] in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States." The formula (and the CJEU's review) only refers to the principle of proportionality in general, not to the specific proportionality *stricto sensu* test, which would only follow subsequent to an assessment of suitability and necessity (C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR 3967, para. 19).

[52] Harbo, *The Function of Proportionality Analysis in European Law*, at. 29.

[53] With similar wording, von Danwitz, T. (2003). "Der Grundsatz der Verhältnismässigkeit im Gemeinschaftsrecht", *Europäisches Wirtschafts- und Steuerrecht, 14*(9), 393–402.

[54] However, where the CJEU considers that it disposes of all necessary facts and a balancing between fundamental freedoms and fundamental rights must be performed, it may engage in a lengthy balancing exercise. Cf. e.g. C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659.

[55] With similar wording, Craig, P. (1993). *EU Administrative Law*, Oxford: Oxford University Press, 2006, at 657; de Burca, G., "The Principle of Proportionality and Its Application in EC Law", *Yearbook of European Law, 13*(1), 105–150, at 113. It can already be noted that the standard of scrutiny of national courts may considerably vary from one Member State to another due to different judicial cultures, resulting in different protection levels for market actors. See for this point Sect. 9.3.3.3 *i.f.*

doctrine of the margin of appreciation deserves a separate and detailed presentation for the purpose of this book. Part II will examine the *significant role* that this doctrine has played in the case law on gambling. As a consequence, this section describes the doctrine in detail, namely its *notion and origin* (Sect. 3.4.1), its relationship to the principles of *subsidiarity* (Sect. 3.4.2), *judicial review* and *proportionality* (Sect. 3.4.3) and the *reasons* for which it is practised (Sect. 3.4.4). Since the *ECtHR* has strongly shaped this doctrine, the following considerations regularly refer to that court. This angle further underlines that the use of the doctrine is not limited to the Internal Market Courts. However, there are *commonalities and differences* between the Internal Market Courts and the ECtHR, which must be considered when examining whether the former should apply a wider, similar or narrower margin of appreciation when confronted with similar justification grounds (Sect. 3.4.5).

3.4.1 Notion and Origin

The term 'margin of appreciation' is derived from the French *'marge d'appréciation'*. Besides this term, other notions can also be found to describe the same judicial tool; margin or range of discretion, discretion, latitude, space of manoeuvre, deference and variations thereof. According to this doctrine, an inter-/supranational court may leave a range of discretion to domestic authorities when reviewing whether the relevant national measures comply with the inter-/supranational[56] rules in question. In other words, the respective court *applies self-restraint in the review process*. The doctrine of the margin of appreciation therefore regards the process of judicial decision-making; it is a tool that serves to reach solutions in specific court cases.[57]

The doctrine finds its origins in national law. It is known to the practice of administrative law in all civil law jurisdictions,[58] and the most complex and sophisticated canon has been developed in Germany.[59] In a national setting, a (higher) court may regularly leave a certain amount of discretion to administrative authorities when reviewing the objective and proportionality of their decisions. This is particularly true for courts of last resort. Ultimately, these are ways to address the tensions between the *local and centralised* authority, or alternatively, *governmental/administrative and judicial* authority. The world of common law

[56] In the case of the EU (EEA) and the CJEU (EFTA Court), one would arguably have to speak of *(quasi-)supranational* rules and *(quasi-)supranational* court.

[57] Brems, E., *Human Rights: Universality and Diversity,* International Studies in Human Rights, vol. 66, The Hague: Martinus Nijhoff Publishers, 2001, at 422.

[58] Matscher, F., "Methods of Interpretation of the Convention" in *The European System for the Protection of Human Rights*, Macdonald, R.S.J., Matscher, F., and Petzold, H. (Eds.), Dordrecht: Martinus Nijhoff Publishers, 1993, pp. 63–79, at 76.

[59] Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen/Oxford/New York: Intersentia Uitgevers NV 2002, fns 4 and 5.

was traditionally neither familiar with the doctrine of the margin of appreciation nor with a classic proportionality test. The *Wednesbury* test is limited to assessing the *reasonableness* of the measure.[60] Similarly, courts in Scandinavia traditionally limited their review of administrative measures to a *reasonableness* test rather than a (full) proportionality test.[61]

On the *international level*, the first recourse to the margin of appreciation occurred under the Convention system,[62] and the ECtHR has shaped this doctrine like no other court.[63] Even though the origin lies in national law, the ECtHR's practice has developed *autonomously* from specific national doctrines. The doctrine became a *major export product* of the ECtHR and has been reflected around the world.[64]

While it is usually the government agents who claim a margin of appreciation, the doctrine can also be raised *ex proprio motu*.[65] In *preliminary ruling* proceedings, the Internal Market Courts grant the margin of discretion in the first place to the referring national court; that court then decides how much discretion it grants to the domestic authorities that are party to the case. This perspective is in line with the aforementioned fact that the Court of Justice regularly leaves the balancing exercise of the proportionality *stricto sensu* test to the referring court (see Sect. 3.3).

---

[60] The concept was established in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948] 1KB 223, United Kingdom: Court of Appeal (England and Wales), 10 November 1947. The UK courts have nevertheless evidenced their willingness to apply a proportionality review in cases touching upon EU fundamental freedoms (Harbo, *The Function of Proportionality Analysis in European Law*, at 165 *et seq.* and cited cases).

[61] Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 4, who discusses in particular the case of Norway. The differences in judicial cultures can result in considerable differences regarding the overall standard of scrutiny when reviewing national measures that restrict EU/EEA fundamental freedoms. See for this point Sect. 9.3.3.3 *i.f.*

[62] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 3.

[63] Rupp-Swienty, A., *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, Munich: VVF, 1999.

[64] The Inter-American Court of Human Rights expressly recognised the doctrine while the United Nations Human Rights Committee implicitly referred to it (Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 4 fns 9–10). The WTO AB has not expressly referred to the doctrine. This still young court-like institution applies a more contractual rather than constitutional reading of WTO law and has found other ways of showing deference to national authorities. Cf. e.g. AB-1997–4, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 117; cf. also Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 4 fn 10.

[65] Sweeney, J.A. (2005). "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era", *International & Comparative Law Quarterly, 54*(2), 459–474.

3.4.2 Relationship Between Margin of Appreciation and Principle of Subsidiarity

The margin of appreciation is closely related to the larger principle of subsidiarity. The relationship is one of *lex specialis – lex generalis*.[66] The margin is an expression of the general principle of subsidiarity, with the latter showing a far more comprehensive character. The principle of subsidiarity addresses the *universality-diversity dichotomy in a more global manner*. This dichotomy can be observed in various legal frameworks of trade or human rights, including the Internal Market. While one principle is seen as universal, namely fundamental freedoms or human rights, the principle of subsidiarity aims at ensuring the *protection of local diversity*. It will be shown that the principle of subsidiarity is particularly important in relation to *'local values'* informed by morality, culture and religion.

According to the principle of subsidiarity, matters should be dealt with by the lowest possible authority, except if the higher or centralised authority can deal with matters more effectively.[67] This principle can apply to all three branches of state power (legislator, executive and judiciary). The relationship of the principle of subsidiarity to the margin of appreciation was aptly described in *Handyside*:

> The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights […]. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted […]. Consequently, Article 10 para. 2 (art. 10–2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force […].[68]

3.4.3 Relationship Between Margin of Appreciation, Judicial Scrutiny and Principle of Proportionality

The essence of the margin of appreciation can only be understood within the *broader process of judicial scrutiny* of national measures. It is only *within* the judicial scrutiny performed by the Internal Market Courts or the ECtHR that a margin of appreciation is granted. Accordingly, while discretion is being granted, the European High Courts review both the legitimacy of the *objective* pursued by the domestic authorities as well as the *proportionality* of the measures in question:

---

[66] Christoffersen, J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights,* International Studies in Human Rights, vol. 99, Martinus Nijhoff Publishers, 2009, at 237–238.

[67] Cf. e.g. Art. 5 TEU.

[68] Handyside v the UK, Application no 5493/72 [1976], para. 48.

> Article 10 para. 2 (art. 10–2) does not give the Contracting States an unlimited power of appreciation. […] The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[69]

While the distinction between the concepts of proportionality review and margin of appreciation is often neglected and not clear in the literature,[70] it is essential for the understanding of the role of the margin of appreciation. The two aforementioned quotes of the ECtHR clearly make the distinction and render the chronological relationship clearer between proportionality and margin of appreciation. Under certain circumstances, a court may, a priori, grant discretion to the domestic authorities regarding the means of pursuing certain objectives (see Sects. 8.2, 8.3 and 8.4). Confronted for instance with a situation that regards – as in the aforementioned *Handyside* case – an issue of morality, a court will a priori take a cautious approach that is respectful of domestic diversity. However, there is no margin of appreciation without scrutiny as noted in the aforementioned quote as well. The a priori cautious approach of the court necessarily goes hand in hand with a subsequent *scrutiny* of the objective and proportionality of the measures.

While the judicial review also concerns the aim, the proportionality test regularly forms the crucial part of the review. In the majority of cases where the margin plays an important role before the European High Courts, it is not the legitimacy of the objective that is disputed but the proportionality of the national measures. The proportionality test is described as *corrective and restrictive* of the margin of appreciation.[71] This further underlines that *discretion never comes without scrutiny*. A wide margin of appreciation is likely to correlate with a lenient proportionality test.[72] Standard of review and margin of appreciation are *opposite sides of the same coin*.[73] It would hardly make sense to first grant an a priori wide margin only to subsequently apply a very strict proportionality review. However, the European High Courts may no longer feel bound to the a priori granted margin of appreciation if the Member State's position is hardly or not convincingly argued.[74]

---

[69] Ibid., para. 49.

[70] Cf. e.g. Harbo who criticises a lack of distinction of the two concepts in the ECtHR jurisprudence. Yet, he does not clearly distinguish the two concepts in his discussion of the case law either: Harbo, *The Function of Proportionality Analysis in European Law*, at 133.

[71] Matscher, "Methods of Interpretation of the Convention", at 79.

[72] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 2.

[73] Mahoney, P. (1998). "Marvellous Richness of Diversity or Invidious Cultural Relativism?", *Human Rights Law Journal, 19*, 1–5.

[74] Villiger, M., "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts" in *Dispute Resolution*, Baudenbacher, C., and Planzer, S. (Eds.), Stuttgart: German Law Publishers, 2009, pp. 207–213, at 212.

3.4.4 Raison d'être

All three European High Courts practise the margin of appreciation in their jurisprudence. Judges at those three courts show a high degree of independence. The question thus remains *why* independent and powerful courts voluntarily apply self-restraint. The idea of a judge as mere 'bouge de la loi'[75] is not realistic. Furthermore, a shift from diplomatic conflict settlement towards judicial dispute resolution has significantly increased the powers of judges.[76] They have become important decision-makers in recent decades. Political negotiations often knowingly leave questions open, so that courts will have to provide the answers.[77] Moreover, the doctrine of the margin of appreciation is neither mentioned in the EU Treaties nor in the ECHR, and there is no legal obligation *stricto sensu* to resort to this judicial tool. The question remains *why* powerful judges would voluntarily restrict their own powers. The 'raison d'être' of the margin of appreciation is composed of two central aspects.

First, there appears to be a commonly recognised reason. The margin is presented as an expression of the broader principle of *subsidiarity*. It was already mentioned that their relationship can be described as *lex specialis – lex generalis*. In the case of the ECHR, the primary responsibility for the protection of the Convention rights lies with the domestic authorities.[78] This is slightly different regarding the Court of Justice and the EFTA Court in that the Internal Market Courts carry the primary responsibility for the homogeneous interpretation of EU/EEA law.

There is an additional reason. Any international court tries to achieve a high degree of acceptance of its jurisprudence, not least among the governments of the Signatory States because they also decide on the court's existence and powers. While courts certainly decide independently, they can nevertheless try to avoid potentially detrimental confrontations with governments. In *Handyside*, the ECtHR described it as follows:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these [moral] requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. […] Consequently, Article 10 para. 2 (art. 10–2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[79]

---

[75] Montesquieu, *De L' Esprit Des Lois*, Geneva: Barrillot et Fils, 1748.

[76] Baudenbacher, C. (2004). "Judicialization: Can the European Model Be Exported to Other Parts of the World", *Texas International Law Journal, 39*(3), 381–400.

[77] Planzer, S., "*The Arrogant Judges In Luxembourg and What It Is Actually About*", euobserver, 20 September 2007.

[78] Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

[79] Handyside v the UK, Application no 5493/72 [1976], para. 48.

Applying deference in relation to delicate questions allows an international court to *avoid detrimental conflicts with national governments*. It should not be neglected that international courts may take decisions in cases that involve delicate policy choices. In addition, the European High Courts apply a dynamic interpretation of the law; in this constellation, acceptance by those who are affected by the case law is all the more crucial.[80] In the case of the ECHR, the early recognition of the doctrine of the margin of appreciation certainly played an important role in consolidating the Convention system.[81] Related to acceptance is also the aspect of *enforcement*. All European High Courts must ultimately rely on *national* authorities to enforce their decisions. The Internal Market Courts enjoy a relatively stronger position in that regard since the enforcement of decisions is facilitated by the powers of the European Commission and the EFTA Surveillance Authority.

3.4.5 Commonalities and Differences Between the Court of Justice of the EU and the European Court of Human Rights

Part II will inquire whether the use of the margin of appreciation in the gambling cases has followed the principles and criteria developed regarding this doctrine. While a comparative look at the ECtHR can without doubt give helpful guidance for the use of the margin of appreciation in Internal Market issues,[82] it is important to bear in mind the commonalities and differences between the courts. The differences can indicate – *in a situation of similar justification grounds* – whether the Internal Market Courts should apply *a wider, similar or narrower* margin of appreciation than the ECtHR.

With regard to the *commonalities*, the underlying tensions are similar in the frameworks of the ECHR and the Internal Market. The tensions regard the aforementioned *universality-diversity dichotomy* (see Sect. 3.4.2). While universality advocates a full and effective implementation of human rights or fundamental freedoms, diversity advocates certain discretion for domestic authorities in the implementation of human rights or fundamental freedoms. The fact that one court applies human rights, while the other two apply fundamental freedoms, only

[80] Baudenbacher, C. (2003). "The EFTA Court – An Example of the Judicialisation of International Economic Law", *European Law Review, 28*(6), 880–899, at 897.

[81] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 232. However, it would appear that the accession of countries from Central and Eastern Europe did not lead to a widening of the margin of appreciation: Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era". Cf. also Seymour, D. (1992). "The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks", *Connecticut Journal of International Law, 8*(2), 243–261.

[82] Sweeney, J.A. (2007). "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration, 34*(1), 27–52.

seemingly is a significant difference. Essential is the fact that both the Internal Market and the Convention follow the paradigm that, *in principle, certain rights or freedoms* are ensured. They can, *by exception*, *be limited* under certain conditions. Similar to the fundamental importance that the Convention rights take, the Union's fundamental freedoms are superior rights enjoyed by the subjects of the Internal Market. The Court of Justice went as far as to interpret them as superior even in relation to fundamental rights enshrined in national constitutional law.[83]

Certainly, there are also important *differences* between the ECtHR and the Internal Market courts that can affect the use of the margin of appreciation. These differences relate to the *level of integration* and the *role of the judiciary* and must be duly considered.

In 1950, the Convention was endorsed as a *minimum standard* and thus installed as the lowest common denominator.[84] It was a 'harmonisation' of the human rights approaches of the Signatory States around a minimum standard of protection that all parties could agree on.[85] The Convention itself contains an allusion to this perspective: it indirectly states that there was no unity between the signatory states' levels of protection and that human rights had to be further realised.[86] The Strasbourg jurisprudence seems to suggest that this lack of unity not only impacts the formal means of protection of Convention rights but also the very scope of those rights.[87] The Convention thus gives quite a generous leeway to national authorities in defining domestic standards.[88] This contrasts significantly with the *far bolder and more ambitious project* of the establishment of an Internal Market.[89] The Rome Treaties already gave the Union its *supranational structure* and a legal order *sui generis*. Moreover, the 'ever closer union'[90] has constantly deepened its level of

[83] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 3. Instead of reversing this approach, the CJEU subsequently recognised human rights as part of EU law. Nevertheless, the central role of the fundamental freedoms has been upheld.

[84] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 3.

[85] Evrigenis, D. (1982). "Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights", *Human Rights Law Journal, 3*, 121–139, cited in Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at fn 68.

[86] ECHR, Preamble, 3rd para.: "[T]he aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms."

[87] McBride, J., "Proportionality and the European Convention on Human Rights" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 23–35, at 28.

[88] Hall, S. (1991). "The European Convention on Human Rights and Public Policy Exceptions to the Free Movement of Workers under the EEC Treaty", *European Law Review, 16*(6), 466–488, at 475.

[89] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at fn 17.

[90] TFEU, Preamble, *i.i.*

integration and produced its own *secondary law*. The significantly deeper level of integration is also reflected in the *institutions*. In three of the four main decision-making institutions (Commission, Parliament and Court), the members are not simply representatives of the government, which in international relations is unique. Institutional pressure on new Member States is big. Not only is any new Member State obliged to integrate the full *acquis communautaire*; there is also an effective monitoring process by the Commission. The latter's possibilities, in cooperation with the Council, go far beyond mere declarations of discontent. The Commission has far-reaching rights, including the right to open infringement proceedings and to bring cases before the Court of Justice. The Council of Europe does not dispose of similarly powerful instruments.

With regard to the role of the *judiciary*, there are also significant differences. The ECtHR can only hear a case if all domestic remedies have been exhausted.[91] The Strasbourg Court often decides after three national independent courts have already looked at the relevant decision: court of first instance, court of appeal and national court of last instance. The ECtHR's role is only that of a *supervisory judiciary* and it is well advised to apply a degree of self-restraint, not least out of respect for the independence of the courts in the Signatory States. This setting impacts the ECtHR's own perception of its role in the Convention system: "The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate."[92] The overall intention is to encourage states to bring their domestic law in line with the Convention.[93] As Judge Power expressed it in one of her opinions:

> The principle of subsidiarity recognises that the Strasbourg Court is a supervisory body of last resort and that the primary responsibility for remedying violations of the Convention lies with the Contracting Parties.[94]

The Strasbourg Court is at times willing to offer such wide margin of appreciation that its practice could be perceived as arbitrary by some authors. Yet, it counterbalances the margin of appreciation with an effective proportionality test.[95] The Strasbourg Court also considers that among its 47 members,[96] there are countries from Eastern Europe which may have deficits regarding democracy and the rule of law that are not found to the same extent in Western Europe. Realistically, this may lead judges to consider that the 'minimum level' of human rights cannot be imposed at too ambitious a level.

---

[91] Art. 35(1) ECHR.

[92] Kokkinakis v Greece, Application no 14307/88 [1993], para. 47.

[93] Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era".

[94] Judge Power in her dissenting opinion in Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2; Merits and Just Satisfaction), Application no 32772/02 [2009], para. 47. The dissent in her opinion did not regard the principle of subsidiarity.

[95] McBride, "Proportionality and the European Convention on Human Rights", at 35.

[96] "Council of Europe", available at http://www.coe.int.

By contrast, the *Court of Justice* has jurisprudence over (only) 28 Member States, mostly from Western and Central Europe. That court has *very broad and far-reaching powers*. In the preliminary ruling procedure, under which the EU gambling cases have been mostly decided, the Court of Justice rules on the interpretation of EU law *prior* to the national court (often, of first instance). The national court decides on the merits of the case only after the interpretation by the Court of Justice, and the latter's ruling is generally decisive for the merits of the case. That procedure "requires the Court to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible."[97]

In sum, these considerations show that there are good reasons for both the Court of Justice and the ECtHR to practise the doctrine of the margin of appreciation. While the aforementioned tensions relating to the universality-diversity dichotomy are similar, the *differences* between the two judicial settings must be considered too. The EU has a bolder mission and a more advanced integration level.[98] Its institutions and law are supranational and *sui generis*, with the constitutional triad merely being the tip of the iceberg. While the tensions justifying the use of the doctrine are thus similar, one can on valid grounds argue a general tendency of a *narrower margin of appreciation before the Court of Justice* when dealing with similar justification grounds as the Strasbourg Court. This general finding will need to be considered in Part II when examining the use of the margin of appreciation in the gambling cases.

The EEA Agreement extends the Internal Market to the EEA EFTA countries, "with a view to creating a homogeneous European Economic Area."[99] EEA law is essentially identical in substance to EU Internal Market law.[100] The EFTA Court fulfils largely the same tasks towards the EEA EFTA countries as the CJEU towards the EU Member States.[101] In relation to Internal Market issues, it shares most characteristics of the Court of Justice in terms of procedure, power base and integration level.[102] The two courts apply further the same Internal Market law, apply similar

[97] Opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 23; cf. also Art. 267 TFEU.

[98] Cf. also Greer, S., and Williams, A. (2009). "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?", *European Law Journal, 15*(4), 462–481, at 462.

[99] Agreement on the European Economic Area, OJ L 001, 03.01.1994, p. 3, Art. 1.

[100] Baudenbacher, C. (2008). "The Goal of Homogeneous Interpretation of the Law in the European Economic Area: Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance", *The European Legal Forum, 8*(1), 22–31.

[101] Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice, OJ L 344, 31.01.1994, p. 3.

[102] Baudenbacher, C., *The EFTA Court in Action – Five Lectures*, Stuttgart: German Law Publishers, 2010. For instance, the EFTA Court does not have Advocate Generals. In this context, it can be noted that Advocate Generals of the CJEU have played an important role in the judicial dialogue between the CJEU and the EFTA Court: Baudenbacher, C., "The EFTA Court, the ECJ, and the Latter's Advocates General – A Tale of Judicial Dialogue" in *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, Arnull, A., Eeckhout, P., and Tridimas, T. (Eds.), Oxford: Oxford University Press, 2008a, pp. 90–122.

methods of interpretation[103] and have succeeded in guaranteeing a homogeneous development of the rights and obligations in the Internal Market.[104] In particular, the EFTA Court pursues a largely identical practice of the principle of proporionality and the margin of appreciation. Government agents occasionally argued that the EEA Agreement had a different rationale than the EU Treaties, and EEA EFTA States should therefore enjoy greater discretion; the EFTA Court nevertheless pursues the homogeneity principle also in this regard.[105] The aforementioned considerations regarding the margin of appreciation at the Court of Justice apply *in similar terms to the EFTA Court.* The EEA Agreement has remained the most far-reaching trade agreement of the EU; attempts to create other non-EU Member State courts have been struck down by the Court of Justice.[106]

3.5 Results

The creation of an Internal Market has been central to the European integration process. Accordingly, the fundamental freedoms of *goods, persons, establishment, services and capital* take a prominent place in the EU legal framework and can only be restricted under certain conditions. It was shown that Member States can justify restrictions on two tracks. One the one hand, the *TFEU* mentions certain justification grounds. While their exact wording varies, those grounds essentially include *public policy, public security and public health.* In addition, the Court of Justice has recognised further justification grounds in its case law, so-called *'mandatory requirements'*: national restrictions must apply in a non-discriminatory manner, be justified by

[103] Baudenbacher, C., "Zur Auslegung des EWR-Rechts durch den EFTA-Gerichtshof" in *Festschrift für Günter Hirsch zum 65. Geburtstag*, Müller, G., Osterloh, E., and Stein, T. (Eds.), Munich: Verlag C. H. Beck, 2008b, pp. 27–50.

[104] Baudenbacher, "The Goal of Homogeneous Interpretation of the Law in the European Economic Area: Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance"; Baudenbacher, C. (1997a). "The Contribution of the EFTA Court to the Homogeneous Development of the Law in the European Economic Area, Part I", *European Business Law Review, 8*(10), 239–248; Baudenbacher, C. (1997b). "The Contribution of the EFTA Court to the Homogeneous Development of the Law in the European Economic Area, Part II", *European Business Law Review, 8*(11/12), 254–258; Baudenbacher, C., "Anmerkungen zur Rolle des EFTA-Gerichtshofs bei der Gewährleistung von Homogenität und Rechtssicherheit im Europäischen Wirtschaftsraum" in *Festschrift für Wienand Meilicke*, Heidel, T., Herlinghaus, A., Hirte, H., et al. (Eds.), Baden-Baden: Nomos Verlagsgesellschaft, 2010, 33–48; Baudenbacher, C., "Der EFTA-Gerichtshof und sein Verhältnis zu den Gemeinschaftsgerichten" in *Höchste Gerichte an ihren Grenzen*, Hilf, M., Kämmerer, J.A., and König, D. (Eds.), Berlin: Duncker & Humblot, 2007b.

[105] Harbo, *The Function of Proportionality Analysis in European Law*, at 105 and 68–70.

[106] For an example, cf. the CJEU's opinion on a European and Community Patents Court: Opinion 1/09 on a European and Community Patents Court [2011] ECR I-1137. For a comment, cf. Baudenbacher, C. (2011). "The EFTA Court Remains the Only Non-EU-Member State Court: Observations on Opinion 1/09", *European Law Reporter, 7/8*, 236–242.

imperative requirements in the general interest and be suitable as well as necessary to attain the objective which they pursue (*Gebhard* formula).

It was explained that certain differences between the two tracks remain. According to the Court of Justice, mandatory requirements can only justify *indistinctly* applicable measures, whereas Treaty derogations can justify distinctly applicable measures too. However, the distinction seems to have little practical significance, and the *EFTA Court does not practise it*. Another difference consists in the strict interpretation of the Treaty derogations and the *flexible recognition of mandatory requirements*.

In the next step, the Court of Justice's practice of *proportionality* review was examined. The Court significantly varies its review practice from one area to another. In relation to restrictions of fundamental freedoms, the Court reviews whether the measures are *suitable* and *necessary* to attain the objectives persued. First, it is inquired whether the measures are effectively capable of achieving the objectives and second, whether the Member State could also use less restrictive measures. While the Court regularly leaves it to the Member States to define the (consumer) *protection level* that they wish to pursue in areas, which have not been harmonised, the judiciary nevertheless reviews the proportionality of the measures. In preliminary ruling proceedings, the Court often leaves it (partly) to the *referring court* to make final conclusions regarding the proportionality of the measures. Yet, the Court offers *guiding criteria* that the referring court will have to consider in its assessment.

This chapter also described the *doctrine of the margin of appreciation*. In the presence of *certain circumstances* (for instance, issues relating to morality), the European High Courts apply self-restraint when reviewing national measures. However, the a priori *granted discretion* always goes hand in hand with a *judicial review* of the objective and the proportionality of the measures. There are good reasons for the Internal Market Courts and the ECtHR to apply this doctrine: it is an expression of the broader principle of subsidiarity, and it can strengthen the acceptance of the supra-/international jurisprudence. Since the doctrine was strongly shaped by the ECtHR, commonalities and differences between the Internal Market Courts and the ECtHR were examined. Considering the *higher level of integration* and the *more significant role* of the Internal Market Courts within the EU/EEA legal order, it was concluded that a rather smaller margin of discretion was justified when they are confronted with similar public interest objectives as the ECtHR.

Chapter 4
Further Relevant Provisions for EU Gambling Law

The Court of Justice has dealt with the gambling cases as a matter for the law on fundamental freedoms, and this book focuses on these provisions. Therefore, this chapter only briefly examines whether and to which extent other provisions could apply as well.

4.1 Primary Law

The Union's primary law is codified in its Treaties. With the entry into effect of the Lisbon Treaty,[1] the Union's primary law consists of the *Treaty on the Functioning of the European Union ('TFEU')*,[2] the *Treaty on European Union ('TEU')*[3] and the *Charter of Fundamental Rights of the European Union ('Charter')*.[4] According to the TEU, 'the Treaties'[5] and the Charter have the same legal value.[6] This section briefly inquires whether and to which extent provisions of primary law, other than those relating to the fundamental freedoms, could apply to gambling services.

[1] Prior to the Lisbon Treaty, the primary law of the Union and its communities was codified in four consolidated treaties: the Treaty on European Union (EUT), the Treaty establishing the European Community (ECT), the Treaty establishing the European Coal and Steel Community (TECSC), which expired already on 23 July 2002, and the Treaty establishing the European Energy Community (Euratom).

[2] Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 083, 30.03.2010. The TFEU is the amended version of the Treaty establishing the European Community (ECT).

[3] Consolidated Version of the Treaty on European Union, OJ C 83, 30.03.2010. The TEU is the amended version of the old Treaty on European Union (EUT).

[4] Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000. By contrast, Euratom, one of the three initial communities of European integration, was not integrated in the new treaty structure of the EU and continues to form a community through a separate treaty: the consolidated version of the Treaty establishing the European Atomic Energy Community.

[5] Art. 1(2) TFEU and Art. 1 *i.f.* TEU.

[6] Arts 1 *i.f.* and 6(1) *i.i.* TEU.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_4,

4.1.1 Escape Gates

The chapter regarding the right of establishment contains two *escape gates* that exclude the application of this chapter's provisions. First, Article 51 TFEU holds that the provisions on freedom of establishment do not apply to "activities which in that State are connected, even occasionally, with the exercise of official authority." However, the exercise of official authority only includes core activities of the power monopoly of the state, such as police and justice.[7] Indeed, Advocate General Mazák expressly denied the application of this paragraph to the facts in his opinion in the gambling case *HIT & HIT LARIX*.[8]

Secondly, according to the same article, the Parliament and the Council may rule that the provisions on the right of establishment do not apply to certain activities. However, this provision has not been used and its use today would be controversial.[9] In any case, this procedure would first require a proposal from the Commission,[10] and it is difficult to identify an interest of the Commission in taking this road.[11] With the initiation of the Green Paper process,[12] the Commission is more likely to suggest some form of regulation rather than an express exemption.

4.1.2 Competition and State Aid

There are situations where national gambling regulations may be assessed through the provisions on competition law and state aid. A couple of Advocates General have alluded to this possibility.[13] While state aid issues have received major attention

[7] Ennuschat, J., "Zur gemeinschafts – und verfassungrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele" in *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, at 58.

[8] Opinion of Advocate General Mazák in C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, at fn 9.

[9] Ennuschat, "Zur gemeinschafts– und verfassungrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele", at 58.

[10] Stein, T., "Zum < Glück > haben wir den EuGH" in *Festschrift für Günter Hirsch*, Müller, G., Osterloh, E., and Stein, T. (Eds.), Munich: Verlag C.H. Beck, 2008, pp. 185–197, at 197.

[11] Cf. also the opinion of Advocate General Gulmann in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, at fn 45.

[12] Green Paper on On-line Gambling in the Internal Market, COM(2011) 128 final, SEC(2011) 321 final, OJ L 337, 18.12.2009.

[13] In his opinion in the case *Läärä*, Advocate General La Pergola briefly discussed the provisions regarding competition, but his conclusions were nevertheless largely argued with the provisions relating to the fundamental freedoms: opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 16

in media and scholarship during the recent financial crisis,[14] this angle has so far received little attention in the field of gambling.[15] The potentially applicable provisions include Articles 101 (cartels) and 102 (dominant positions) TFEU. Article 106(1) TFEU extends the Treaty's applicability to *public undertakings and undertakings to which special or exclusive rights* were granted. These provisions can apply both to private gambling operators as well as state monopolies.[16]

Article 106(2) TFEU deals with "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly." It may be difficult to argue that *gambling operators as such* provide *services of general economic interest*. While the Court has not dealt with that issue, several Advocates General have answered in the negative.[17] This may be different in relation to a parafiscal levy.[18] Indeed, the Commission approved an amended French scheme for a *parafiscal levy on online horse-race betting to finance a service to improve the bloodline and promote horse-breeding*. The Commission based its decision on Article 107(3)(c) TFEU according to which state aid may be compatible if it "facilitate[s] the development of certain economic activities […], where such aid does not adversely affect trading conditions to an extent contrary to the common interest."[19]

It is more plausible to qualify an *exclusive right holder as such* as having the character of a *revenue-producing monopoly*.[20] Gambling revenues from state monopolies are either integrated in the general state budget or directly allocated to certain public tasks, such as charitable causes. These undertakings may thus be subject to the Treaty rules.[21]

---

and 24 as well as fns 27, 43 and 58. Cf. also opinion of Advocate General Fennelly in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289.

[14] *Ex multis*, cf. Baudenbacher, C., and Bremer, F. (2010). "European State Aid and Merger Control in the Financial Crisis – From Negative to Positive Integration", *Journal of European Competition Law & Practice, 1*(4), 267–285.

[15] Koenig, C. (2007a). "Verspielen die Mitgliedstaaten ihr gemeinschaftsrechtliches Monopolglück?", *Europäische Zeitschrift für Wirtschaftsrecht, 18*(2), 33–34.

[16] The German competition authority ('Bundeskartellamt') for instance saw in the national lottery practice a violation of Art. 101 TFEU: cf. BKartA, B 10 – 92713 – Kc – 148/05, judgment of 23 August 2006.

[17] Advocate General Fennelly in his opinion in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, at fn 31; Advocate General La Pergola in his opinion in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, at para. 30.

[18] State Aid No C 34/10 Taxe affectée au financement de la mission de service public d'amélioration de l'espèce équine et de promotion de l'élevage, déformation dans le secteur des courses et de l'élevage chevalin ainsi que de développement rural, C(2010)7672 final, OJ C 10/4.

[19] Commission Decision of 19 June 2013 regarding French parafiscal levy on online horse-race betting to finance horse-racing companies, case no SA.30753.

[20] Concurring: Stein, T. (1993). "Glücksspiel im europäischen Binnenmarkt: Kein "Markt" wie jeder andere", *Recht der internationalen Wirtschaft, 39*(10), 838–845, at 845.

[21] Art. 106(2) TFEU, cf. further Art. 14 TFEU.

State aid rules too can apply to gambling operators. A Member State may, for instance, grant to its national gambling operator(s) a more favourable tax regime than that granted to foreign operators, which would constitute a form of state aid.[22]

Article 37 TFEU stipulates that state *monopolies of a commercial character* must be adjusted to avoid discrimination regarding the conditions under which goods are procured and marketed. The Court of Justice held that this provision can only apply to the free movement of goods.[23] This provision could therefore be applicable, for example, in a situation where a state or privately controlled undertaking enjoys the exclusive right to produce or distribute slot machines.[24]

Competition and state aid provisions have received increased attention by the Commission in recent years. It opened infringement proceedings under the state aid rules,[25] including in a Danish case regarding an anti-competitive tax regime[26] and a French parafiscal levy to finance horse racing companies.[27,28] The *Zeturf* case before the Court of Justice regarded competition issues too, but the judgment was ultimately argued with the law on fundamental freedoms.[29] Nevertheless, the aforementioned

[22] For an example of a selective tax reduction (state aid), cf. C-88/03 Portugal v Commission ('Azores islands') [2006] ECR I-7115. For an introduction to the topic, cf. Baudenbacher, C., *A Brief Guide to European State Aid Law,* European Business Law and Practice Series, vol. 13, The Hague/London/Boston: Kluwer Law International, 1997.

[23] C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, paras 57–61; cf. also the opinion of Advocate General Tizzano in this case at paras 54–61 who had reached different conclusions on this point.

[24] Art. 37(1) *i.f.* TFEU.

[25] Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 17.

[26] State Aid No C 35/2010 Duties for Online Gaming in the Danish Gaming Duties Act, OJ C 22, 22.01.2011 and IP/19/1711, cited in Green Paper on On-line Gambling in the Internal Market, COM(2011) 128 final, SEC(2011) 321 final, OJ L 337, 18.12.2009, at 12. For a comment, cf. GamblingCompliance, "EU Opens State Aid Case Against Denmark", 16 December 2010.

[27] State Aid No C 34/10 Taxe affectée au financement de la mission de service public d'amélioration de l'espèce équine et de promotion de l'élevage, déformation dans le secteur des courses et de l'élevage chevalin ainsi que de développement rural, cited in Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 17; for a comment, cf. GamblingCompliance, "*European Scrutiny Weighs On French and British Racing*", 21 January 2011. Cf. for the Commission's approval: Commission Decision of 19 June 2013 regarding French parafiscal levy on online horse-race betting to finance horse-racing companies, case no SA.30753.

[28] The French Competition Authority for its part issued a non-binding opinion regarding the horserace and lottery monopolies of Pari Mutuel Urbain (PMU) and Francaise des Jeux (FdJ), calling for clearer guidelines with regard to the separation of online and land-based operations: Opinion no 11-A-02 of 20 January 2011 Regarding the Sector of Online Games of Chance, available at http://www.autoritedelaconcurrence.fr/pdf/avis/11a02.pdf. For a comment, cf. Gambling Compliance, "*Starting With France, EU Competition Watchdogs Turn To Gambling*", 24 January 2011.

[29] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633. For comments, cf. Gambling Compliance, "French Monopolies Facing European Scrutiny", 9 December 2010, and Gambling Compliance, "Starting With France, EU Competition Watchdogs Turn To Gambling".

considerations show that competition and state aid provisions can apply to gambling issues and that the Commission has started to pursue this road.

4.1.3 Non-Discrimination

The aforementioned Article 106(1) TFEU expressly refers to Article 18 TFEU, which *prohibits discrimination on grounds of nationality*. However, the practical relevance of the provision is rather limited in the gambling cases. National measures in the gambling sector are often not discriminatory. In the case of a state monopoly for instance, no other operator can enter the market – irrespective of whether it is a foreign or national operator.[30] More importantly, the Court of Justice so far relied on *mandatory requirements* rather than on the express Treaty derogations. According to the relevant *Gebhard* formula, measures must be 'non-discriminatory'.[31] Even in those gambling cases that involved a discriminatory measure, the Court of Justice did not refer to Article 18 TFEU. This practice is compatible with the perception that the codified non-discrimination provision is only of *general use* in relation to the fundamental freedoms.[32]

4.1.4 Fundamental Rights

EU fundamental rights are prominently protected in the primary law. The Union is "founded on the […] respect for human rights"[33] and recognises the rights, freedoms and principles of the Charter of Fundamental Rights.[34] With the adoption of the Lisbon Treaty, the *Charter became a legally binding document*.[35] For the first time, EU primary law enumerated legally binding fundamental rights. The Court of

[30] Exceptions included C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, and C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185.

[31] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

[32] Hailbronner, K., and Jochum, G., *Europarecht II: Binnenmarkt und Grundfreiheiten*, W. Kohlhammer Verlag, 2006, cited in Ennuschat, "Zur gemeinschafts – und verfassungrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele", at 59. For an example of a broad use of Art. 18 TFEU, cf. C-524/06 Heinz Huber v Bundesrepublik Deutschland [2008] ECR I-9705.

[33] Art. 2 TEU.

[34] The codified law and the case law sometimes refer to 'human rights' while on other occasions referring to 'fundamental rights'. For reasons of consistency, those rights protected under EU law are exclusively referred to as fundamental rights in this book, which at the same time allows to clearly distinguish these rights from human rights as guaranteed under the ECHR and other international human rights instruments.

[35] Art. 6(1) *i.i.* TEU.

Justice had already recognised – long prior to the Lisbon Treaty – fundamental rights as forming *'general principles of EU law'* and developed a rich jurisprudence on fundamental rights. In a separate *excursus*, this book explores to which extent EU fundamental rights could play a role in the gambling case law (see Chap. 11).

4.2 Secondary Law

The question remains whether there are also provisions from secondary law that can apply to gambling issues. The EU has a number of binding and non-binding legislative instruments at its disposal,[36] and the EU's classic approach in *reducing barriers to trade* consists in the *harmonisation* of national laws through directives.[37] To date, the national gambling markets have not been harmonised. For the sake of comprehensiveness, this section inquires *whether and to which extent other directives can be applied* to gambling issues as well as the *potential relevance* of these directives, namely the Services Directive. Furthermore, it inquires to which extent directives *expressly exclude* (fully or partly) gambling from their scope of application. The order of presentation starts with the applicable directives, followed by those (increasingly) excluding gambling services from their scope of application.

4.2.1 Information Society Directive

Among the more important legal acts affecting national gambling regulation is the Information Society Directive.[38] The overall aim of the Directive is to avoid new barriers to trade caused by *national technical standards and regulations*. To this end, Member States must notify the Commission of any relevant draft legislation that may create such barriers.[39] Through means of consultation and administrative cooperation, draft gambling regulations may need to be adjusted along the principles established in the case law.[40] The Directive refers to 'electronic means',[41] which

[36] Art. 288 TFEU.

[37] Arts 114 and 288 TFEU.

[38] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying Down A Procedure for the Provision of Information in the Field of Technical Standards and Regulations ('Information Society Directive'), OJ L 217, 05.08.1998.

[39] Recitals 1, 16 and 26 of the Directive.

[40] Littler, A., *Member States versus the European Union – The Regulation of Gambling*, Leiden: Martinus Nijhoff Publishers, 2011, at 286.

[41] Art. 1(2)(a) of the Directive. This term covers also other means of communication, not just the Internet. Cf. also Sect. 4.1 of the UK Gambling Act, which refers to 'remote gambling', a term covering the use of any remote form of communication, UK Gambling Act, 2005, available at http://www.legislation.gov.uk/ukpga/2005/19/contents/enacted. Cf. further Littler, *Member States versus the European Union – The Regulation of Gambling*, at 285.

results in a wide scope of application. Gambling services and devices can fall within the scope of the Directive.[42] In relation to services, Advocate General Bot confirmed the Directive's applicability in *Liga Portuguesa* where the exclusive rights of the state monopolist were extended to "all means of communication."[43] Regulation relating to the use of gambling devices too has been found to fall under the Directive.[44]

4.2.2 Distance Selling Directive

The Distance Selling Directive[45] aims to approximate the laws, regulations and administrative provisions concerning *distance contracts between consumers and suppliers* and confers certain rights on consumers.[46] According to its definitions of distance contract and distance communication,[47] online gambling services can fall within the scope of the Directive. Although the Directive provides that *consumers cannot exercise their right of withdrawal* in relation to 'gaming and lottery services' except otherwise agreed by the parties,[48] the remainder of the conferred rights applies to gambling services.[49]

[42] Art. 1(2)(a) of the Directive: ""service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." Cf. also the CJEU's interpretation of 'gambling services' since its first ruling in *Schindler*: C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 26–29. Cf. also Art. 57 TFEU.

[43] However, the application of the Information Society Directive was only of relevance for the question whether the fines imposed on the defendants Bwin and Liga Portuguesa were admissible under EU law. Opinion of Advocate General Bot in C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, paras 160–192.

[44] C-213/11, C-214/11 and C-217/11 (Joined Cases) Fortuna sp. z o.o. (C-213/11), Grand sp. z o.o. (C-214/11), Forta sp. z o.o. (C-217/11) v Dyrektor Izby Celnej w Gdyni [2012] nyr. More precisely, the CJEU dealt in this case with the notion 'technical regulation' according to Art. 1(11) of the Directive. Cf. further C-65/05 Commission v Greece [2006] ECR I-10341, para. 61.

[45] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts ('Distance Selling Directive'), OJ L 144, 04.06.1997.

[46] Art. 1 of the Directive.

[47] Arts 2(1) and 2(4).

[48] Art. 6(3) of the Directive, indent 6.

[49] The Directive is currently under review due to a proposal for a Consumer Rights Directive: cf. "Green Paper on the Review of the Consumer Acquis", available at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#dir.

4.2.3 Anti-Money Laundering Directive

The Third Anti-Money Laundering Directive[50] replaced the two former anti-money laundering directives.[51] At the time of writing, a Commission proposal for a Forth Directive has been published.[52] To prevent money laundering and terrorist financing, the Third Anti-Money Laundering Directive imposes requirements of customer due diligence and supervisory obligations on certain institutions and businesses. The Directive is likely to be the sole directive that *expressly applies inter alia* to gambling, namely casinos.[53] It requires that "all casino customers be identified, and their identity verified if they purchase or exchange gambling chips with a value of EUR 2,000 or more."[54] Notably, Article 36 somehow limits the regulatory choices of Member States in that it demands "casinos [shall] be licensed in order to operate their business legally." Accordingly, Member States are obliged to devise *some authorisation scheme* that amounts to a licensing system for land-based and online[55] casinos.

In order to pursue a *consistent and systematic policy*, Member States relying on money laundering to justify restrictions of EU fundamental freedoms in *sectors other than casinos* should be expected, in this author's view, to extend the national implementing act to these sectors. The Directive obliges Member States to extend its scope to activities "particularly likely to be used for money laundering or terrorist financing purposes."[56]

---

[50] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing ('Third Anti-Money Laundering Directive'), OJ L 309, 25.11.2005, 15–36.

[51] Art. 44 of the Directive referring to Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 344, 28.12.2001, and Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 166, 28.06.1991.

[52] Proposal for a Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, COM/2013/045 final, 2013/0025 (COD). Regarding the gambling sector, the proposal suggests to widen the scope of application to include "providers of gambling services." Under the Third Directive, only casinos fall within the scope of application.

[53] Art. 2(1)(3)(f) of the Directive.

[54] Art. 10(1) of the Directive.

[55] Arts 10 and 36, combined with recital 14 of the Directive.

[56] Art. 4(1) of the Directive.

4.2.4 *Data Protection Directive and Directive on Privacy and Electronic Communication*

The Data Protection Directive[57] and the amended Directive on Privacy and Electronic Communication[58] provide for data protection in the EU. The obligations contained in these directives may be of particular relevance in the *online gambling sector*, considering electronic storage of user data, such as contact and financial information, or behavioural data, such as gambling frequency, wagered stakes and time of play.[59]

4.2.5 *Unfair Commercial Practices Directive*

The Unfair Commercial Practices Directive,[60] which aims to protect consumers from unfair commercial practices that may harm consumers' economic interests,[61] explicitly operates without prejudice to "those rules which […] relate to gambling activities."[62] Still, the Directive is important in relation to the *advertising and marketing* of gambling.[63] It prohibits practices contrary to the requirements of professional diligence or those that (are likely to) materially distort the economic

[57] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ('Data Protection Directive'), OJ L 281, 23.11.1995.

[58] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services; Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector; and Regulation (EC) No 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws, OJ L 337, 18.12.2009.

[59] Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 14.

[60] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.06.2005.

[61] Art. 1 of the Directive.

[62] Preamble, recital 9 of the Directive.

[63] Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 13. Furthermore, the Directive may be relevant regarding prize competitions, lotteries or bonuses where the participation is made conditional upon the purchase of goods or services: C-540/08 Media print Zeitungs– und Zeitschriftenverlag GmbH & Co. KG v 'Österreich'-Zeitungsverlag GmbH [2010] ECR I-10909; C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH [2010] ECR I-217.

behaviour of consumers. An interesting question is to which extent national gambling regulations respect the social responsibility principles contained in the Directive: the latter prohibits *misleading practices* likely to deceive the average consumer, *misleading omissions* regarding information necessary to make an informed transactional decision as well as *aggressive commercial practices*.[64] Notably, it protects those "particularly vulnerable […] because of their mental or physical infirmity, age or credulity."[65] This is directly relevant in that research has evidenced that *adolescents show a heightened vulnerability* to gambling disorders (see Sect. 9.1.3.5).

4.2.6 VAT Directive

The VAT Directive[66] *exempts transactions* from "betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State."[67] In accordance with this degree of discretion, some Member States apply the exemption only to lotteries and limited forms of betting.[68] Disputes between operators and tax authorities regarding the (non-)exemption of gambling services have lead to a rich case law.[69]

---

[64] Arts 5–9 of the Directive.

[65] Art. 5(3) of the Directive.

[66] Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ('VAT-Directive'), OJ L 347, 11.12.2006.

[67] Art. 135(1)(i) of the Directive; cf. however for operators providing online gambling from outside the Internal Market: Vlaemminck, P., and Hubert, A., *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at Gambling Conference, Prague, June 2009), at 8.

[68] Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 15. Regarding VAT exemptions, cf. de la Feria, R. (Ed.), *VAT Exemptions: Consequences and Design Alternatives,* Eucotax Series on European Taxation, Alphen aan den Rijn: Kluwer Law International, 2013, at 'Part III: Exemptions for gambling'.

[69] Cf. e.g. C-377/11 International Bingo Technology SA v Tribunal Económico-Administrativo Regional de Cataluña (TEARC) [2012] nyr; C-38/93 H. J. Glawe Spiel– und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst [1994] ECR I-1679; C-498/99 Town & County Factors Ltd v Commissioners of Customs & Excise [2002] ECR I-7173; C-259/10 and C-260/10 (Joined cases) Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc. [2011] nyr; C-58/09 Leo-Libera GmbH v Finanzamt Buchholz in der Nordheide [2010] ECR I-5189; C-464/10 État belge v Pierre Henfling, Raphaël Davin and Koenraad Tanghe [2011] ECR I-6219; C-283/95 Karlheinz Fischer v Finanzamt Donaueschingen [1998] ECR I-3369; C-453/02 and C-462/02 (Joined cases) Finanzamt Gladbeck v Edith Linneweber (C-453/02) and Finanzamt Herne-West v Savvas Akritidis (C-462/02) [2005] ECR I-1131; C-231/07 and C-232/07 (Joined cases) Tiercé Ladbroke SA (C-231/07) and Derby SA (C-232/07) v Belgian State [2008] ECR I-73 (Order of the Court).

4.2.7 Audio Visual Media Services Directive and Television Without Frontiers Directive

The Audio Visual Media Services Directive[70] succeeded the Television without Frontiers Directive,[71] updating it to technological developments. The latter ensured the free movement of European television programmes and introduced a broadcasting quota that reserved half of transmission time for European works. While the preamble generally *excludes gambling services*,[72] the Directive nevertheless applies where a *broadcasted programme* is devoted to games of chance. Moreover, it is unclear whether a preamble recital can be relied upon to derogate from the main provisions of the Directive.[73] In any event, certain games of chance may qualify as 'teleshopping' within the meaning of the Television without Frontiers Directive.[74]

4.2.8 E-Commerce Directive

The Directive on Electronic Commerce (the 'e-Commerce Directive')[75] aims to ensure the free movement of services of information society, involving a limited approximation of national provisions.[76] Gambling services are *excluded from the scope of the Directive* but their definition is narrower than in other directives.[77] The Directive applies to "promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise,

[70] Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services ('Audiovisual Media Services Directive'), OJ L 95, 15.04.2010.

[71] Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 298, 17.10.1989.

[72] Preamble, recital 22 of the Directive.

[73] C-162/97 Criminal Proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn [1998] ECR I-7477, para. 54. For a discussion of that point, cf. Littler, *Member States versus the European Union - The Regulation of Gambling*, at 297–298.

[74] C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF) [2007] ECR I-8817, paras 30–38.

[75] 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 in Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce' or 'e-commerce Directive'), OJ L 178, 17.07.2000.

[76] Art. 1(1)-(2) of the Directive.

[77] Cf. the wording of Art. 1(5)(d) 3rd indent of the Directive as well as recital 16 of the Preamble.

serve only to acquire the promoted goods or services."[78] The criterion of a mere secondary, promotional role reminds of the distinction made by the Court of Justice in *Familiapress*.[79]

4.2.9 Services Directive

The Services Directive[80] excludes gambling services from its scope "in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection."[81] The original proposal included gambling services subject to a transitional derogation, and additional harmonisation efforts were made dependent upon the publication of a report and further consultations.[82] However, the European Parliament removed gambling services from the Directive's scope; further consultations as foreseen in the initial proposal did not take place for many years. Even though the proposal contained a reference to future harmonisation,[83] it should be noted that Council and Parliament were not obliged to proceed to harmonisation. They could have limited their discussions for instance to further consultations regarding *consumer protection* issues. Considering the 2-decades-and-counting adversarial 'dialogue' between Member States and private operators in countless court cases, the question arises whether this controversy has allowed for a more coherent, structured and productive output. The debate could have taken place within a transitional legislative framework and it would have been a mere commitment of a continued discussion in the

[78] Preamble, recital 16 of the Directive. Competitions as well as games relate to promotions. Cf. the French text: « Elle ne couvre pas les concours ou jeux promotionnels qui ont pour but d'encourager la vente de biens ou de services » (Preamble, Recital 16 of the Directive). Whether or not the exclusion requires a skill component (cf. for this point Littler, *Member States versus the European Union – The Regulation of Gambling*, at 287) does not seem to be decisive.

[79] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689, para. 23: "The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine."

[80] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive'), OJ L 376, 27.12.2006. For a contribution regarding the legal situation prior to the Services Directive, cf. *Services and Free Movement in EU Law*, Andenas, M., and Roth, W.-H. (Eds.), Oxford: Oxford University Press, 2002.

[81] Preamble, recital 25 of the Directive. Cf. also Art. 2(2)(h) of the Directive. This book demonstrates that the argument of a special or peculiar nature of gambling is central to considerations of the EU legislative and judicial branches and assesses in relation to gambling addiction whether empirical evidence supports such view (see Sect. 9.1).

[82] The Swiss Institute of Comparative Law was mandated by the European Commission to compose this report: Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*.

[83] Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2, 13.01.2004, Art. 40(1).

legislative branch. Ironically, a continued political discussion would have been likely to save Member States from countless court cases.[84] Furthermore, it is noteworthy that the current *Green Paper process* takes an approach that is quite similar to that suggested in the original proposal of the Services Directive: it establishes a "report by the Commission and a wide consultation of interested parties."[85] By integrating gambling services in the Services Directive, the Member States could have preserved their broad regulatory preferences, including the option of entrusting a single operator with exclusive rights.[86] It was even argued that this integration would not have led to a liberalisation, and that the discussion would have taken place within the guidelines so far provided by the Court of Justice.[87]

4.3 Results

This chapter established that *competition and state aid provisions* apply to the activities of *both private and state gambling operators*; the Commission has given increased attention to these rules. Article 106(1) TFEU extents the applicability of Articles 101 (cartels) and 102 (dominant positions) TFEU to public undertakings and undertakings to which special or exclusive rights were granted, such as state or private *gambling monopolies*. While Advocates General found that gambling monopolies hardly qualify as 'undertakings entrusted with the operation of services of general economic interest', they can constitute *'revenue-producing monopolies'* in the sense of Article 106(2) TFEU. Finally, favourable tax regimes towards national gambling operators can trigger the application of the *state aid* rules. Other provisions of EU primary law were found to be of minor importance. The significance of EU fundamental rights for the gambling jurisprudence is assessed elsewhere in this book.

A number of directives were identified that either apply to gambling services or (partly) exclude gambling services from their scope of application. While some of these directives are of direct relevance for gambling activities, none aims to facilitate cross-border gambling services. In particular were found to be relevant for the gambling sector (to varying degrees): the Information Society Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive and the Directive on Privacy and Electronic Communication.

---

[84] Concurring: Littler, *Member States versus the European Union – The Regulation of Gambling*, at 292.

[85] Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2, 13.01.2004, Art. 40(1)(b). Note that the quoted wording is from the original proposal for a *Services Directive* (sic!) while perfectly describing the process of the actual Green Paper.

[86] Art. 1(2)-(3) of the Directive: "[…] This Directive does not deal with the abolition of monopolies providing services […]."

[87] Littler, *Member States versus the European Union – The Regulation of Gambling*, at 293.

The Unfair Commercial Practices Directive specifically defines commercial standards that can be of relevance in relation to responsible gambling advertising, in particular when aimed towards adolescents.

Finally, it was noted that the exclusion of gambling services from the scope of the Services Directive might have produced undesirable results both for Member States and consumers. Ultimately, the European Commission with its Green Paper process pursues a similar road as initially foreseen for gambling services in the draft Services Directive.

Chapter 5
Results of Part I

Part I presented the legal framework within which gambling services take place in Europe. Chapter 2 drew attention to the fact that '*European gambling law*' *consists of an interplay* between national gambling regulations and EU law. In heated discussions on gambling, these two legal orders are all too often presented as two antagonistic entities. To the present day, the EU legislator has not used its *(shared) competences* to pass legislation in the area of gambling services (Internal Market, consumer protection). Member States are still competent to regulate gambling within their territories. However, due to the *supremacy of EU law* national gambling regulations must be in line with EU law and respect in particular the general law on the fundamental freedoms. While the EU has not specifically regulated gambling, the generally applicable EU law nevertheless *impacts the application of national gambling laws*. National restrictions to the freedom to provide gambling services must serve a public interest objective and be proportionate to the objective.

Moreover, the chapter also clarified that there are *additional constraints* on national gambling regulations beyond EU law. Gambling rules must also comply with requirements stemming from the *national constitutional order*, for instance the respect of fundamental rights and general principles such as proportionality. Further obligations may stem from *public international law*, namely *ius cogens* or international agreements. In particular trade agreements (like the *GATS*) or human rights treaties (like the *ECHR*) may impact national gambling regulation.

Chapter 3 presented the *general law on the fundamental freedoms* since the Court of Justice has dealt with the gambling cases as a matter of EU fundamental freedoms. Due to the central role of the fundamental freedoms of *goods, persons, establishment, services and capital*, Member States can only restrict them under certain conditions. Restrictions can be justified either based on express *Treaty* derogations, namely *public policy, public security and public health*, or so-called *mandatory requirements* in the public interest as recognised in the case law, such as *consumer protection*. Restrictions must further be *proportionate, namely suitable and necessary*, to attain the public interest objective. In areas that have not been harmonised by EU law, the Court of Justice generally leaves it to the Member States

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_5,

to define the (consumer) *protection level*, which they wish to pursue. Where the Court of Justice does not itself decide on the proportionality of measures, it offers guiding criteria to the referring court.

Since the *doctrine of the margin of appreciation* has played a major role in the gambling jurisprudence, Sect. 3.4 presented its notion, origin, raisons d'être and relationship to other principles. All European High Courts apply this doctrine, which is an expression of the (broader) *principle of subsidiarity*. Accordingly, these courts use, under certain conditions, self-restraint when reviewing the objective and proportionality of national measures. However, the granted discretion to national authorities always goes hand in hand with judicial scrutiny. It was concluded that the significant differences regarding the *level of integration* and the *role of the judiciary* between the EU/EEA and the Convention system justified a generally smaller margin of appreciation in the jurisprudence of the Internal Market Courts when confronted with similar public interest objectives as the ECtHR.

Finally, Chap. 4 briefly inquired whether *further provisions of EU primary and secondary law* could be applicable to gambling issues. With regard to primary law, the *competition and state aid* provisions are most relevant. These provisions apply to private gambling operators as well as state monopolies; the latter may constitute revenue-producing monopolies in the sense of Article 106(2) TFEU. The potential role of EU fundamental rights in the gambling jurisprudence is assessed elsewhere (Chap. 11). Furthermore, a *number of directives* were identified that are relevant for the gambling sector, in particular the Information Society Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive, the Directive on Privacy and Electronic Communication and the Unfair Commercial Practices Directive. While some directives are of considerable relevance, for instance the Unfair Commercial Practices Directive in relation to gambling advertising, none aims to facilitate cross-border gambling services. Other directives expressly exclude gambling services from their scope such as the *Services Directive*; this has arguably led to undesirable outcomes for Member States and consumers.

Part II
Analysis of the EU Gambling Case Law

The presentation of the legal framework (Part I) provided the basis for a detailed analysis of the gambling case law of the Court of Justice in Part II. This analysis will follow the structure of a classic judicial test: *scope of application, justification grounds* and *proportionality* of measures restricting fundamental freedoms. The legal analysis is, however, strongly informed by a perspective of *empirical evidence on gambling addiction*. As both Internal Market Courts apply the same law in substance, the approach chosen by the Court of Justice is contrasted with that of the EFTA Court throughout Part II.

Chapter 6 inquires several dimensions of the *scope of application* of EU law in relation to gambling. Chapter 7 examines the *justification grounds* accepted by the Court of Justice. *Public morality* is a particularly interesting and often argued justification ground. This chapter discusses the relationship of the state towards gambling. Is public morality a *suitable perspective* to protect consumers from gambling-related harm?

Chapters 8 and 9 are strongly related. In the presentation of the general law on fundamental freedoms, it was shown that the European High Courts may, in certain situations, grant *discretion* to national authorities. This *a priori* applied judicial self-restraint is nevertheless combined with a *review of the proportionality* of the measures. Accordingly, Chap. 8 examines the *principles and criteria* that typically steer the use of the margin of appreciation and whether the gambling jurisprudence followed these criteria. Chapter 9 subsequently inquires to which extent discretion was combined with a proportionality review. In this context, the Court of Justice has often expressed its *views on games of chance and gambling addiction*. Following an introduction to the *state of research* on gambling addiction, it is analysed to which extent the views of the Court are supported by empirical evidence, and how these perceptions have ultimately affected the Court's practice of the proportionality review.

Chapters 10 and 11 represent two excursions providing a legal assessment of the potential roles of the *precautionary principle* and *EU fundamental rights* for the gambling case law.

Chapter 6
Scope of Application in EU Gambling Law

This chapter briefly examines different dimensions of the scope of application. First, do gambling-related facts bring that matter within the scope of application of EU law? Second, which fundamental freedoms apply to the field of games of chance? Finally, when do the games in question qualify as games of chance?

With regard to the first dimension, the Court of Justice can decide on substance only if the facts of the case fall within the scope of the EU Treaties. Whether this is the case may be disputed and a controversial issues. The Court of Justice has repeatedly chosen a wide interpretation of the scope of application of EU law.[1]

Initially, counsels of several governments were of the view that gambling services did not fall within the scope of EU law. In their opinion, lotteries were not an *economic activity* and thus fell outside the scope of EU law.[2] They argued that such activities had been traditionally prohibited or operated under the direct control of public authorities. Yet, it must have been obvious, also in the early 1990s, that gambling offers represent economic activities and cannot be seen as a mere application of public order law.[3] In *Schindler*, it was further argued – somehow inconsistent – that lotteries did not serve an economic purpose, but their nature related in fact to

[1] Cf. e.g. C-260/89 Elliniki Radiophonia Tiléorassi AE ('ERT') and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et alii [1991] ECR I-2925; C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689; C-71/02 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025; C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.

[2] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 16–17: Belgium, Germany, Ireland, Luxembourg, Portugal were of this view. By contrast, Spain, France, the UK and the Commission took the view that the facts in *Schindler* related to 'services' and constituted an economic activity, thus falling within the scope of EU law.

[3] Stein, T., and von Buttlar, C., "Europarechtliche Konsequenzen eines begrenzten Lizenzierungsmodells für die (private) Veranstaltung von Sportwetten" in *Aktuelle Probleme des Rechts der Glücksspiele*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, pp. 81–111, at 83.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_6,

recreation and amusement.[4] Without extensive elaboration on this point, the Court of Justice made it clear "that the importation of goods or the provision of services for remuneration […] are to be regarded as "economic activities" within the meaning of the Treaty."[5] According to the Court, the importation of lottery tickets fell within the scope of intra-Union trade in services.

Member States further argued that gambling activities were regularly organised by public authorities and solely in the public interest; accordingly, EU law could not apply. This argument could not be convincing in that other activities are also operated in the public interest by public authorities. Nevertheless, they fall within the scope of EU law, in particular 'services of general economic interest'.[6] Moreover, if the aforementioned recreation or amusement character of gambling activities were to exclude them from the scope of the Treaties, a large part of the tourism and entertainment industry would fall outside the scope of EU law as well. In retrospect, the reliance on the recreational nature of gambling stands in contradiction to another argument raised by Member States. Some governments tried to liken gambling activities to *illicit products* such as drugs.[7] The Court of Justice dismissed this argument since (licit) lotteries seemed to be commonplace among Member States. In *Schindler* and numerous subsequent cases, governments argued a *'peculiar nature'* of gambling services based on public morality concerns and risks relating to addiction and crime. This view of a peculiar nature of gambling and its comparison to illicit products, such as drugs, does not fit the argument of gambling as a recreational activity.

With regard to the second dimension, the Court of Justice regularly had to decide *which fundamental freedom(s)* would be applicable. In theory, the provisions of all fundamental freedoms may apply to gambling activities. If the legislation of a Member State required casinos to exclusively employ nationals or staff that had resided for a minimum duration in that jurisdiction, the provisions on the free movement of persons would be concerned. Similarly, the free movement of capital can also be affected. In *Liga Portuguesa*, the Court considered its applicability in the context of an online operator that was prohibited to provide services in Portugal and prevented from sponsoring the Portuguese football league. The Court held that "any restrictive effects […] on the free movement of capital and payments would be no more than the inevitable consequence of any restrictions on the freedom to provide services."[8]

---

[4] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 16.

[5] Ibid., para. 19.

[6] Art. 106(2) TFEU. Services of general economic interest can for instance relate to public hospitals and similar public infrastructure.

[7] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 31–36.

[8] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 47.

Gambling issues can also relate to the free movement of goods since gambling devices constitute goods. The Court of Justice confirmed in *Läärä* that the provisions regarding the free movement of goods could apply to the importation of slot machines.[9]

However, the cases before the Court of Justice have almost exclusively been examined with the provisions relating to the freedom to provide *services* and the freedom of *establishment*.[10] Even though the involved gambling devices constitute goods, their role regularly relates to the provision of gambling services. In *Schindler*, the Court found that the sending of advertisement, lottery application materials and lottery tickets were not ends in themselves. Their sole purpose was to enable UK residents to participate in the German lottery, and this constellation was to be assessed under the provisions of the freedom to provide services.[11] These provisions protect not only the service providers' interest in offering their services but also the consumers' interest in accessing these services.[12] In cases relating to land-based forms of gambling, the facts may often fall within both the scopes of the freedom to provide services and the freedom of establishment.[13] When several fundamental freedoms are concerned, the Court of Justice regularly assesses the facts only with the provisions of one fundamental freedom. It explained its approach in *Liga Portuguesa*:

> Where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it.[14]

In cases relating to *online* gambling, the freedom to provide services is regularly the sole fundamental freedom concerned. Due to the inherently cross-border nature of online activities, these operators do not need to seek establishment in various jurisdictions:

> […] the mere fact that a provider of games of chance marketed over the internet makes use of material means of communication supplied by another undertaking established in the host Member State is not in itself capable of showing that the provider has, in that Member

[9] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 20–26.

[10] Freedom of establishment: Arts 49 TFEU and 31 EEA; freedom to provide services: Arts 56 TFEU and 36 EEA.

[11] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 17–25. This view was shared by Spain, France, the UK and the Commission.

[12] Cf. *ex multis* the gambling case C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, para. 18.

[13] For a delimitation of the two concepts in a gambling case, cf. C-470/11 Garkalns SIA v Rigas dome [2012] nyr, paras 23–32.

[14] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 47. Cf. further for this point C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521, para. 34.

> State, a fixed establishment similar to an agency […]. [F]or there to be establishment within the meaning of the Treaty, a commercial relationship […] must make it possible for the operator to participate, on a stable and continuous basis, in the economic life of the host Member State, and must thus be such as to enable customers to take advantage of the services offered through a permanent presence in the host Member State, which may be done by means merely of an office managed by a person who is independent but authorised to act on a permanent basis for the operator, as would be the case with an agency […].[15]

Even if the operator decides to set up certain computer support infrastructure, such as *servers*, and make use of *computer support services* of a provider established in the host Member State, the provisions relating to the freedom to provide services still apply.[16]

Finally, the question remains to be examined under which conditions games qualify to be assessed *in the light of precedent on gambling services*. This issue is of importance because the Court of Justice has granted wide discretion to national authorities in relation to gambling issues. The Court has granted a special status only to certain games, namely *games of chance*.

According to the Court of Justice, these games are characterised by a strong element of *chance* (as opposed to skill) and money is wagered on an uncertain outcome. Moreover, these games have to show a minimum of *economic importance and functional independence* from other purposes. The Court of Justice denied in *Familiapress*[17] that prize competitions, like crossword puzzles in the press, amounted to 'gambling'. Such games were not comparable to the 'special features' of lotteries, as noted in *Schindler*. Opposed to large-scale lotteries involving a high risk of crime or fraud, prize competitions were small scale and less was at stake. They did not constitute an economic activity in their own right but were simply part of the editorial content of a magazine.[18] Moreover, the prize competitions did not constitute games of chance but rather involved a strong skill component. Finally, consumers did not wager money to participate.[19]

---

[15] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 34–38. Cf. also C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[16] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 34–38.

[17] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689.

[18] Ibid., paras 20–23. With regard to the criterion of an 'economic activity in its own right' in the context of teleshopping, cf. C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF) [2007] ECR I-8817, paras 37–38.

[19] In its jurisprudence, the CJEU also dealt with a particular form of prize draws that was held to adversely affect the health of consumers. An import–export company had announced on its website

Similarly, the Court did not rely on precedent from the gambling jurisprudence in *Commission versus Greece*. The relevant games regarded electrical, electromechanical and electronic games. They did not show the aforementioned characteristics and were *inter alia* not played for the prospect of winning money. Consequently, the Court concluded that the findings from earlier gambling cases could not be used in this case[20] and applied a stricter proportionality review than in the gambling cases.[21]

The *Omega* judgment is sometimes mentioned in the context of the gambling case law.[22] However, the comparison is only valid – to some extent – in that the Court referred in *Omega* to moral, religious and cultural considerations as it did in *Schindler* and subsequent gambling cases.[23] For the rest, *Omega* differed significantly. First of all, it did not involve games of chance but games of (doubtful) *skill*. In addition, the controversy in *Omega* related *exclusively* to strong public morality concerns, namely in relation to human dignity. It will be explained in the next chapter why public morality is not similarly concerned regarding games of chance in comparison to games where people play at killing other people.

This chapter discussed three dimensions of the scope of application of EU law. The Court of Justice held in *Schindler* that lottery services fell within the scope of application of EU law. It recognised that lotteries and in subsequent cases other forms of gambling constituted *'economic activities'* within the meaning of the Treaties. While in theory all fundamental freedoms can apply to gambling activities, the freedom to provide *services* and the freedom of *establishment* are most likely to apply. In the *online sector*, mostly the freedom to provide services is applicable. Finally, the precedent on gambling only applies to certain games, namely *games of chance*. Additionally, these games must show a *minimum economic importance* and *functional independence*; this excludes, for instance, prize competitions like crossword puzzles in the press.

---

a monthly prize draw with the chance of winning medicinal products (Ginseng extract powder). According to the CJEU, the relevant EU secondary law prohibited such promotions: C-374/05 Gintec International Import Export GmbH v Verband Sozialer Wettbewerb eV [2007] ECR I-9517.

[20] C-65/05 Commission v Greece [2006] ECR I-10341, paras 36–37.

[21] Concurring: Doukas, D., and Anderson, J. (2008). "Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded". *Yearbook of European Law, 27*, 237–276, at 255.

[22] Cf. e.g. Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 969 fn 3, and at 979.

[23] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609, para. 37.

Chapter 7
Justification Grounds in EU Gambling Law

7.1 Consumer Protection and Public Order

In the long line of gambling cases, governments have argued an extensive list of public interest objectives to justify restrictions to fundamental freedoms. The Court of Justice has usually accepted them without detailed assessment, which is not unusual. In general, the Court is very lenient in accepting new 'imperative requirements' as legitimate public interest objectives. It has accommodated virtually any public interest objective with the exception of those of a purely economic, fiscal or protectionist nature (see Sect. 3.2.2).[1]

According to the Study of Gambling Services, the objectives that the Court sanctioned in its gambling jurisprudence include[2]:

- Maintenance of public order[3]
- Prevention of fraud and other criminal activities[4]
- Limitation of the exploitation of the human passion for gambling[5]

[1] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 70–75.

[2] Cf. for this list and the cited cases, Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 981–982.

[3] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 31.

[4] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60; C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 30; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, paras 62–63.

[5] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, paras 30 and 35.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_7,

- Prevention of the damaging individual and social consequences of incitement to expenses[6]
- Consumer protection[7]
- Maintenance of the social order[8]
- Protection of moral and cultural aspects[9]
- Prevention of gambling from being a source of private profit.[10]

The Court further accepted the following objectives:

- Limitation of the propensity of consumers to gamble or of curtailing the availability of gambling[11]
- Combating of financial crime and money laundering[12]
- Prevention of the incitement to squander money on gambling[13]
- General need to preserve public order[14]
- Avoid private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune[15]

---

[6] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60; C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, paras 30 and 35.

[7] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 73.

[8] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 58; C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, paras 62 and 73.

[9] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[10] Ibid., para. 57.

[11] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 54.

[12] Recently confirmed in C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 22.

[13] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 36; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, paras 20, 22, 70; C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, paras 23 and 29.

[14] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 36.

[15] Ibid., para. 43.

- Protection from the substantial impairment of the interests of the state[16]
- Protection of the interests of local residents[17]
- Fighting addiction to gambling[18]

The Court further accepted as an additional but not per se sufficient public interest objective:

- The financing of social activities.[19]

The financing of social, benevolent activities or good causes, such as horse breeding[20] and rural development,[21] cannot be the fundamental justification but must be nothing more than an *incidental beneficial consequence*.[22] The avoidance of a diminution or reduction of tax revenues is not a valid justification.[23]

The long list of objectives illustrates the practice of the Court to essentially sanction any public interest objective. The large discretion of Member States in this regard is often illustrated by a vague wording of the justification grounds.[24] The concerns behind this long list of objectives can be summarised under two main categories. This has in fact been the practice of the Court of Justice:

> the Court has held several times that the objectives pursued by national legislation in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question, and of consumers more generally, and the protection

[16] C-470/11 Garkalns SIA v Rigas dome [2012] nyr, para. 48.

[17] Ibid., para. 40.

[18] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, paras 20, 22, 70; C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 22.

[19] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 61.

[20] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, paras 8 and 40.

[21] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 51–53.

[22] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 61.

[23] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 61; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 105; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 53–54.

[24] Ritaine, E.C., and Lein, E., "Les jeux de hasard dans l'Union européenne: Panorama de droit comparé et implications sur la libre circulation des services" in *Annuaire Suisse de droit européen*, Epiney, A., Egbuna-Joss, A., and Wyssling, M. (Eds.), Bern/Zurich: Staempfli Verlag/Schulthess Verlag, 2006, pp. 465–478, at 477.

> of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services.[25]

The various concerns therefore fall under the justification grounds of *consumer protection* and *public order*. These grounds vary significantly as the first refers to concerns that are easily identifiable: consumers ought to be protected from gambling-related risks when they consume gambling services. These risks essentially relate to addiction and crime, including fraud committed by operators.[26] It is necessary to ensure that the consumer is 'treated honestly'.[27] The Court of Justice seems to imply that only consumers are exposed to fraud, yet, fraudulent practices may also take place the other way around.[28]

The second term '*public order*' *is more elusive*. The Court of Justice has mostly used the term 'maintenance of order in society'[29] or then 'the general need to preserve public order'.[30] The wording illustrates that the term 'public order' accommodates various concerns that somehow relate to 'order'. These are on the one hand concerns relating to *criminal activities* that are known to be prevalent in the gambling sector. However, they also involve more vague concerns that relate to *public morality*. Public order includes all criminal acts that are not aimed against consumers. The Court of Justice frequently refers to crime prevention in very

---

[25] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 45, as well as C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 74.

[26] Concurring: Spapens, T., Littler, A., and Fijnaut, C.J., *Crime*, *Addiction and the Regulation of Gambling*, Leiden: Martinus Nijhof Publishers, 2008. C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 75; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67; C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, para. 23; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 46; C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, paras 56 and 72; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 88; C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 29.

[27] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 57.

[28] Young, R., and Todd, J., *Online Gambling – Focusing on Integrity and a Code of Conduct for Gambling*, Report prepared for the European Parliament by Europe Economics, 2008, at 2.

[29] Cf. already in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 58.

[30] C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 29, *i.f.*

broad terms.[31] It is well known that gambling structures can serve as means for money laundering, irrespective of their (private or public) ownership.[32] Other means may be just as effective and attract less attention from legislators, such as investments in real estate.[33] Moreover, the customers of operators can commit fraud as well.[34]

7.2 Ambivalent Relationship of the State Towards Gambling

There is only one category of objectives that the Court of Justice has repeatedly refused to accept as a legitimate public interest objective: those of a purely *economic*, *fiscal or protectionist* nature (see Sect. 3.2.2).[35] This is an interesting aspect since gambling services are normally accompanied by economic interests.[36] It is hard to imagine a substantial offer of games of chance where the (public or private) operator would not accumulate revenues and allocate them to some purpose. The state budgets of the large majority of the EU/EEA Member States have been directly alimented by gambling revenues, in many cases for decades.[37] Certainly, due to religious views, games of chance were banned in many parts of Europe in the post-antique world.[38] Historians argue that gambling bans were increasingly lifted when public authorities realised that the operation of games of chance served as a

[31] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 57; C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 62; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 52; C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para, 72.

[32] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 49–50; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 74–76.

[33] Unger, B., & Ferwerda, J. *Money Laundering in the Real Estate Sector*: *Suspicious Properties*, Cheltenham: Edward Elgar, 2011.

[34] Young, and Todd, *Online Gambling – Focusing on Integrity and a Code of Conduct for Gambling*, at 2.

[35] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 70–75.

[36] In relation to the gambling sector, the CJEU held in *Commission v Italy* that "the need to ensure continuity, financial stability and a proper return on past investments for licence holders" could not serve as overriding reasons in the general interest: C-260/04 Commission v Italy [2007] ECR I-7083, para. 35. For an overview of economic aspects of gambling, cf. Coryn, T., Fijnaut, C., and Littler, A., *Economic Aspects of Gambling Regulation*: *EU and US Perspectives*, Leiden: Martinus Nijhoff Publishers, (2008).

[37] Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010.*

[38] *Ex multis*, Zollinger, *Geschichte des Glücksspiels*: *Vom 17. Jahrhundert bis zum Zweiten Weltkrieg*, at 283. Cf. for this point also Weber, M., *Die protestantische Ethik und der Geist des Kapitalismus*, *Archiv für Sozialwissenschaft und Sozialpolitik*, Nördlichen: Druckerei C.H. Beck, 1904–1905.

great source of revenues.[39] Public authorities and occasionally even religious institutions therefore developed a 'pragmatic' moral view on games of chance.[40]

Due to these economic interests, the state's relationship to gambling services has always been ambivalent. This ambivalence is not specific to a certain regulatory licensing model: criticism towards public monopolies in this context is shortsighted. There are *many fiscal or fiscal-like ways* for the state to profit from gambling revenues ranging from operating games by its own public monopoly to allowing a highly liberal licensing system. The ambivalent relationship was succinctly described by Advocate General Stix-Hackl in *Lindman*:

> The relationship between States and the gambling industry could generally be described as ambivalent. On the one hand, because of the social risks gambling involves, States have traditionally felt obliged to regulate or restrict it; however, gambling is of great significance for the public purse, both in fiscal and in general economic terms.[41]

Due to the risks that gambling involves, such as social costs linked to gambling addiction, states have traditionally considered that there are good reasons to restrict or even prohibit gambling offers. On the other hand, the public purse profits from gambling revenues, directly or indirectly, by the proceeds from public operators or by taxing private operators. Besides the fiscal interests of the state, there is a bigger economic interest: the gambling industry also creates jobs and may lead to further economic growth in the related entertainment and tourism industries. It is difficult for politicians to escape this conflict of interests.

The *quasi-fiscal function* of games of chance became only a topic of discussion with the cases after *Schindler*. This was particularly true in the Italian cases where referring courts had raised doubts about the consistency of national gambling policies. Government agents pleaded the limitation of gambling offers. At the same time, expansionist policies aimed at increasing gambling revenues could be noted in practice. Advocate General La Pergola had previously pointed at conflicts of interests in *Läärä* and Advocate General Fennelly addressed the inconsistencies prominently in *Zenatti*:

> it would not be acceptable, on the other hand, if the grant of licences or concessions were simply a means of channelling the proceeds of virtually unrestricted demand into the coffers of the national authorities or of bodies engaged in public-interest activities. A Member State may not, in my view, engage either directly or through certain privileged bodies in the active promotion of officially organised gambling with the primary objective of financing

---

[39] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 11–12.

[40] A pragmatic perspective on games of chance may occasionally be noted among religious institutions as well. 5.3 % of the shares of Casinos Austria AG are held by 'Bankhaus Schelhammer and Schattera'. According to the latter's website, it is the oldest private bank of Vienna and held with a majoritarian ownership by institutions of the Roman-Catholic Church of Austria. The website of the bank states: "Closely bonded to the values and mandates of the Church in Austria" ('Den Werten und Aufträgen der Kirche in Österreich eng verbunden'). Cf. *Annual Report of Casinos Austria AG*, *6*, available at http://infochair.casinos.at/infochair/presse/gb09_low.pdf and http://www.schelhammer.at/kirche.

[41] Opinion of Advocate General Stix-Hackl in C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, para. 84.

> social activities, however worthy, under the guise of a morally justified policy of control of gambling. This would, as I have already said, constitute a merely economic objective.[42]

Up to *Zenatti*, the Court of Justice had shown quite a negligent approach towards the conflict of interests for the state. In *Schindler* and *Läära*, it was not without relevance in the Court's view that games of chance could make a significant contribution to public interest activities, for instance, sports or culture.[43]

Advocate General Fennelly made the ambivalence of the situation clearer. If the Court did not counterbalance its earlier statements, its silence could be understood as sanctioning the means to serve good ends. Consequently, the Court of Justice added in *Zenatti*:

> However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[44]

The ambivalence, however, remained: *good ends could provide some justification* although they could not serve as the central public interest objective. This ambivalence could be particularly well observed where charities or similar bodies either organised games of chance or profited from the proceeds of gambling operations. The Court of Justice repeatedly accepted the idea of the moral superiority of allocating gambling proceeds to good causes compared to mere private profit:

> the United Kingdom legislation […] pursued the following objectives: […] to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.[45]

This and subsequent statements testify an uneasy feeling towards private profit made by operating games of chance. Thus, it would appear to be *morally preferable to only allow for public profit* and the allocation of the proceeds going to 'good causes'.[46] The greed of private operators is contrasted with the good deeds of the state and charities.[47] The notion 'epidemic' has been used in relation to the spread

---

[42] Opinion of Advocate General Fennelly in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 32.

[43] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[44] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

[45] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 57.

[46] Cf. e.g. Bodo, C., Gordon, C., and Ilczuk, D., *Gambling on Culture*: *State Lotteries as a Source of Funding for Culture - The Arts and Heritage*, Amsterdam: Circle, 2004.

[47] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 30; C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43.

of unlicensed operators rather than health concerns.[48] This moral perspective on games of chance comes with a problem that Advocate General La Pergola described in *Läärä* as the '*venial sin*'.[49] In that case, the state-controlled operator RAY was to collect funds for various public-interest objectives:

> Obviously, it cannot be ruled out that the RAY may have fallen into the practices of which the appelllants [*recte*: appellants] complain – assuming that this is confirmed – precisely because it believed itself to be none the less covered by the umbrella of 'good causes'. Given the uses to which the Law requires the related profits to be direct [*recte*: directed], action to stimulate demand for games of chance could be construed as a kind of venial sin, in other words, a means of exercising the monopoly which, when examining the need for the prohibition, we should view less harshly than would be appropriate if the system permitted the personal enrichment of those organising the game. […] At least in this case, one would be tempted to say that the end does not justify the means.[50]

The EFTA Court adhered to a similar argumentation. Its assessment towards the role of 'good causes' was more critical than that of the Court of Justice and it held that the purpose of good causes *could not serve to re-establish a* '*moral equilibrium*':

> As an aim in itself, it would seem that [the aim of preventing gambling from being a source of private profit] must be based on a resentment of games of chance for reasons of morality, […] the aim of preventing gambling from being a source of private profit can serve as justification only if the restrictive measures reflect that moral concern. If a State-owned monopoly is allowed to offer a range of gambling opportunities, the measure cannot be said to genuinely pursue this aim. In this respect, it is to be recalled that the financing of good causes may only be an incidental beneficial consequence. Accordingly, the use of the profits from the monopoly provider for the financing of good causes may not form part of a moral justification, in the form of re-establishing the moral equilibrium, for nevertheless allowing games of chance.[51]

The moral argument of using the gambling revenues for good causes is particularly popular in relation to charities that organise games of chance or where the proceeds go to *charitable work*. In fact, the use of gambling for social and cultural institutions (for example church-sponsored bingo, government-sponsored lotteries) dates back centuries. Even prominent academic institutions, such as

---

[48] Cf. the wording of the explanatory memorandum of the relevant Greek legislation establishing the State monopoly as quoted in the opinion of Advocate General Mazák in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 3.

[49] Opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 35.

[50] Opinion of Advocate General La Pergola in ibid., para. 35.

[51] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 48.

Harvard University, were partly founded with lottery revenues.[52] Similar to the situation where gambling revenues (from state or private operators) float into the state budget, the situation where the money is gained by or allocated to charities or charitable purposes involves a conflict of interests for the state. Even though the money does not go into the state budget, it *exonerates the state's own financial efforts*. The tasks to which the revenues are allocated reflect societal choices: for example, the fact that society finds it important to subsidise the breeding of a certain horse race[53] or support for rural development.[54]

It was only in recent times that the Court of Justice has addressed the point that charity work exonerates the state's budget. Previously, it simply repeated its formula that it was indeed relevant that gambling proceeds were allocated for public interest purposes. By contrast, the Court had noted this financial relationship in other areas of law.[55] The relevant case concerned Mr Persche, a tax advisor established in Germany. He had made a substantial gift to a Portuguese charity and consequently asked the German tax authorities for a tax deduction. This was not granted because the interested body was not a recognised German charity. The Court of Justice found the measure to be discriminatory and pointed at the relationship between charities' work and the exoneration of the state budget:

> Admittedly, by encouraging taxpayers, with the prospect of a tax deduction for gifts made to bodies recognised as charitable in support of their activities, a Member State encourages such bodies to develop charitable activities for which, usually, it would or could take responsibility itself. It is conceivable, therefore, that national legislation providing for a deduction for tax purposes of gifts for the benefit of charitable bodies could encourage such bodies to substitute themselves for the public authorities in assuming certain responsibilities, and that such assumption could lead to a reduction of the expenses of the Member State concerned capable of compensating, at least partly, for its decreased tax revenues resulting from the right to deduct gifts.
>
> However, it does not follow that a Member State can introduce a difference in treatment, in respect of the deduction for tax purposes of gifts, between national bodies recognised as being charitable and those established in another Member State on the grounds that gifts made for the benefit of the latter, even if their activities are among the purposes of the legislation of the former Member State, cannot lead to such budgetary compensation. It is settled case-law that the need to prevent the reduction of tax revenues is neither among the objectives stated in [Article 65 TFEU] nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty.[56]

In another case, the close financial relationship between the state and charitable work was even pleaded by the German government. Germany used this relationship to argue its defence:

> Thirdly, the German Government maintains that it would threaten the cohesion of the national tax system to exempt from corporation tax income received by non-resident

[52] Potenza, M.N., "Gambling and Morality: A Neuropsychiatric Perspective" in *Gambling: Mapping the American Moral Landscape*, Wolfe, A., and Owens, E.C. (Eds.), Waco (Texas): Baylor University Press, 2009, pp. 175–191, at 175.

[53] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, paras 8 and 40.

[54] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633.

[55] C-318/07 Hein Persche v Finanzamt Lüdenscheid [2009] ECR I-359.

[56] Ibid., paras 45–46.

> foundations in respect of the management of property they own in Germany. According to that Government, the effect of such an exemption would be to remove liability to tax in respect of activities devoted to the public interest pursued by charitable foundations. In so far as such foundations assume direct responsibility for the common good, they act as substitute for the State, which may, in return, grant them tax benefits without breaching its obligation of equal treatment.[57]

By contrast, it was only in *Markus Stoss* that the Court of Justice applied the same conclusion in the context of gambling services also. To be precise, it was the referring Administrative Court of Stuttgart, which raised the attention to that point:

> Since the Verwaltungsgericht Stuttgart has also indicated that, after the deduction, provided for by the legislation at issue in the main proceedings in favour of eligible non-profit-making activities, has been made, the surplus revenue is paid into the public purse, and in so far as it is not possible to exclude the possibility that the financial support given to bodies recognised as being in the public interest permits the latter to develop activities in the public interest which the State might normally be called upon to undertake, thereby leading to a reduction in the State's expenses, it should, secondly, be recalled that neither is the need to prevent the reduction of tax revenues among the overriding reasons in the public interest capable of justifying a restriction on a freedom instituted by the Treaty.[58]

Traditionally, the Court had given the impression that only private operators, aiming at increasing their profits, suffered from a conflict of interest.[59] Only recently, the Court of Justice adjusted its view on private versus public income. Private operators, charaties and the public purse have an interest in hearing their cash registers ring.[60] In *Zeturf*, the Court of Justice held:

> Indeed, it may be considered that there is a certain conflict of interest for all operators, including those that are public or charitable bodies, between the need to increase their income and the objective of reducing gambling opportunities. A public or non-profit-making operator may, like any private operator, be tempted to maximise its income and develop the gambling market, thus undermining the objective of seeking to reduce gambling opportunities.
>
> This is particularly the case where the income generated is intended to achieve objectives acknowledged to be in the public interest, the operator being encouraged to increase the income generated by the gambling in order to fulfil those objectives more effectively. The allocation of income to those objectives may, moreover, lead to a situation in which it is

---

[57] C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften [2006] ECR I-8203, para. 51.

[58] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 105.

[59] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 30; C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43.

[60] Bogart, W.A., *Permit but Discourage - Regulating Excessive Consumption*, Oxford/ New York: Oxford University Press, 2001, at 355 *i.f.*

> difficult to forgo the amounts generated by the gambling, the natural tendency being to increase opportunities for gambling and to attract new bettors.
>
> Those considerations are particularly relevant in situations where the single operator holds, as is the case in the main proceedings, exclusive rights over the organisation of horse races as well as over the betting on those races. That operator is then in a very favourable position to increase, should it so wish, betting activities, by organising more events on which bets can be placed.[61]

7.3 Gambling Addiction: A Case for Public Morality or Science?

It was established that the numerous concerns relating to gambling can be summarised under two justification grounds: consumer protection and public order.[62] The first relates to gambling-related risks that may be of direct concern to consumers, primarily the addiction to games of chance and fraud committed by operators. The second term is more elusive and involves all other forms of crime that do not directly regard consumers but society as a whole (such as the interest in a clean financial market that is free of money-laundering and other criminal activities). Also, under the label 'public order', concerns are put forward that relate to the morality or rather immorality of games of chance.

Some regard gambling addiction as an issue of public morality and others as an issue for science. The prism that is chosen impacts one's perception of gambling and of the addiction to games of chance.

The case law of the Court of Justice shows an *emphasis on public morality concerns*. Moral, cultural and religious factors are seen as co-responsible for the 'peculiar nature' of gambling.[63] Some governments went so far as to liken gambling to illegal products like drugs.[64] Similarly, authors argued that the lack of agreement as to the morality of games of chance was the greatest obstacle to regulating gambling at EU level and used comparisons to abortion, prostitution or drug control.[65] The true

---

[61] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 59–61.

[62] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 45; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 74.

[63] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

[64] Ibid., para. 32.

[65] Devaney, M. (2009). "Online Gambling and International Regulation: An Outside Bet", *Information & Communications Technology Law, 18*(3), 273–283, at 274; cf. also Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 175.

obstacle to pan-European regulation is of course not morality but taxation, in other words, the cutting of the copious cake.[66]

Indeed, the Court of Justice relied on such 'peculiar nature' of gambling and found the morality of games of chance "at least questionable."[67] While authors noted that the argument of a 'peculiar nature' of gambling played an essential role in the gambling case law,[68] *this argument has been uncritically accepted*.[69] According to the Court of Justice, it would appear that people who engage in gambling are regularly not able to control their behaviour. As the Court of Justice highlighted, the "human desire to gamble" needs to be confined within controlled channels[70]; even the mere "human pleasure in gambling" can be a problem.[71] Advocate General Gulmann referred to "gambling fever."[72] Moreover, it would appear that the Court of Justice *disapproved of certain ways in which people spend money in their leisure time*. Preventing people to "squander money on gambling" was therefore accepted as a legitimate public interest objective.[73]

---

[66] Concurring: Verbeke who bluntly calls the morality-religion-culture argument mere hypocrisy: Verbeke, A.-L., "Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy" in *In the Shadow of Luxembourg*: *EU and National Developments in the Regulation of Gambling*, Litter, A., Hoekx, N., Fijnaut, C., et al. (Eds.), Leiden/Boston: Martinus Nijhoff Publishers, 2011, pp. 251–259, at 257. Regarding diverging gambling tax approaches, cf. Häberling, G., "Internet Gambling Policy in Europe" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, pp. 284–299, at 294–295.

[67] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 32.

[68] Doukas, and Anderson, "Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded", at 240.

[69] *Ex multis*, Badura, P., "Verfassungsrechtliche und gemeinschaftsrechtliche Fragen einer Neuordnung des Glücksspielwesens in Deutschland" in *Aktuelle Probleme des Rechts der Glücksspiele - Vier Rechtsgutachten*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, at 45.

[70] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 37. Similarly, the Belgium national lottery had, according to a Belgium court, "the objective of channelling man's inherent compulsion to gamble" (C-525/06 De Nationale Loterij NV v Customer Service Agency BVBA [2009] ECR I-2197 (Order of the Court), para. 3). Furthermore, the Spanish government claimed that its policy of taxing winnings from games of chance was aimed to "discourage gambling in general." Therefore, not the avoidance of *excessive* gambling but of *gambling itself* seemed to be the aim of the policy. It was, however, difficult to explain why winnings made with certain Spanish operators were exempted from taxation. The sums wagered with those operators covered more than 40 % of the national market. C-153/08 Commission v Spain [2009] ECR I-9735, in particular paras 36, 67–76.

[71] Advocate General Trstenjak supported the wording of the German government in her opinion in C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH [2010] ECR I-217, para. 93.

[72] Opinion of Advocate General Gulmann in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 37.

[73] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67. Similarly, the rationale underlying Latvian municipal authorities' refusal to issue (additional)

Proceeds for public or charitable purposes are seen as providing some degree of justification. The Court approved the objective of preventing gambling from being "a source of private profit."[74] It also found it legitimate to adhere to the view that it was "unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune."[75]

Terms such as social evil, questionable morality, squandering money, gambling fever, and activities of a special or peculiar nature do not seem to refer to an activity whose inherent risks could be addressed by appropriate regulation. Rather, it harks back to ancient times where risk-focused regulation attempting to minimise negative side effects of an activity[76] did not exist and where gambling addiction was largely a matter for moral judgment. The words of Pastor Hopkins from New England are a testament of those times:

> Oh! It is foul […] let the gambler know that he is watched, and marked; and that […] he is loathed. Let the man who dares to furnish a resort for the gambler know that he is counted a traitor to his duty, a murderer of all that is fair, and precious, and beloved among us.[77]

Historically, the perception of gambling and the addiction to the game were loaded by moral judgments. The moral perspective on gambling was heavily informed by religious convictions. The question today is whether the regulation of gambling and public health policy on gambling addiction should be based on religious and moral views rather than on empirical evidence from scientific research.

It was noted in the introduction that the regulation of gambling became heavily influenced by religious convictions in the post-antique world. Christian religious leaders despised gambling and made the *regulation of gambling a matter for religious believes*. The aforementioned example of Pastor Hopkins is only one of countless examples as Part I demonstrated. In Luther's view, gamblers failed to understand that God alone was steering their fortune, and by gambling they effectively challenged God's authority.[78] Indeed, God and games of chance may be seen as competitors on the market for hope.[79] Books of devils categorised gambling

---

gambling licenses was "the concern to prevent the public from being tempted to favour games of chance over other leisure opportunities." C-470/11 Garkalns SIA v Rigas dome [2012] nyr, para. 10.

[74] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 30.

[75] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43.

[76] For a recent publication advocating an approach that regulates consumption while trying to discourage unhealthy forms or levels of consumption, cf. Bogart, *Permit but Discourage - Regulating Excessive Consumption*. For a nudge approach, cf. Thaler, R.H., and Sunstein, C.R., *Nudge*: *Improving Decisions About Health*, *Wealth*, *and Happiness*, New Haven CT/London: Yale University Press, 2008.

[77] Samuel Hopkins, pastor of the First Congregational Church, Montpelier, Vermont, The Evils of Gambling, sermon of 19 April 1835, cited in: Thompson, W.N., *Gambling in America*: *An Encyclopedia of History*, *Issues*, *and Society*, Vol. 1, Santa Barbara (California): ABC-CLIO Inc., 2001, at 131.

[78] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 10.

[79] Lutter, M. (2011). "Konkurrenten auf dem Markt für Hoffnung. Religiöse Wurzeln der gesellschaftlichen Problematisierung von Glücksspielen", *Soziale Probleme, 22*(1), 28–55.

along with harlotry and drinking.[80] Playing games was despised as idle and unproductive behaviour.[81] As gambling was described as an immoral activity, people engaging in gambling consequently behaved immorally. The latter were grouped with thieves and robbers and described as cheats and felons. Those excessively involved in gambling were seen as degenerated. What could have possibly been the cause of the addiction to the game in this worldview? The *moral deficiency* of the addict.[82]

These views contrast sharply with a scientific perspective on addiction. They also contrast more broadly with the *image of man* that we generally hold today. For decades, Western societies have been characterised by the enjoyment of individual liberties. Existentialists would even speak of a non-delegable responsibility to make individual choices. As Sartre phrased it: "L'homme est condamné à être libre."[83]

The question is whether the idea of gambling as a matter for public morality is in line with the spirit of the age in Europe. Religious concepts of gambling as sin, vice or otherwise morally reprehensible activity badly fit the image of man in Western societies. Nor does it fit well with the image of the *self-determined economic actor* that the Court of Justice created in *Van Gend & Loos*[84] and subsequent judgments of constitutional dimension. This consumer makes choices, enjoys rights and enforces them himself.[85] Moreover, the reliance on religious and moral grounds in relation to gambling may be resisted by the European self-perception of a secular statehood based on constitutional patriotism.[86] When confronted with immigration, Europe likes to underline that its demands towards immigrants are not based on Christian claims but based solely on the constitutional order. It would appear that the Union legislator did not feel comfortable relying on the Christian heritage; instead, it chose to emphasise secular '*universal values*' both in the TEU[87] and in the Charter.[88]

---

[80] Buland, "Die Kultur des Spiels – Einige Aspekte zur Einführung", at 11. Cf. also Schumacher, "'Des Teufels Spiel' – Glücksspiel in Mittelalter und früher Neuzeit".

[81] Zollinger, *Geschichte des Glücksspiels*: *Vom 17. Jahrhundert bis zum Zweiten Weltkrieg*, at 283. Cf. further for this point Weber, *Die protestantische Ethik und der Geist des Kapitalismus*, *Archiv für Sozialwissenschaft und Sozialpolitik*.

[82] Potenza, "Gambling and Morality: A Neuropsychiatric Perspective", at 176 and the therein cited literature.

[83] Sartre, J.-P., *L'existentialisme est un humanisme*, Paris: Nagel, (1946).

[84] C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR English special edition 1, at II, B, 4th para.: "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law […] and the subjects of which comprise not only Member States but also their nationals. […] Community law therefore is also intended to confer upon them rights which become part of their legal heritage."

[85] Cf. hereto the principle of direct effect as enshrined in ibid., at II, B, 4th para.

[86] For the concept of 'Verfassungspatriotismus', cf. Sternberger, D., *Verfassungspatriotismus*, Frankfurt a.M.: Insel, 1990.

[87] TEU, Preamble, 3rd para.: "DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."

[88] Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, Preamble, 2nd para.: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible,

Nowadays, the aforementioned considerations make it hard to argue that gambling and the addiction to the game are still substantially a matter to be assessed from a public morality perspective.[89] Nevertheless, there are legitimate concerns surrounding gambling. It may for instance be seen as immoral to draw financial profit from a consumer who suffers from a mental health condition, namely the addiction to gambling. Corporate social responsibility issues have received increasing awareness in recent times.[90] Yet, this kind of moral concern has a whole different quality than the initially described moral condemnation of gambling as such. The following model serves to illustrate this point.

Cases involving questions of morality essentially fall in *two categories*.[91] In the first category, the moral concerns regard the activity *as such*. These are *core cases* of morality. In the second category, the moral concerns relate to the *detrimental consequences* that the activity potentially involves.

In the first category, the *activity itself* is seen as *immoral*. According to the value judgments of a society, certain behaviour is seen as morally reprehensible. As these are clearly questions of morality, the respective answers may vary depending on influences of *geography*, *religion*, *culture and time*.

An example for this first category could be observed in the facts of the *Omega* case.[92] For good reasons, the Court of Justice considered that the German Basic Law was seeking to guarantee human dignity by prohibiting 'playing at killing' as a leisure activity. German society was entitled to find it morally reprehensible to run games that involve the "simulation of acts of violence against persons, in particular the representation of acts of homicide."[93] An aspect that is often neglected in relation to the principle of proportionality in this decision is that the domestic authorities limited their prohibition to the 'play at killing' game while all other games of the gaming hall remained permissible.[94]

Likewise, a society may disapprove of nudity in public. It may find it reprehensible to walk around naked in town: the freedom of the individual to walk around naked ends where many others see such behaviour as reprehensible. In another geographical or cultural context, for instance a separate beach zone or certain tribes, this may be seen differently.

---

universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

[89] Concurring: Verbeke who refers to the morality argument as hypocritical: Verbeke, "Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy", at 257.

[90] Gasser, U., "Responsibility for Human Rights Violations, Acts or Omissions, within the 'Sphere of Influence' of Companies" in *Human Rights*, *Corporate Complicity and Disinvestment*, Nystuen, G., Follesda, A., and Mestad, O. (Eds.), Cambridge: Cambridge University Press, 2011, pp. 107–131.

[91] The next couple of paragraphs profited from a discussion with Professor Mathias Kumm of New York University.

[92] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn 92004) ECR I-9609.

[93] Ibid., para. 39.

[94] Ibid., para. 39.

Another example of this first category of inherently immoral activities is the prohibition of the import of pornographic products, such as explicit magazines, to say Saudi Arabia or Malaysia. An international legal order has an interest in respecting such kind of value judgments as it otherwise takes a big risk of hampering its acceptance.

By contrast, in the case of issues falling in the second category, the moral disapproval is not aimed at the activity as such but at the *detrimental consequences* that the activity potentially involves. These are not core cases of morality. They regard issues in relation to which *society wishes to eliminate or reduce the detrimental side effects* associated with the activity. Gambling activities fall in this latter category. Considering the aforementioned image of man, it is hard to argue that games of chance *as such* are immoral or an activity that is morally reprehensible. *Yet*, *moral concerns may relate to the detrimental side effects of gambling*: it is seen as immoral if a gambling operator uses an information bias for fraudulent practices on consumers; it is seen as immoral if an operator abuses the mental health condition of a person for its enrichment.

There is an essential qualitative difference between the two categories. The first category is necessarily dominated by *subjective* moral views. It is hard to imagine that science can play a significant role here – if any at all. Whether the majority view of a society finds it reprehensible to offer games in which people play at killing is primarily a moral question. By contrast, the second category does not in principle reject the activity as such but it recognises that there are *risks*. The important difference is that 'risks' refer to observable 'facts'. And where facts can be observed, they can be scientifically studied. Gambling-related risks can therefore be assessed. They can be measured by epidemiological studies; regulatory interventions like prevention programmes can be evaluated.

These thoughts confirm that there are indeed occasions when moral considerations can legitimately find their place in parliament and courtrooms. By contrast, for issues that do not constitute core cases of morality but touch upon the detrimental side effects of the activity, science should be the appropriate advisor to regulators and other decision-makers.

Moral views on gambling and on other areas of risk regulation hold the potential to function as *barriers to an objective evidence-informed assessment*. Such perspective on gambling regularly colours the gathering or interpretation of facts, which in turn hampers an objective assessment of gambling-related risks. The question in this context is: Do the facts still shape the opinion or does the opinion shape the facts?

Collins described well how moral views on addiction issues *jeopardise a sound health policy*. A possible consequence of a moral perspective is that the person with a mental health condition, namely addiction, is treated inhumanly. He is not perceived as a person suffering from a disorder recognised in the medical literature. In the case of illicit substances, he is persecuted by the criminal justice system. If the addiction relates to licit products, his behaviour may not qualify as a criminal act. But from a religious and moral perspective, his behaviour constitutes a moral failure.

Another expression of a moral perspective is seemingly less dramatic. It nevertheless has far-reaching consequences for the regulation of health risks. Inaccurate perceptions of addiction issues are very common, even among decision-makers. Genuine public health problems are confused with moral issues regarding the limits of our liberal tolerance. Is it tolerable that drug addicts frequent public places? Public debates often inflated by disproportionate media attention on the limits of liberal tolerance lead at irregular intervals to the call for 'public order'.[95]

Collins noted that public policy towards addiction is regularly corrupted by covert ideological agendas inspired by puritanical moral views that can be joined by covert commercial protectionism. According to Collins, this leads to dishonest or simply incompetent state-sponsored bad research, serving to uphold prohibitionist public health policies. He argued that this type of sponsored research has, ironically, particularly grave consequences in democracies, given that these political systems are essentially based on governments driven by public opinion. The dissemination of suitable research findings combined with a puritan information agenda makes it extremely hard to achieve a *rational and humane discussion on addiction policy*.[96] As a result, there is a risk that addiction problems are dramatised and reduced to a seemingly easily identifiable cause. The call for 'public order' is the call to eliminate that cause. Yet, research on gambling addiction shows that these issues are complex as manifold factors interact in the process of developing addictive behavioural patterns (see Sect. 9.1.3.2). In a *value-loaded atmosphere*, a scientific perspective has a terribly hard stance.[97]

As opposed to speeches calling for public order and the protection of morality, scientific research may appear as rather dry and certainly unemotional to the greater public. The strength of science lies precisely in this dryness. As Ross and Kinbaid described:

> Scientific knowledge tends to undermine dramatic purity.[98]

The problem with risk regulation that is informed by moral views rather than empirical evidence is that it systematically fails to adequately address the concrete

---

[95] For the two previous paragraphs, cf. the introductory remarks on the article by Collins in: Ross, D., and Kincaid, H., "Introduction: What Is Addiction?" in *What Is Addiction*?, Ross, D., and Kincaid, H. (Eds.), Cambridge, MA: MIT Press, 2010, pp. vii–xl, at ix. Cf. also Collins, P., *Gambling and the Public Interest*, Westport, CT: Praeger Publishers, 2003.

[96] Collins, P., "Defining Addiction and Identifying the Public Interest in Liberal Democracies" in *What is Addiction*?, Ross, D., Kincaid, H., Spurret, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 410–433, at 411.

[97] Regarding drugs and gambling policies, cf. e.g. Euchner, E.-M., Heichel, S., Nebel, K. et al. (2013), "From Morality Policy to Normal Policy: Framing of Drug Consumption and Gambling in Germany and the Netherlands and Their Regulatory Consequences, in Morality Policies in Europe: Concepts, Theories, and Empirical Evidence", Christoph Knill (guest editor), *Journal of European Public Policy*, *20*(3) (Special Issue: Morality Policies in Europe: Concepts, Theories, and Empirical Evidence), 372–389.

[98] Ross, and Kincaid, "Introduction: What Is Addiction?", at vii.

problems.[99] As Ross and Kinbaid noted, it took only statistically careful prevalence studies to show that the overwhelming majority of addicts eventually break their disordered behaviour without ever seeking clinical assistance – let alone angelic salvation.[100] These findings also demystified the primary role of institutionalised treatment and shifted the focus to *public education*.

Another example of a morality-informed policy could be found in a gambling case before the EFTA Court. It was noted that there are legitimate reasons to believe that it is immoral of operators to take financial advantage of a health condition from which a gambling consumer suffers. But there is an important qualitative difference in the following statement pleaded before the EFTA Court:

> The Defendants argue that […] there is the moral imperative that private persons should not profit from the misfortune of others.[101]

The core idea is legitimate: one should not make a financial profit from the misfortune, such as the mental health condition of a gambling addict. However, this statement was used to justify the existence of a state monopoly. It would therefore appear that while it is morally inappropriate for private persons to profit from the misfortune of others, *e contrario* it is acceptable for public authorities to do so.

In the jurisprudence of the Court of Justice, the *financial side of gambling is closely linked to the moral argument on gambling*. This can be seen in the criterion of 'private profit from a social evil' or in the requirement that gambling revenues could only be of 'incidental beneficial consequence' but not the actual objective.[102] From a consumer protection perspective, it is questionable whether these are well-suited criteria. There is nothing wrong about the fact that gambling provides public authorities with revenue, directly or indirectly, by public operators, charities or by taxing private operators. The opposite may be true. If some of these earnings are *earmarked for health programmes* relating to research, prevention and treatment of gambling addiction or general health issues, addiction-related harm may be reduced by the use of these financial means. The starting point of responsible gambling policies is the acknowledgment by both public authorities and the industry of their obvious financial interests and that each assume their responsibility when permitting and offering an activity that is proven to involve health and other risks.[103]

---

[99] Concurring: Verbeke who noted that much gambling legislation was based on assumptions regarding gambling addiction that are presented as if they were facts: Verbeke, "Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy", at 257.

[100] Ross, and Kincaid, "Introduction: What Is Addiction?", at vii.

[101] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 49.

[102] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43; C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

[103] Concurring with similar wording: Bogart, *Permit but Discourage – Regulating Excessive Consumption*, at 355 *i.f.*

Furthermore, from the perspective of the gambling addict, the allocation of the gambling proceeds to 'good causes' such as sports or culture does not make a difference. What really matters for this person's health is that a *sound risk regulation* is in place. The diagnostic criteria for gambling addiction ('gambling disorder') do not distinguish whether the addict gambles with operators whose proceeds go towards charitable causes or simply towards private profit (see Sect. 9.1.2.1).

It must be noted that the scientific perspective also contains a philosophical dimension as there is a profoundly *humanistic* aspect to it. It places the individual at the centre of reflection.[104] It does not take a judgmental approach. Gambling regulation that is truly informed by a scientific approach *aims at empowering the gambling addict*. Since many addicts express deviant social behaviour and subsequently suffer from self-loathing, the humanistic element consists in supporting them to *regain their dignity*. Emotional suffering is regularly at the beginning of the development of addictive behavioural patterns (see Sect. 9.1.4).[105]

From a moral perspective, engaging in drug addiction can be seen as a failure of character. What makes it worse for people suffering from gambling addiction is the fact that there is *no psychoactive substance that could be blamed* for the addict's behaviour. This further encourages some people to adopt a judgmental moral stance towards gambling addicts ('weak character'). It is regularly neglected that disordered behaviours are an *expression of deeper problems*, of an emotional suffering of the person concerned. Gambling addicts are not an exception.[106]

7.4 Results

Chapter 7 analysed the justification grounds pleaded in the gambling case law. The Court of Justice has recognised a wide array of public interest objectives and summarised them under two main justification grounds: *consumer protection and maintenance of public order*. Consumer protection relates to gambling-related risks from which consumers ought to be protected, namely gambling addiction and fraud committed by operators. The notion of public order seems to accommodate various concerns relating to public morality and crime such as money laundering. By contrast, the Court held early on that the *financing of social and benevolent activities or good causes* could not serve as the fundamental justification but only constitute an *incidental beneficial consequence* of the operation of games of chance. In line with

[104] Note in this context that the humanistic principle of placing the human being at the centre of reflection is prominently referred to in the Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, Preamble, at 2nd para.: "[The Union] places the individual at the heart of its activities."

[105] For a publication convincingly making this point, cf. Khantzian, E.J., and Albanese, M.J., *Understanding Addiction as Self Medication*: *Finding Hope behind The Pain*, Lanham, MD: Rowman & Littlefield Pub Inc., 2008.

[106] This paragraph profited from a discussion with Dr Richard LaBrie of Harvard Medical School.

its general case law, it further held that the avoidance of a diminution or reduction of tax revenues in particular could not constitute a valid justification.

The next section discussed the *ambivalent relationship of the state* towards gambling. The state has an *economic interest* in the gambling revenues (by operating games through a state monopoly or taxing private gambling operators) and the gambling business more generally (creation of jobs, structural support for regions, etc.). On the other hand, the state has an *interest in restricting gambling activities* due to the social costs of gambling, namely gambling-related harm. The pursuit of economic interests may lead to inconsistencies in gambling policies as noted by the Court of Justice on several occasions. At first, only Advocates General criticised such inconsistencies due to economic interests. While the Court of Justice did not enter this discussion in the early case law, it later acknowledged that the financing of good causes could only constitute "an incidental beneficial consequence" but not the actual reason for the restrictive gambling policy. Nevertheless, the Court of Justice found it "not without relevance" that the operation of games of chance could make a significant contribution to public interest activities. By contrast, *Advocates General and the EFTA Court rejected that the end could* (*partly*) *justify the means* ('*moral equilibrium*', '*venial sin*'). It was only in recent decisions that the Court of Justice also clearly recognised the *conflict of interest of charities and public authorities*. In particular, it found that charity work exonerated the state's expenses as the former may substitute for the latter's tasks.

Finally, Sect. 7.3 discussed whether gambling and the addiction to the game were a case for *public morality or science*. Historically, the regulation or rather prohibition of games of chance was based on religious and moral beliefs. Along some examples, it was shown that *Christian religious leaders despised gambling* as an idle and unproductive behaviour. In particular, the protestant ethos of assiduous work, order and frugality contrasted strongly with the concept of enjoying gambling. Gambling addicts were consequently seen as *morally deficient*.

With examples from the jurisprudence on gambling, it was shown that the Court of Justice adopted language, which seemed to be strongly influenced by moral views. Such perspective does not fit well with nowadays European spirit of the age and the image of the self-determined consumer in the EU.

Along the lines of a *two-category model*, it was argued that gambling did not constitute a core issue of morality since the legitimate concerns related to potential detrimental side effects like gambling addiction but not to the activity as such. Instead, it was advocated to take a scientific perspective on gambling-related risks and to base public policies on empirical evidence. Moral views, by contrast, carry the risk of *hindering an objective evidence-oriented assessment*.

Chapter 8
The Use of the Margin of Appreciation in EU Gambling Law

In the previous chapter, it was established that the Court of Justice recognised public interest objectives relating to threefold concerns: concerns relating to criminal activities, concerns relating to public morality and concerns relating to the health of consumers (gambling addiction). The present chapter inquires the use of the margin of appreciation specifically in relation to these concerns. Since the doctrine was introduced and heavily shaped by the ECtHR (Sect. 8.1), a thorough analysis of that court's rich and detailed practice of the doctrine shall establish the principles (Sect. 8.2) and criteria that steer the application of the doctrine in cases relating to crime, public morality and health (Sect. 8.3). The thoroughness of this part of the analysis finds justification in that the doctrine has played a key role in the development of the gambling jurisprudence. Subsequently, the findings are contrasted with the use of the margin of appreciation in the gambling case law of the Court of Justice and the EFTA Court (Sect. 8.5). Chapter 8 exclusively focuses on the margin of appreciation that is a priori granted. Chapter 9 will subsequently take a detailed look at how this general approach has been balanced in the gambling case law by an adequate proportionality review.

8.1 Reasons for Taking a Comparative Look at the European Court of Human Rights

The use of the margin of appreciation in the gambling cases is a delicate issue. The stakes involved are very high and it can be no surprise that government agents demand the widest possible margin of appreciation while private operators advocate the strictest possible review of national restrictions. The use of the margin of appreciation is a complex process as it involves the balancing of various factors. An isolated look at the gambling cases risks to be dominated by personal views that one may have towards gambling issues. Consequently, the use of the margin of

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_8,

appreciation in the gambling cases needs to be viewed in the larger context of the doctrine as a whole.

The ECtHR has shaped the *doctrine* of the margin of appreciation like no other court.[1] In fact, a discussion of this doctrine is hardly imaginable without a comparative look at Strasbourg.[2] At the international level, the first recourse to the margin of appreciation occurred under the Convention system.[3] It was shown that the *raison d'être* of the margin of appreciation is essentially identical in the Internal Market setting and under the Convention system. The doctrine serves to address the universality-diversity dichotomy (see Sect. 3.4.2). Similarly, both the Strasbourg and Luxembourg judiciaries apply a proportionality review to counterbalance the discretion a priori granted.[4] Over decades, the Strasbourg Court has acquired extensive experience in applying the doctrine. It is the *quantity* and the *diversity* of issues that have allowed for the development of a *detailed and diversified case law*.

As Sweeny correctly argued, the case law of the ECtHR can offer helpful guidance in steering the margin of appreciation in Internal Market issues,[5] and the gambling jurisprudence is just one out of many possible applications. In countless cases, the ECtHR has addressed the *justification grounds* raised in relation to gambling issues: crime (confer in the gambling cases: money-laundering or fraud), public morality (confer: moral concerns regarding gambling) and health (confer: protecting consumers from gambling addiction).[6]

8.2 How to Steer the Margin of Appreciation: General Principles

8.2.1 General Considerations

This section presents the general principles that the ECtHR has established and which ensure that the use of the doctrine is steered in a coherent and non-arbitrary manner.

---

[1] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*.

[2] Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights".

[3] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 3.

[4] McBride, "Proportionality and the European Convention on Human Rights".

[5] Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights".

[6] The present analysis focuses on the extensive case law of the ECtHR regarding these grounds of justification in order to contextualise the use of the margin of appreciation in the gambling case law of the CJEU. By contrast, the ECtHR has rarely dealt with gambling cases specifically that would have involved a discussion of the use of the margin of appreciation: see Sect. 8.4.3.

In the context of the Convention, the doctrine of the margin of appreciation is better suited for certain rights than for others. The doctrine has been mostly used in relation to emergency cases (Article 15), anti-discrimination (Article 14) and of course the personal freedoms under Articles 8–11[7] as well as the right to property (Article 1 of Protocol No 1).[8] Even though the Court has never expressed a limitation to a *numerus clausus* of Convention rights,[9] it has not applied the doctrine regarding certain rights.[10] The rights enshrined in Articles 2–7 are not well suited to accommodate a classic balancing act of interests and the discretion that may be granted within this balancing act.[11]

The provisions protecting *personal freedoms* (Articles 8–11)[12] are particularly apt to accommodate the doctrine. Similar to the fundamental freedoms in the Internal Market, they enshrine the *characteristic structure of a principle combined with a derogation clause*. The first paragraph states the general principle – a right that any person shall enjoy – while the second paragraph mentions the conditions under which derogations to the general rule are permitted. Comparable to the practice of the Internal Market Courts, exceptions are to be interpreted narrowly also in the Convention system.[13] Limitations must reflect a 'public interest', be 'prescribed by law' and 'necessary in a democratic society'.[14] Accordingly, the following analysis takes into account in particular Articles 8–11 of the Convention. Prior to specific criteria, a few overriding principles are presented that guide the ECtHR's use of the margin of appreciation.

---

[7] For a discussion of these articles more specifically, cf. Greer, S., *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights Files, vol. 15, Council of Europe (Ed.), Strasbourg: Council of Europe Publishing, 1997.

[8] Greer, S.C., *The Margin of Appreciation*: *Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files, vol. 17, Council of Europe (Ed.), Strasbourg: Council of Europe Publishing, 2000, at 5.

[9] Macdonald, R.S.J., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *Le droit international à l'heure de sa codification*, *Etudes en l'honneur de Roberto Ago*, 1987, at 192.

[10] de la Rasilla del Moral, I. (2006). "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", *German Law Journal, 7*(6), 611–624; Callewaert, J. (1998). "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?", *Human Rights Law Journal, 19*(6), 6–9.

[11] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 42–43. For Art. 3, cf. e.g. Soering v the UK, Application no 14038/88 [1989], para. 88.

[12] The right to respect for private and family life (Art. 8); freedom of thought, conscience and religion (Art. 9); freedom of expression (Art. 10); and freedom of assembly and association (Art. 11).

[13] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983], para. 97; Klass et alii v Germany, Application no 5029/71 [1978], para. 42.

[14] Cf. e.g. Art. 10(2): "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

8.2.2 The Role of the Motivation of the Decision

The first principle of review is a careful assessment of the motivation of the national decision. Not even the widest discretion would prevent the ECtHR from reviewing the decision. A *thorough judicial review of the motivation* is all the more important where wide discretion is granted to national authorities. According to Judge Villiger, the jurisprudence of the ECtHR shows that a convincing, coherent motivation ties to a considerable extent the hands of the Court. If this is not the case, the Strasbourg Court no longer feels bound to the margin of appreciation a priori granted.[15] The motivation of the decision must be *relevant and sufficient*.[16] The defending government must convincingly establish both the objective and the proportionality of the restrictions.[17]

8.2.3 The Importance of the Convention Right

The width of the margin of appreciation varies between different Convention rights. Some rights take a particularly important role within the Convention system and a detailed review of the national measures is indicated:[18]

> the scope of the margin of appreciation enjoyed by the national authorities will depend […] on the nature of the right involved. […] The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.[19]

The jurisprudence shows that a particular importance is not assigned to a provision as a whole. *Only certain expressions* of the respective provision may be considered particularly important, and as a consequence hardly any margin of appreciation will apply to these expressions. With regard to Articles 8–11, the particularly important expressions involve core aspects of private sphere as well as political debate.[20] At the other end of the spectrum with lesser importance would be for instance the rights of coalitions under Article 11, more precisely activities of trade unions, the conduct of collective bargaining and the right to strike.[21]

The genesis of the Convention explains this prioritisation, which was heavily influenced by the experience of atrocities committed by totalitarian regimes. One of

---

[15] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 212.

[16] Handyside v the UK, Application no 5493/72 [1976], para. 50.

[17] Funke v France, Application no 10828/84 [1993], para. 55.

[18] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 137.

[19] Gillow v the UK, Application no 9063/80 [1986], para. 55.

[20] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 141.

[21] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 210.

the key power tools of totalitarism is the suppression of free political debate and the intrusion of the official ideology in all aspects of private life. As such, the ECtHR has given particular importance to those aspects of Article 8 (private life/home) that concern the most intimate aspects of private life, such as the sexual life of a person.[22] Other examples include the integrity of the home, protection of personal data and the professional secrecy between client and counsel.[23]

Parallel considerations apply to the freedom of expression under Article 10. This freedom is especially important since it plays a central role in a democratic society,[24] including the expression of personal views and on public affairs.[25] The Court has also repeatedly underlined the special role of elected representatives and of the press as the public watchdog. The public had a right to receive such information.[26] Similarly, a very narrow margin of appreciation applies generally to the freedom of thought, conscience and religion under Article 9.[27]

Some expressions of Convention rights are therefore considered to be more important than others. Some authors have gone as far as to create a hierarchy of provisions in the form of an atomic or solar system.[28] Any schematic depiction must however consider that it is normally not the provision but only certain expressions of the right that profit from a particularly high importance.[29]

8.2.4 The Nature of the Justification Ground

Similar to the importance of the Convention right, the nature of the justification ground matters greatly. The relevant question is *whether the justification ground is somehow special or different*. Certain characteristics of that nature may justify

[22] Cf. e.g. Dudgeon v the UK, Application no 7525/76 [1981]; Dickson v the UK, Application no 44362/04 [2007], regarding artificial insemination in prison.

[23] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 138. Cf. also Dudgeon v the UK, Application no 7525/76 [1981], para. 65; Gillow v the UK, Application no 9063/80 [1986], para. 55.

[24] Brems, E. (1996). "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 56*, 240–314, at 269.

[25] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 138; Autronic AG v Switzerland, Application no 12726/87 [1990], para. 61; Handyside v the UK, Application no 5493/72 [1976], para. 49.

[26] Sunday Times v the UK, Application no 6538/74 [1979], para. 65; Sunday Times v the UK (No 2), Application no 13166/87 [1991], para. 50; Observer and Guardian v the UK, Application no 13585/88 [1991], para. 59; Castells v Spain, Application no 11798/85 [1992], paras 42–43.

[27] Kokkinakis v Greece, Application no 14307/88 [1993], para. 31.

[28] Yourow, H.C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer, 1996.

[29] Concurring: Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 144.

granting wider discretion to domestic authorities. While most justification grounds do not lead to a wide margin of appreciation, some nevertheless do. This point will be discussed directly in relation to the relevant grounds crime (prevention), public morality and health.

8.3 How to Steer the Margin of Appreciation: Criteria in Relation to Crime, Health and Public Morality

The previous section established a couple of general principles that steer the use of the margin of appreciation. This section now analyses the criteria that have been developed specifically in relation to crime, public morality and health. As the ECtHR's use of the doctrine is extremely voluminous, this section is informed by publications that looked at this issue in great detail.[30]

Since restrictions to the freedom to provide gambling services have been justified on grounds of crime prevention, health (gambling addiction) and public morality, the use of the margin by the ECtHR must be studied in relation to related grounds. Particular attention is paid to health and public morality as these findings will prove to be very instructive for the analysis of the gambling case law.

8.3.1 Crime

The ECtHR has dealt with crime as a justification ground in countless cases. It differentiated between various forms of crime; *not all of them* profit from the same width of discretion.

In the early days of the Convention, both the Commission of Human Rights and the ECtHR applied the doctrine in relation to public emergency cases under Article 15. The very wording of this provision makes it likely that national authorities enjoy wide

[30] For some of the most comprehensive studies, cf. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*; Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*; Christoffersen, *Fair Balance*: *Proportionality*, *Subsidiarity and Primarity in the European Convention on Human Rights*; Kastanas, E., *Unité et diversité*: *notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles: Établissements Émile Bruylant, 1996; Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*; Koch, O., *Der Grundsatz der Verhältnismässigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Schriften zum Europäischen Recht vol. 92, Berlin: Duncker & Humblot, 2003; Muzny, P., *La technique de proportionnalité et le juge de la convention européenne des droits de l'homme*: *Essai sur un instrument nécessaire dans une societé democratique*, Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2005.

discretion in relation to emergency measures.[31] The two characterising elements of public emergency cases are the *time factor*, *namely urgency* ("the pressing needs of the moment")[32] and the *seriousness of the threat* ("[i]n time of war or other public emergency threatening the life of the nation").[33] This *combination of two* special factors justifies a wide margin of appreciation. The doctrine of the margin of appreciation was introduced in the Convention jurisprudence by the Human Rights Commission's report on the *Cyprus case*.[34] At the time, the UK administered the island of Cyprus and pleaded a state of emergency. From the outset, the Human Rights Commission made it clear that while it grants discretion, it also reviews the decision:

> The Commission was in no way precluded by the Convention from reviewing a decision taken by a Government in derogation of the Convention under Article 15 and from examining critically the appreciation of the Government as to the exigencies of the situation. On the other hand, it was a matter of course that the Government concerned was in a better position than the Commission to know all relevant facts and to weigh in each case the different possible lines of action for the purpose of countering an existing threat to the life of the nation. Without going as far as to recognise a presumption in favour of the necessity of measures taken by the Government, the Commission was of the opinion, nevertheless, that a certain margin of appreciation must be conceded to the Government.[35]

The Human Rights Commission continued to use the doctrine in subsequent cases such as *Lawless*[36] and the *Greek Colonels cases*.[37] In the *Greek Colonels cases*, it clarified that the *burden of proof* rested with the government, which had to show that the conditions to derogate from the Convention in Article 15 were met.[38]

With regard to the Strasbourg Court, that body implicitly applied the doctrine in its first case *Lawless* in 1961[39]and continued to do so in subsequent cases.[40] The first express reference to the doctrine by the ECtHR was in relation to Article 8 in *De Wilde*,[41]

---

[31] Art. 15: "In time of war or other public emergency *threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent *strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law." Italic emphasis added.

[32] Ireland v the UK, Application no 5310/71 [1978], para. 207.

[33] ECHR, Art. 15(1) *i.i.*

[34] Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, at 15; Report by the Commission in Greece v the UK ('Cyprus case') [1958–59].

[35] Report by the Commission in Greece v the UK ('Cyprus case') [1958–59], 326–7, at pt 318, paras 5–7.

[36] Report by the Commission in Lawless v Ireland [1960–61].

[37] Report by the Commission in the 'Greek case', Application no 3321/67, 3322/67, 3323/67, 3344/67 [1969].

[38] Report by the Commission in ibid., at 70, *i.f.*

[39] Lawless v Ireland (No 3), Application no 332/57 [1961].

[40] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium, Application no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 [1968] where the Court cites the margin of appreciation on several occasions; Wemhoff v Germany, Application no 2122/64 [1968]; Delcourt v Belgium, Application no 2689/65 [1970].

[41] Cases of De Wilde, Ooms and Versyp ("Vagrancy") v Belgium, Application no 2832/66, 2835/66, 2899/66 [1971].

referring to it as the 'power of appreciation'.[42] The Strasbourg Court expanded over time the scope of application of the doctrine from *emergency* cases (Article 15) to *non-discrimination* (Article 14) and *Articles 8 to 11 that contain the characteristic accommodation clause*.[43] Yet, the jurisprudence of the Strasbourg Court shows that the use of the margin of appreciation in emergency cases forms a special category:

> The limits on the Court's powers of review […] are particularly apparent where Article 15 (art. 15) is concerned. […] By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.[44]

In spite of the wide margin, the ECtHR still exercises a European supervision by inquiring whether the state has gone beyond the "extent strictly required by the exigencies."[45] What is more, when governments claim a state of emergency the Council of Europe will proceed to inquiries on the spot.[46]

Regarding the use of the margin in the accommodation clauses of Articles 8–11, there are two justification grounds that stand out. The first is *national security*. The nature of this ground is somehow related to the concerns surrounding public emergency cases. The ECtHR grants an a priori wide margin in such cases too.[47] The second category is *terrorism*.[48] Within the bigger category of 'crime', it forms a special case. The ECtHR's practice is coherent in that authorities taking measures against terrorism regularly need to consider the two characteristic elements of *urgency and severity*:

> Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements.[49]

---

[42] At para. 93: "[The Court] then observes […] that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) (art. 8–2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was "necessary" to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others." The expression 'power of appreciation' was used subsequently too (cf. e.g. Golder v the UK, Application no 4451/70 [1975], para. 45).

[43] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights".

[44] Ireland v the UK, Application no 5310/71 [1978], para. 207.

[45] Ibid., para. 207; Lawless v Ireland (No 3), Application no 332/57 [1961], paras 22 and 36–38.

[46] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 189.

[47] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 260. Cf. e.g. Leander v Sweden, Application no 9248/81 [1987], para. 59; Klass et alii v Germany, Application no 5029/71 [1978], para. 49.

[48] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 263. Cf. e.g. Murray v the UK, Application no 14310/88 [1994], para. 90.

[49] Klass et alii v Germany, Application no 5029/71 [1978], para. 48.

The close relationship of the fight against terrorism and national security is evident from the case law and the literature. The ECtHR recognised that both grounds can serve as justifications in a case,[50] and the margin of appreciation has been analysed in the literature jointly in relation to both grounds.[51] The grounds of national security and the fight against terrorism generally lead to a wide margin of appreciation.[52] This differs strongly from judgments relating to concerns of crime and disorder more generally.[53] *Crime in general or public order does not lead* to domestic discretion.[54] In these cases, the ECtHR did not mention the doctrine. It also did not grant any particular discretion where this justification ground has been used;[55] other considerations were more relevant such as the special status of a prisoner or military staff that can lead to a widening of the margin of appreciation.[56] Apart from these special relations to state authorities, *crime concerns do not trigger any particular margin of appreciation*.

Starting around the 1990s, the case law shows a certain shift, and the aforementioned description of older case law needs to be adjusted in two regards. First, authors have observed that a wide margin is *no longer regularly granted* in relation to national security and terrorism.[57] In several cases, the doctrine was neither mentioned nor effectively granted.[58] In other cases, the ECtHR argued certain discretion but *with another aspect* such as the special status of the applicants.[59]

---

[50] Ibid., para. 46: "The Court, sharing the view of the Government and the Commission, finds that the aim of the [German legislation] is indeed to safeguard national security and/or to prevent disorder or crime." Cf. also Murray v the UK, Application no 14310/88 [1994], paras 90–91.

[51] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 189–190.

[52] Ibid., at 190 fn 252; Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 105.

[53] For an analysis of the case law on 'prevention of disorder and crime' under Articles 8, 10 and 11, cf. Clayton, R., and Tomlinson, H., *Law of Human Rights*, Oxford: Oxford University Press, 2000, 834 *et seq*.

[54] *Ex multis*, Funke v France, Application no 10828/84 [1993]; Murray v the UK, Application no 14310/88 [1994]; Klass et alii v Germany, Application no 5029/71 [1978]; Autronic AG v Switzerland, Application no 12726/87 [1990].

[55] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 262.

[56] For rights of prisoners, cf. e.g. Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983]; for military staff, cf. e.g. Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria, Application no 15153/89 [1994]. In the latter case, the prevention of disorder was justified by the special regime of soldiers. The ECtHR referred to the need of military discipline.

[57] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 191.

[58] Vereniging Weekblad Bluf! v NL, Application no 16616/90 [1995]; Brogan et alli v UK, Application no 11209/84, 11234/84, 11266/84, 11386/85 [1988].

[59] Cf. e.g. Vogt v Germany, Application no 17851/91 [1995], para. 53 (the special status regarded a national civil servant); cf. also Hadjianastassiou v Greece, Application no 12945/87 [1992], para. 46. The review is stricter where important rights are at stake such as political speech: Castells v

Second, *if national security is not the sole ground* on which the ruling is based, the discretion shrinks. Examples include *Observer and Guardian*[60] as well as *Sunday times* (*no 2*).[61] In these cases, national security was only one among other grounds invoked.[62] This is a noteworthy aspect that will be revisited in relation to public morality concerns.

8.3.2 Health

8.3.2.1 Notion

Articles 8–11 of the Convention list the protection of health as one of the recognised justification grounds for restrictions of human rights. The justification ground 'health' is of essential importance for the present analysis as the *protection of consumers' health from gambling addiction* is one of the central justifications in the gambling case law. The term health in the Convention includes the psychological and physical well-being of an individual person or small groups of persons as well as the public health generally.[63] Accordingly, this definition encloses *mental health disorders* such as relating to gambling. Gambling addiction impacts the psychological and physical well-being of a person.[64] The present analysis in relation to health is twofold. It first assesses the use of the margin of appreciation in *cases involving health issues* and second, it takes a close look at the role that has been granted to *medical research and empirical evidence* in the review process.

The health concerns in the gambling cases relate in particular to the protection of vulnerable individuals such as *children and adolescents*.[65] The next chapter will show that adolescents evidence a clearly increased vulnerability towards

---

Spain, Application no 11798/85 [1992], paras 42 and 76; Ceylan v Turkey, Application no 23556/94 [1999], para. 34.

[60] Observer and Guardian v the UK, Application no 13585/88 [1991].

[61] Sunday Times v the UK (No 2), Application no 13166/87 [1991].

[62] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 261.

[63] Breitenmoser, S., *Der Schutz der Privatsphäre gemäss Art. 8 EMRK*, Helbing & Lichtenhahn, 1986, cited in: Grote, R., Marauhn, T., and Meljnik, K., *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Mohr Siebeck, 2006, at 810.

[64] Cf. the diagnostic criteria of gambling disorder:
Diagnostic and Statistical Manual of Mental Disorders: DSM-5, American Psychological Association (Ed.), Washington DC/London: American Psychiatric Publishing, 2013, at 585.

[65] Expressly mentioned e.g. in C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 103, 105, 111; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 60.

gambling addiction (see Sect. 9.1.3.5). Similarly, health concerns regarding children and adolescents have been pleaded in numerous cases before the ECtHR. The other *vulnerable group* involves the health and well-being of *persons of* '*unsound mind*' under Article 5(1)(e) in the context of the deprivation of personal freedom.

8.3.2.2 Protection of Well-Being and Health in Childcare

The childcare cases regard situations where a child was separated from its parents (or one parent) and put in state childcare or where the child was adopted by new legal parents. Article 8 of the Convention protects the (natural) parent(s)' right to family life, inter alia "the mutual enjoyment by parent and child of each other's company."[66] Authorities for their part justify limitations of that right with interests relating to the child's health.[67] The objective of the measure is to protect the child from physical or mental harm.[68]

General Considerations

In its jurisprudence on health concerns, the ECtHR has constantly underlined the importance of combining discretion with the central role of the proportionality

[66] W. v the UK, Application no 9749/82 [1987], para. 59; cf. also H.K. v Finland, Application no 36065/97 [2006], para. 105.

[67] On a linguistic point: The ECtHR does not always expressly refer to the term 'health'. It may also deal with the relevant measures under 'the protection of the rights and freedoms of others'. National authorities, however, expressly argue these cases with the mental and physical health of the child. In the *Olsson* case for instance, the Swedish legislation referred to the aim of the child's health or development: Olsson v Sweden (No 1) Application no 10465/83 [1988]. The Commission of Human Rights for its part considered in that case that the decisions were taken in the children's interest and had the legitimate aims of protecting health or morals and of protecting the rights and freedoms of others (para. 64). The ECtHR then adopted this view, without further distinguishing between the different grounds (para. 65). In *Johansen*, the Norwegian legislation and authorities also expressly referred to the child's mental health: Johansen v Norway, Application no 17383/90 [1996], para. 16.

[68] National legislation and governments regularly refer to the child's health. Alternatively the notions well-being or development may be used. Cf. e.g. Art. 307 Swiss Civil Code: "if the well-being of the child is in danger" or the Swedish legislation, Child Welfare Act 1960 (barnavårdslagen 1960:97), Sect. 25(a), cited in the case Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 35: "[if] a person, not yet eighteen years of age, is maltreated in his home or otherwise treated there in a manner endangering his bodily or mental health, or if his development is jeopardised by the unfitness of his parents or other guardians responsible for his upbringing, or by their inability to raise the child." For a discussion of the case, cf. Howell, C.R. (1995–1996). "The Right to Respect for Family Life in the European Court of Human Rights", *University of Louisville Journal of Family Law, 34*.

review. The motivation put forward had to be relevant and sufficient.[69] A careful weighing of all interests involved needed to be done. In spite of offering particular importance to the best interests of the child,[70] the protection of the child's health interests must be balanced with the interests of the parents. The ECtHR goes as far as to note that "it is not enough that the child would be better off if placed in care."[71] While acknowledging in certain situations a certain margin of appreciation,[72] the ECtHR's review is strict:

> [The Court's] review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith […] in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient".[73]

The ECtHR seems in particular to *reject a role that would be limited to a mere test of arbitrariness and unreasonableness* as referred to in the earlier mentioned *Wednesbury* test in common law.[74] It insists on a *full proportionality review*.

Very Restrictive Measures Hardly Justifiable

The ECtHR has constantly emphasised the temporary character that measures should take:

> taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child.[75]

Absolute measures, namely measures that deprive the parents of their right to family life, "should only be applied in exceptional circumstances and could only be

---

[69] H.K. v Finland, Application no 36065/97 [2006], para. 106; similar in Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 68, as well as in Johansen v Norway, Application no 17383/90 [1996], para. 64.

[70] H.K. v Finland, Application no 36065/97 [2006], para. 109; already in Johansen v Norway, Application no 17383/90 [1996], para. 78.

[71] Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 72. The ECtHR concurred with the view of the Human Rights Commission.

[72] *Ibid*., para. 67; similar in other public care judgments, e.g. in W. v the UK, Application no 9749/82 [1987], para. 60.

[73] Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 68.

[74] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948].

[75] H.K. v Finland, Application no 36065/97 [2006], para. 109. Cf. already in Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 81: "The care decision should therefore have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family." Cf. further Johansen v Norway, Application no 17383/90 [1996], para. 78.

justified if they were motivated by an overriding requirement pertaining to the child's best interests."[76]

Therefore, it is difficult to argue very restrictive measures before the ECtHR, in particular *permanent or absolute measures*.

Time Factor: Urgency

It was noted earlier that the urgency character of public emergency cases (and partly of national security and terrorism issues) may lead the Strasbourg Court to grant wide discretion to national authorities. In line with that criterion, the ECtHR distinguishes between two phases in childcare. It grants a wide margin only in relation to the *initial decision of taking a child into care* but not with regard to the decision to keep it in care. Authorities enjoy a wide margin of appreciation when initially assessing the necessity of childcare, especially in *emergency* situations. Moreover, the assessment of the appropriateness of intervention can vary from one state to another,[77] which reminds of the similar recognition of the Court of Justice that protection levels can vary between Member States (see Sect. 8.5). Many of the childcare cases originated in Nordic countries[78] where the role of the state is more comprehensive and authorities are in charge of many functions that traditionally were fulfilled by parents.[79] By contrast, *measures that do not require urgent action*, such as the decision on the continuation of public childcare or more far-reaching restrictions, *do not profit from widened discretion*:

> a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life.[80]

---

[76] Johansen v Norway, Application no 17383/90 [1996], para. 78; similar in H.K. v Finland, Application no 36065/97 [2006], para. 110.

[77] Johansen v Norway, Application no 17383/90 [1996], para. 64.

[78] Ibid. (violation); Sanchez Cardenas v Norway, Application no 12148/03 [2007] (violation); K.T. v Norway, Application no 26664/03 [2008] (no violation); Söderbäck v Sweden, Application no 24484/94 [1998] (no violation); H.K. v Finland, Application no 36065/97 [2006] (violation); Eriksson v Sweden, Application no 11373/85 [1989] (violation); Rieme v Sweden, Application no 12366/86 [1992] (no violation); Margareta and Roger Andersson v Sweden, Application no 12963/87 [1992] (violation); Olsson v Sweden (No 2) Application no 13441/87 [1992] (violation); Olsson v Sweden (No 1) Application no 10465/83 [1988] (violation); Nyberg v Sweden, Application no 12574/86 [1990] (friendly settlement after Human Rights Commission found violation); L. v Finland, Application no 25651/94 [2000] (violation); K. and T. v Finland, Application no 25702/94 [2001] (violation); Nuutinen v Finland, Application no 32842/96 [2000] (no violation).

[79] For a representative statement, for instance in relation to Denmark, cf.: "*Die Dänen und die Andern*", Das Magazin, vol. 48, 2009: "«Family used to be the basis of society», says Jon, «now, it is kindergarten.» Jon says that families could break apart, and in fact they did, in high numbers. Families were not reliable. But the state was." (Author's own translation from the German original.)

[80] Johansen v Norway, Application no 17383/90 [1996], para. 64.

Procedural Rights and Administrative Burden

The ECtHR's willingness to grant wide discretion *has decreased over the years*. More recent decisions show that the Court is less inclined to grant substantial discretion. It assesses carefully whether the parents are duly involved in the process of determining the custody.[81] They must also be given access to information that authorities rely on in their decisions. *Administrative difficulties of authorities are not seen as primarily relevant*. Irrespective of encountering difficulties, the state has, in the ECtHR's view, the positive obligation to involve the parents. The mere fact that a solution chosen by the authorities is *less burdensome on them* when compared to another solution, which would restrict less the right to family life, is almost irrelevant.[82]

8.3.2.3 Persons of Unsound Mind

The second category in which health considerations have played an important role regards the lawful detention of persons of 'unsound mind' under Article 5(1)(e). The term refers to people who suffer from a *mental illness*, either permanently or temporarily. Authorities can lawfully restrict somebody's liberty if that person is a danger to the health of others or to his own health.[83]

Time Factor: Urgency

The time factor plays again an important role in the use of the margin of appreciation. Similar to what was seen in relation to public childcare interventions, the ECtHR offers wide discretion to local authorities in relation to *emergency confinements* of mentally ill persons.[84] However, the wide discretion is to some extent counterbalanced by the fact that the term 'unsound mind' is interpreted narrowly. The objective of Article 5(1) is that no one is dispossessed of his liberty in an arbitrary manner and the exception cannot "be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society."[85]

---

[81] Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 65. Cf. e.g. Ignaccolo-Zenide v Romania, Application no 31679/96 [2000].

[82] Clayton, and Tomlinson, *Law of Human Rights*, at 834 and 932–933.

[83] *Ex multis*, cf. the Dutch legislation as cited in the case Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 11 *i.f.*: "the Netherlands courts will authorise the confinement of a "mentally ill person" only if his mental disorder is of such a kind or of such gravity as to make him an actual danger to himself or to others."

[84] Ibid., para. 42.

[85] Ibid., para. 37.

Review of Consistency of Policy

The Strasbourg Court reviews strictly whether the measures *truly serve the purpose* pleaded by the government. In *Aerts*, the plaintiff could not be held criminally responsible for certain offences. He was detained in the psychiatric wing of a prison. The ECtHR found that if the exception clause of unsound mind was argued, the detention of that person had to take place in an *appropriate institution where the relevant treatment* could be offered.[86]

> [T]here must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution […] The reports […] show sufficiently clearly that the Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind, the latter not receiving either regular medical attention or a therapeutic environment. […] The proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient.[87]

The ECtHR thus stresses the consistency of a policy. If health concerns are pleaded, the relevant measures or programmes *must convincingly reflect these health concerns*, and they must be suitable to address the concerns. It emphasises the decisive role of the policy as it is *practised*, not simply as it is foreseen in the law. Similarly, it underlined in *Ashingdane* that the lawfulness of the measures was not simply about the correctness of the initial order but also about matters such as the place, environment and conditions of detention.[88] The institution should ensure physical safety with adequate therapeutic and recreational programmes and continuous contact with the outside world.[89]

> [N]o detention that is arbitrary can ever be regarded as "lawful". […] there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.[90]

Central Role of Medical Science and Empirical Evidence

In the context of the gambling cases, a further aspect of the jurisprudence of the ECtHR is highly instructive: the *central role that it assigns to science*. Repeatedly, it underlines the essential role of empirical evidence and its evolving nature. Unsound mind is

> a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness

---

[86] Aerts v Belgium, Application no 61/1997/845/1051 [1998], para. 46.

[87] *Ibid*., paras 46–49.

[88] Ashingdane v the UK, Application no 8225/78 [1985], para. 44.

[89] Bartlett, P., Lewis, O., and Thorold, O., *Mental Disability and the European Convention on Human Rights*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, at 28.

[90] Ashingdane v the UK, Application no 8225/78 [1985], para. 44.

> changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.[91]

A restriction of liberty preconditions "medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation."[92] Confinement can only be continued if the disorder persists.[93]

A position that reflected broadly accepted research findings two decades ago may not reflect *current international scientific knowledge*. With certain time lag, newly gained scientific knowledge first affects the scientific discourse and only subsequently the general perception in society. The Strasbourg Court underlines the role of science and empirical evidence as it is a means to *objectivise the decision-making process*. Medical evidence is a substantial *safeguard against arbitrariness* and the abuse of Article 5 for other purposes.[94]

> The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.[95]

Medical Discretion

While the ECtHR insists on the central role of science, it *offers discretion to the medical personal and the authorities when assessing complex facts*. It refers to established principles of medicine,[96] psychiatric principles generally accepted at the time as well as to medical necessity;[97] it underlines that "it is for the medical authorities to decide, on the basis of the recognisable rules of medical science, the therapeutic methods to be used."[98] The ECtHR relies on the medical expertise *except if there are reasons to doubt the professional assessment*.[99] In *Winterwerp* for instance, it had "no reason whatsoever to doubt the objectivity and reliability of the medical evidence."[100] A clinic or a doctor thus enjoys wide discretion in determining the relevant data.[101] However, 'medical discretion' is not granted if the ECtHR has

[91] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 37.

[92] Ibid., para. 39.

[93] Ibid., para. 39.

[94] Rakevich v Russia, Application no 58973/00 [2003], para. 32.

[95] Herczegfalvy v Austria, Application no 10533/83 [1992], paras 82–83.

[96] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 117.

[97] Herczegfalvy v Austria, Application no 10533/83 [1992], para. 83.

[98] Ibid., para. 82.

[99] Similarly, the CJEU too grants wide discretion where it has to deal with complicated, technical questions for which the relevant authority has special expertise: Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 26.

[100] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 42.

[101] M.S. v Sweden, Application no 20837/92 [1997], para. 49; Anne-Marie Andersson v Sweden, Application no 20022/92 [1997], para. 36.

indications that the diagnosis was not reached by a *suitably qualified expert* or that there were other indications, which made the ultimate decision not objective or professional. It departs from the results of a diagnosis if it was made in bad faith or for a collateral purpose.[102]

Complex Factual Assessments

It is principally for the local authorities to evaluate the evidence before them as they are *better placed to evaluate the evidence*.[103] The Court simply reviews their decisions. The local authorities enjoy the direct contact with the interested parties and can hear them in person.[104] They are "in a better position than the European judges in striking a fair balance between the competing interests involved."[105] Domestic authorities, including courts, "had the benefit of reports from child psychiatrists and a psychologist as well as from specialised agencies."[106] Medical assessments are part of the fact-finding process. The ECtHR's general policy is to rely on facts that are established by the national courts and to apply deference to medical opinions.[107] Medicine does not always offer clear answers; this is further reason for granting discretion to domestic authorities.[108]

Professional Standards

The question remains how the ECtHR can effectively review national measures if it offers discretion regarding medical expertise. The Court underlines the central role of *best practice* and *empirical evidence*. While the ECtHR cannot itself establish the exact state of the art of best medical practice, it can strictly review whether the

[102] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 44.

[103] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 40.

[104] Similarly, the Court of Justice too grants wide discretion where the relevant decision-making authority is in a better position or has a higher overall competence to decide on the issues: Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 26.

[105] Söderbäck v Sweden, Application no 24484/94 [1998], para. 33.

[106] Olsson v Sweden (No 2) Application no 13441/87 [1992], para. 87.

[107] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 43.

[108] Cf. e.g. Johnson v UK, Application no 22520/93 [1997], para. 61 where the Court notes that "in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science." Hence, the responsible authority was entitled to exercise discretion in deciding whether the patient could already be left at large (para. 63).

authorities and experts applied *professional standards*.[109] These obligations include the duty to take careful notes of the patient's state of health. In *Keenan v UK*, the Court was

> struck by the lack of medical notes concerning Mark Keenan, who was an identifiable suicide risk and undergoing [.] additional stresses […]. Given that there were a number of prison doctors who were involved in caring for Mark Keenan, this shows an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process.[110]

Substantive medical *professionalism* serves as safeguard for the Convention rights.[111] In this context, the Council of Europe enshrined a duty to keep medical notes in one of its recommendations. Article 13(2) stipulates that "[c]lear and comprehensive medical and, where appropriate, administrative records should be maintained for all persons with mental disorder placed or treated for such a disorder."[112] The Recommendation further describes in its Articles 11 and 12 professional standards and general principles of treatment.[113]

Role of Domestic Court

The Strasbourg Court takes a holistic view: it considers the whole judicial scrutiny process, which also includes domestic courts. The latter's role in the review process may depend on the discretion enjoyed by other authorities. In areas where

---

[109] For two relevant publications, cf. van der Wal, G., "Quality of Care, Patient Safety, and the Role of the Patient" in *Health Law*, *Human Rights and the Biomedicine Convention*, *Essays in Honour of Henriette Roscam Abbing*, Gevers, J.K.M., Hondius, E.H., and Hubben, J.H. (Eds.), Leiden/Boston: Martinus Nijhof Publishers, 2005, and Hubben, J.H., "Decisions on Competency and Professional Standards" in *Health Law*, *Human Rights and the Biomedicine Convention*, *Essays in Honour of Henriette Roscam Abbing*, Gevers, J.K.M., Hondius, E.H., and Hubben, J.H. (Eds.), Leiden/Boston: Martinus Nijhof Publishers, 2005.

[110] Keenan v UK, Application no 27229/95 [2001], para. 114.

[111] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 28.

[112] Art. 13(2) Recommendation REC(2004)10 of the Committee of Ministers to Member States Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder.

[113] For conventions containing rights relating to health, cf. ibid., at 112 fn 3; Universal Declaration of Human Rights, 1948, Art. 25 available at http://www.un.org/en/documents/udhr/; International Covenant on Economic, Social and Cultural Rights, 1966, Art. 12 available at http://www.unhcr.org/refworld/docid/3ae6b36c0.html; Convention on the Elimination of all Forms of Discrimination against Women, 1979, Art. 12 available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm; United Nations Convention on the Rights of the Child, 1989, Art. 24 available at http://www2.ohchr.org/english/law/crc.htm; Council of Europe; European Social Charter of the Council of Europe, Principle 11 and Art. 13; Convention on Human Rights and Biomedicine, 1997, Art. 3 available at http://conventions.coe.int/Treaty/en/Treaties/html/164.htm.

parliamentary scrutiny is weak, the ECtHR demands strict judicial review. An effective control was especially needed *where the executive enjoyed wide discretionary powers* and parliamentary scrutiny was low.[114]

> [A]n interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[115]

8.3.2.4 Results

Over all, the analysis of the ECtHR's case law in relation to health concerns shows that the Strasbourg Court does *not grant any particular margin of appreciation*. It does however grant wider discretion where situations show *urgency*. This is the case in relation to the *initial decision* of taking a child into care or a person of unsound mind into detention. The Strasbourg Court heavily emphasises the *central role of science*, *empirical evidence*, *best practice and professionalism*. This serves to *objectivise the decision-making process and to avoid arbitrariness*.

8.3.3 Public Morality

8.3.3.1 General Approach

Handyside is arguably one of the most prominent decisions of the ECtHR. Mr Handyside, an English Publisher, delivered bookstores with 'The Little Red Schoolbook', which was mainly aimed at school children, age 12 and above. The book was seized due to its controversial content regarding certain passages that described actions that could appear as morally questionable or illegal.[116] *Handyside* is the role model of a public morality case. It exclusively concerned that justification

---

[114] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983], para. 90.

[115] Klass et alii v Germany, Application no 5029/71 [1978], para. 55.

[116] The judgment cites *inter alia* two passages: "Maybe you smoke pot or go to bed with your boyfriend or girlfriend – and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret. Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'."

"Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed. But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before."

ground, and the UK authorities argued protecting a particularly *vulnerable* population group: *children and adolescents*. The ECtHR granted wide discretion:

> it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place […]. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements […]. Article 10 […] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[117]

The Strasbourg Court applies a wide margin of appreciation in relation to public morality concerns,[118] as well illustrated in *Handyside*. Certainly, the wide discretion granted in *Handyside* was also likely due to the fact that the book was primarily aimed at school children. The Human Rights Commission and the ECtHR have more readily accepted an intervention by the state when the authorities aim at protecting youth.[119] This motivation was also central in the case *Müller* versus *Switzerland*, which concerned the exhibition of sexually explicit art. The ECtHR noted that the exhibition was open to everybody, including children.[120]

The special characteristic justifying a wide discretion is linked to the fact that pure questions of morality are, by their very nature, *not open to an objective assessment*. Views on moral issues vary strongly by culture, time, geography, religion and, last but not least, individually. Are questions of morality thus exempt from judicial review?

The answer is found in *Open Door and Dublin Well Woman v Ireland*,[121] another role model case of public morality. Several Irish organisations provided counselling to pregnant women in Ireland regarding abortion facilities outside of Ireland. In Ireland, abortion was banned. A court injunction prohibited those organisations to provide information on abortion facilities abroad. Before the ECtHR, the Irish government argued that the former should refrain from reviewing moral considerations. However, the Court reviewed the measure and found the Irish limitation of the freedom of expression disproportionate:

> The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable.[122]

---

[117] Handyside v the UK, Application no 5493/72 [1976], para. 48.

[118] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 211. For further illustrative examples, cf. Müller et alii v Switzerland, Application no 10737/84 [1988], as well as Otto-Preminger-Institut v Austria, Application no 13470/87 [1994].

[119] Kaering-Joulin, R., "Public Morals" in *The European Convention for the Protection of Human Rights*, Delmas-Marty, M. (Ed.), Dordrecht/Boston/London: Kluwer Academic Publishers, 1992, at 83, 87.

[120] Müller et alii v Switzerland, Application no 10737/84 [1988], para. 36.

[121] Open Door and Dublin Well Woman v Ireland, Application no 14234/88 and 14235/88 [1992]. For a discussion of the case, cf. Thompson, A. (1994). "International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Women Centre v. Ireland", *Boston University International Law Journal, 12*, 371.

[122] Open Door and Dublin Well Woman v Ireland, Application no 14234/88 and 14235/88 [1992], para. 68.

The Strasbourg Court's outspoken reply is evidence of its conviction that discretion does not exclude a review of the aim and of the proportionality in relation to public morality concerns. In the Irish case, it was decisive that the national measures were overbroad; they imposed an absolute and permanent restraint. Moreover, the measure was found to be not even suitable as Irish women could get the respective information through other channels too. They went in significant numbers to the UK to receive abortion services.[123]

The ECtHR recognises the *special nature of public morality* issues and acknowledges *an* a priori *wide margin of appreciation* to national authorities. On the whole, public morality concerns generally lead to more significant self-restraint on the part of the Court than in cases where national security is pleaded.[124] At the same time, the ECtHR insists on reviewing the aim and the proportionality of the measures.

8.3.3.2 Limitations: Pure Question of Morality? European Consensus?

Two important limitations of the wide margin of appreciation must be noted as they both serve as safeguards against the abuse of the public morality justification. First, the ECtHR grants wide discretion only if the case relates to a pure question of public morality, that is, when there is *no other justification ground* in view. This is consistent with what has been mentioned earlier in the context of crime, more precisely, national security and emergency cases. Public morality concerns do not lead to a wide margin of appreciation if they are not the *sole justification* in the case.[125]

This approach of the Strasbourg Court is *consistent with the twofold model of public morality concerns* that was suggested in Sect. 7.3. Cases involving questions of morality essentially fall in two categories. In the first category, the moral disapproval concerns the activity *as such* ('core cases of morality'). Were an international court to impose its own moral views, it would take a big risk of hampering the acceptance of its case law. By contrast, the second category of moral concerns does not disapprove of the activity as such but of the *detrimental consequences* that the activity potentially involves. In relation to this latter category, science can play a constructive role by *objectivising a discussion on risks*. Nevertheless, it must be acknowledged that the scientific paradigm also has its

[123] For further illustrative cases, cf. Müller et alii v Switzerland, Application no 10737/84 [1988] on the confiscation of pictures of the Swiss artist Müller, which depicted sodomy and blasphemy, and Otto-Preminger-Institut v Austria, Application no 13470/87 [1994] relating to a blaspheme film where the Austrian government relied on moral considerations since religious feelings, which got hurt, could possibly lead to public disorder.

[124] Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 209.

[125] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983]; Olsson v Sweden (No 1), Application no 10465/83 [1988].

limits. In the very last, it has established methods to distinguish the objective appearance of information from subjective reactions to it.[126]

The second limitation pertains to the fact that the ECtHR does not grant wide discretion if it can identify a common moral position, a *consensus among the Signatory States*. While the ECtHR accepts that different states may have different views on questions of morality,[127] it does not approve when a Signatory State is clearly lagging behind. Consensus may be witnessed not only in law but also in practice. If the Strasbourg Court notes such consensus, it narrows down the initially granted wide margin of appreciation. This criterion can be understood as an *attempt to assess something objectively*, namely morality, which is generally hard to assess in any objective way. The ECtHR has repeatedly used this criterion,[128] which also illustrates well the dynamic method of interpretation of the ECtHR. The Strasbourg Court interprets the Convention as a living instrument in the light of present day conditions.[129] The extent of discretion thus depends on the presence of a consensus.[130]

8.3.3.3 The Universality-Diversity Dichotomy and Cultural Relativism

The Strasbourg Court offers substantial discretion to national authorities in cases that exclusively relate to public morality concerns. However, public morality is a very diffuse and accordingly complicated justification ground.[131] The challenge for the ECtHR is to accommodate cultural, religious and moral differences while avoiding that this justification ground is arbitrarily abused. As noted earlier, the doctrine of the margin of appreciation and the principle of subsidiarity are in a relationship of *lex specialis* and *lex generalis*,[132] with the principle of subsidiarity showing a more comprehensive character and addressing the universality-diversity

[126] Regarding the problem of causality of information and its legal dimensions, cf. Gasser, U., *Kausalität und Zurechnung von Information als Rechtsproblem*, Doctoral thesis submitted at the University of St.Gallen, Munich: Verlag C.H. Beck, 2002.

[127] The ECtHR noted that there was no such consensus regarding the question of assisted suicide. While some countries like Switzerland approved or at least tolerated assisted suicide, other Signatory States of the Convention defended a contrary policy: Haas v Switzerland, Application no 31322/07 [2011], para. 55. For a comment, cf. Hottelier, M., Mock, H., and Puéchavy, M., *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed., Geneva/Zurich/Basel: Schulthess Médias Juridiques SA, 2011, at 83–88.

[128] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 256.

[129] Baudenbacher, C., "Introduction to: Methods of Interpretation – Judicial Dialogue" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008c, pp. 171–174, at 173.

[130] Handyside v the UK, Application no 5493/72 [1976].

[131] Grote, Marauhn, and Meljnik, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, at 810.

[132] Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights.

dichotomy more broadly.[133] What does this dichotomy consist of? Human rights are supposed to be of universal validity, as they are assumed to be inherent to a person's existence. However, there are substantial cultural differences between different countries and regions. Ultimately, the dichotomy relates to the question of the *manner in which universal human rights can and should be applied in a culturally diverse world*.

A broader perspective shows that the dichotomy is not limited to human rights. In the EU and the EEA, the corresponding principles are the 'universally' applicable fundamental freedoms. Here, cultural diversity is a challenge to the homogenous nature of the Internal Market. Likewise, the dichotomy also arises before the WTO judiciary, even though the panels and Appellate Body apply a more contractual interpretation rather than a 'constitutional' balancing exercise. This finds expression in a methodology of the WTO judiciary that is dominated by a grammatical interpretation.[134]

In sum, the *dichotomy* represents a *double-edged challenge* to an international judicial mechanism. If the cultural diversity is not taken into account, the respective court risks having its acceptance hampered. If the argument of cultural diversity is granted too much weight, the universality of the 'principles', that is, human rights or fundamental freedoms, is at risk. Resorting to 'cultural relativism' can therefore water down these guarantees and subject them to arbitrary determinations.[135] The *challenge of cultural relativism* is best seen in cases involving morality concerns. The approach of the ECtHR to deal differently with cases that exclusively regard moral questions compared to others where morality is only one of the justification grounds seems an appropriate answer to the challenge. The approach also reminds of the earlier described twofold model, which distinguishes between core cases of morality and cases of mere disapproval of detrimental side effects (see Sect. 7.3).

8.4 Summarising the Principles and Criteria and Double-Checking Them in Gambling Cases Before the European Court of Human Rights

The two previous sections have elaborated the *principles and criteria that steer the Strasbourg Court's use of the margin of appreciation*. The identified principles and criteria are briefly summarised before their application is double-checked with the rare cases before the ECtHR that involved games of chance.

[133] For a detailed study of this dichotomy, cf. Brems, *Human Rights*: *Universality and Diversity*.

[134] Sacerdoti, G., "Methods of Interpretation by the Appellate Body of the WTO" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008, pp. 175–183.

[135] The CJEU has struggled with similar tensions, e.g. in C-41/74 Yvonne van Duyn v Home Office [1974] ECR 1337; C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

8.4.1 General Principles

The margin of appreciation is always *embedded in the broader process of judicial scrutiny*. Irrespective of the extent of the margin granted, *the aim and the proportionality of the national restrictions are always* carefully reviewed. If the motivation of the national decision is not convincing and consistent, *the ECtHR no longer feels bound to the margin of appreciation* a priori *granted* and is inclined to impose its own balancing of interests. The margin of appreciation is further informed by the *importance of the Convention right* (for instance, certain aspects of private life) and the *special nature of the justification ground* (for instance, morality).

8.4.2 Criteria Regarding Crime, Health and Public Morality

It was analysed whether the ECtHR grants a somewhat wider margin of appreciation in relation to the justification grounds relevant in the gambling case law. The practice is relatively easy to observe since the ECtHR has been very explicit about its use of the doctrine in relation to crime (prevention), health and public morality and has offered a detailed catalogue of criteria. The Court of Justice is often less explicit about its use of the doctrine, partly due to the different and shorter drafting style of the judgments. Nevertheless, the literature identified criteria of the Court of Justice, which are often reminiscent of those of the Strasbourg Court.[136]

8.4.2.1 Crime

Within the category of crime in the large sense, one situation clearly stands out: *public emergency cases* under Article 15. Such situations are characterised by the time factor *urgency* and the *severity* of the threat. This particular combination of factors that are challenging to any government justifies in the ECtHR's view a wide margin of appreciation. Nevertheless, the ECtHR reviews the aim and proportionality in these cases too.

There are two more categories of concerns that may be summarised under prevention of crime, which in the past profited from a wide margin (even though not

[136] Criteria commonly used by both courts include: urgency of situation, importance of objective pursued, technicality of subject-matter, degree of expertise required, severity of impact of measure, search for less restrivte means, temporary versus permanent measure: Tridimas, T., "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publisher, 1999, pp. 65–84, at 76–77.

as wide as in emergency cases): *national security and terrorism*. This is coherent in that situations relating to these concerns may involve the two aforementioned characteristic elements of urgency and severity. In more recent years, the Court has nonetheless *narrowed down* the margin in these situations. If national security is *not the sole ground* on which the ruling is based, the margin is further narrowed down. In relation to *all other forms of crime* — and consequently those forms of crime of relevance in the gambling cases (fraud, money laundering) — *the ECtHR does generally not mention the doctrine and does not grant a particular margin of appreciation*.

8.4.2.2 Health

Most cases touching upon health concerns before the ECtHR relate to enforced childcare by the state and the deprivation of freedom of persons of unsound mind. In regards to the former, the ECtHR proceeds to a careful weighing of all interests. It is in particular not enough to merely consider that the child would be better off if placed in care. Permanent or absolute restrictions can hardly ever be justified. The ECtHR only grants wide discretion for the *initial decision of placing* the child in public care. Mere *administrative burdens* are not seen as primarily relevant considerations.

Regarding the detention of persons of unsound mind, the time factor of *urgency* is again decisive to grant authorities wide discretion for the decision of the *initial detention*. The term 'unsound mind' is interpreted strictly. By contrast, the margin is narrowed down for the question of keeping the person in detention. In particular, the consistency of the effectively practised policy is closely reviewed. Programmes and institutions need to be *suitable*, from a medical perspective, to address the person's mental health problem by ensuring *adequate therapeutic and recreational programmes* as well as contact with the outside world.

Medical research, *empirical evidence*, *best practice and professionalism* play a central role in the considerations of the Strasbourg Court. The ECtHR sees these points as *effective safeguards against arbitrariness* and the abuse of the derogation for other purposes. The Court demands that the constantly evolving best international science is relied on. Nonetheless, it grants so-called *medical discretion*: in principle, it is for the medical authorities to decide the therapeutic methods. Similarly, the ECtHR grants some discretion to authorities when complex facts must be assessed and balanced as local authorities are usually better placed to strike a fair balance.

The ECtHR imposes on both public authorities and medical personal high professional quality standards. This includes the duty to carefully observe the development of a disease and to keep careful record. Finally, the ECtHR demands *strict judicial control where the executive has far-reaching discretionary powers*. Overall, the ECtHR does *not grant a particular margin of appreciation* in relation to health concerns.

8.4.2.3 Public Morality

For good reasons, the Strasbourg Court grants wide discretion in relation to public morality issues. Views on moral questions are *necessarily subjective and hard to objectivise*. The ECtHR reviews the aim and proportionality of the restrictions in these cases too. The policy of granting wide discretion experiences two limitations that serve as safeguards against the abuse of the public morality justification. First, the ECtHR grants wide discretion only if the facts of the case *exclusively concern public morality* and no other justification ground. This is reminiscent of the approach in relation to *national security and emergency cases*.[137] Second, a wide margin is no longer granted if a *common European consensus* can be identified among the Signatory States on this moral issue.

8.4.3 Double-Checking the Principles and Criteria in Gambling Cases

The present analysis of the use of the margin of appreciation has focused on the extensive case law of the ECtHR regarding the grounds of justification of crime, health and morality concerns. The ECtHR has rarely dealt with cases that involved the use of the margin of appreciation in relation to games of chance specifically. In the following, it will nevertheless be double-checked how the ECtHR used its principles and criteria in these cases as well.

Among the cases that appeared to be relevant for the present analysis,[138] it can be observed that most of them involved no margin of appreciation. Often, they related to gambling tax issues and aspects of fair trial under Article 6 ECHR.[139] Other cases included the question whether the Convention or domestic law granted a right to provide gambling services or to acquire gambling goods (see Sect. 11.3.1). The mere *presence of games of chance did not trigger the ECtHR to apply a margin of appreciation*, and even less, a wide margin of appreciation.

In the rare cases where discretion for domestic authorities was discussed, the use of the margin of appreciation was argued on other grounds. The decision in *TIPP 24 AG v Germany* regarded a German operator that offered online intermediation of betting. It had to cease its remaining activities as of January 2009 due to an online gambling ban introduced by a State Treaty between the German Länder. The ECtHR granted a wide margin of appreciation in this case. The discretion, however, was not argued with the presence of games of chance but the Convention rights concerned.

---

[137] See further the proposed model referring to 'core cases' of morality at Sect. 7.3.

[138] A search in the ECtHR's collection of documents with the terms 'gambling', 'gaming' and 'games of chance' (in judgments and decisions) found 75 hits. However, the large majority was irrelevant for the present discussion. Most hits resulted from excerpts of facts and national laws cited in the judgment or decision that had little or nothing to do with the outcome of the case.

[139] *Ex multis*, Liborio Garofolo v Switzerland, Application no 4380/09 [2013].

The ECtHR noted that domestic authorities enjoyed wide discretion in striking a fair balance between public interest objectives and *company property rights* (*Article 1, Protocol No 1*) *as well as freedom of speech in commercial matters* (*Article 10 ECHR*).[140] The Court's decision is in line with a much older decision of the Commission regarding the revocation of an Irish licence to operate amusement arcades (Article 1, Protocol No 1).[141] Similar to the domestic practice of national courts, the ECtHR also applied a more lenient review as regards questions relating to *classic exercise of administrative discretion*, involving aspects of *expediency or specialised expertise* (see also environmental or planning matters).[142]

The approach is perfectly consistent with the ECtHR's general case law. Discretion involving questions of expediency or specialised expertise was noted in relation to 'medical discretion' or 'complex factual assessments' as well (see Sect. 8.3.2.3). The analysis further established general principles that apply irrespective of the justification ground. One principle is that the width of the *margin of appreciation varies between different expressions of Convention rights* (see Sect. 8.2.3). Examples of particularly important expressions where hardly any margin of appreciation can apply include for instance core aspects of private sphere as well as political debate.[143] It was noted that expressions of lesser importance included for instance the rights of coalitions under Article 11;[144] the same applies to company property rights and commercial speech (advertising).

8.5 The Margin of Appreciation in the Gambling Case Law of the Court of Justice of the EU

This section discusses the use of the margin of appreciation in the case law on gambling. First, the *development of the practice* of the margin of appreciation before the Court of Justice is outlined. In the next stage, the practice is compared with the use of the margin of appreciation by the EFTA Court. Finally, these approaches are contrasted with the principles and criteria established in the previous section in relation to the doctrine as applied by the ECtHR (Sect. 8.5.5). Section 8.5 solely examines the overall use of the margin of appreciation in the gambling cases. A detailed analysis of the proportionality review is reserved for the subsequent Chap. 9.

---

[140] TIPP 24 AG v Germany, Application no 21252/09 [2012], paras 32, 35, 39.

[141] Colm McKenna v Ireland, Application no 16221/90 [1991].

[142] Sigma Radio Television Ltd. v Cyprus, Application no 32181/04 and 35122/05 [2011], para. 153; Kingsley v the UK, Application no 35605/97 [2000], para. 53 (referred to Grand Chamber but solely on the point of costs).

[143] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 141.

[144] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 210.

8.5.1 Early Case Law: Unlimited Margin of Appreciation

In its early case law in *Schindler*,[145] *Läärä*,[146] *Zenatti*[147] and *Anomar*,[148] the Court of Justice practised a virtually unlimited margin of appreciation and did de facto not review the proportionality of the measures.

The first case, *Schindler*, concerned the UK legislation on lotteries that banned large-scale lotteries at the time. The Court of Justice granted an unlimited margin of appreciation due to the '*peculiar nature*' of lotteries that it noted. The peculiar nature was concluded from the following elements: lotteries like other types of gambling involved moral, religious or cultural aspects. They further involved a high risk of crime or fraud. They also incited people to spend, which could have damaging individual and social consequences. It was not without relevance that lotteries were used to finance benevolent or public interest activities.[149]

> Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[150]

The Court of Justice continued the policy of an unlimited margin of appreciation in *Läärä*. This case was significantly different in that the relevant gambling services (slot machines) were not banned, but the right to offer such games was reserved to a state operator. The Court revisited what it had referred to in *Schindler* as "a sufficient degree of latitude:"

> However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment […]. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict. In those circumstances, the mere fact that a 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

---

[145] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039.

[146] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067.

[147] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289.

[148] C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621.

[149] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[150] Ibid., para. 61. Regarding lottery regulation in the EU, cf. Kingma, S.F., and van Lier, T., *The Leeway of Lotteries in the European Union – A Pilotstudy on the Liberalisation of Gambling Markets in the EU*, Amsterdam: Dutch University Press, 2006.

> 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 are intended to provide.[151]
>
> The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States.[152]

The approach of the Court in *Schindler* and *Läärä* was remarkable in that it significantly differed from its general practice. Under the preliminary ruling procedure of Article 267 TFEU, the Court is called to offer guidance to the referring court. As Advocate General La Pergola noted in *Läärä*, the Court is required

> to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible.[153]

The Court of Justice usually discusses the proportionality of the measure. Sometimes, it then decides itself whether the measures were proportionate. Often, it will leave it to the referring court to answer this question while providing criteria that are aimed to guide the national court's decision on this point.[154]

The decisions in *Schindler* and *Läärä* are very different in this regard. The Court granted an *unlimited* margin of appreciation, therefore giving Member States a 'carte blanche' in this area of law. It did not proceed to a discussion of the proportionality of the measures. *It concluded itself* in both cases that the measures were proportionate and did not leave the answer to that question to the referring court.

The next two cases did not significantly change that picture. The *Zenatti* ruling confirmed the wide discretion enjoyed by the Member States. However, Advocate General Fennelly had pointed at inconsistencies in the Italian gambling regime and the Court of Justice took up this point:

> However, as the Advocate General observes […], such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[155]

This remained an isolated statement. The Court of Justice did not engage in a more detailed discussion of this point nor did it hold the Italian measures

---

[151] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 35–36.

[152] Ibid., para. 39.

[153] Opinion of Advocate General La Pergola in ibid., para. 23.

[154] For an illustrative example, cf. C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171, para. 39.

[155] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

disproportionate. It had expressly held the measures to be proportionate in *Schindler* and *Läärä*. In *Zenatti*, it left it to the national court to verify

> whether […] the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.[156]

In *Anomar*, the Court found the Portuguese legislation to be similar to the Finnish legislation as discussed in *Läärä*. It limited its ruling for large parts to simply referring to the unlimited discretion of national authorities. The Advocate General noted that the Court of Justice had substantially relaxed the principle of proportionality in *Läärä*, "which normally applies to implementation of the provisions of the freedom to provide services."[157] The Court's reference to the principle of proportionality remained rhetoric. It neither engaged in a proportionality test nor did it instruct the national court to further look at this point:

> the Court has held that national measures which restrict the freedom to provide services […] must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it […].
>
> Nonetheless, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict […] and which have been deemed compatible with the Treaty.
>
> […] the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.[158]

8.5.2 Gambelli and Lindman: Limitation of the Margin of Appreciation

Within one week, the Court of Justice handed down the decisions in *Gambelli*[159] and *Lindman*.[160] It was the first time that a significant change was applied in the use of the margin of appreciation. Hatzopoulos and Do concluded that these decisions brought an end to the Court of Justice's tendency to turn a blind eye to protectionist justifications in the field of gambling.[161] According to the Court in *Gambelli*, national measures could only be suitable if they were "consistent and systematic."

---

[156] Ibid., para. 37.

[157] Opinion of Advocate General Tizzano in C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 71.

[158] Ibid., paras 86–88.

[159] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[160] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519.

[161] Do, T.U., and Hatzopoulos, V. (2006). "The Case Law of the ECJ concerning the Free Provision of Services: 2000–2005", *Common Market Law Review, 43*(4), 923–991, at 971.

If national authorities incited and encouraged consumers to participate in gambling primarily in view of the financial benefit for the public purse, they could not invoke public order concerns.

Gambelli was the first decision to contain some element of proportionality review. More precisely, it discussed the suitability of the measures. The referring Italian court had noted that Italy practised a policy of expansion of games of chance, while claiming a goal of limiting gambling opportunities. In this case, the Court could hardly avoid being outspoken. Inconsistencies of the Italian gambling regime had already been critically noted by Advocate General Fenelly in *Zenatti* and Advocate General Alber in *Gambelli*.

> In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.[162]

The Court of Justice also gave some guidance regarding the compatibility of the Italian tender licensing procedure with Union law and as regards the proportionality of the criminal penalties imposed on unlicensed operators. The Court's decision even seemed to leave the door somehow open for a certain degree of mutual recognition of licences.[163] *Gambelli* differed significantly in that the Court *for the first time engaged in a discussion* of the referred questions. The Court of Justice left it ultimately to the national court to decide whether the Italian legislation "actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims."[164]

As opposed to *Gambelli*, the decision in *Lindman*[165] received little attention in the literature and with the interested stakeholders. This is because it was handed down only one week after *Gambelli* and the latter was seen as a major step in the case law on gambling. Also, the facts of the case concerned rather straightforward discriminatory measures. Lottery revenues with foreign lotteries were subject to taxation while revenues from Finnish lotteries were not. Notable was not the outcome of the ruling but an interesting *obiter dictum*.[166] The Court stated that the case file did not disclose any *statistical or other evidence* on the *gravity of the risks* connected to playing games of chance. Since the Court added this criterion without any need to do so, it suggested that authorities needed to provide empirical evidence when arguing gambling-related risks. Hereby, the Court not only underlined the *burden of proof*, which was with the Member State, but also suggested that empirical evidence and accordingly a scientific perspective on gambling-related risks could take a central role in future cases.

---

[162] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69.

[163] Ibid., paras 72–73.

[164] Ibid., para. 75.

[165] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519.

[166] An *obiter dictum* is a remark made in a judgment, which is not necessary to decide the case. Instead, the case serves as the opportunity to make that statement in view of future cases.

8.5.3 Subsequent Case Law: A Mixed Picture

The decisions in *Gambelli* and *Lindman* held the potential to significantly change the direction of the case law. For the first time, the margin of appreciation had been limited. Under the suitability test, a consistent and systematic policy had been demanded. Moreover, the Court had pointed at the role of evidence in relation to gambling-related risks.

However, the post-*Lindman* decisions show a mixed picture with regard to the use of the margin of appreciation. Decisions with an approach seemingly similar to that in *Gambelli*, for instance *Placanica*,[167] altered with other decisions whose standard of review was reminiscent of the early case law, for instance *Liga Portuguesa*.[168]

Chapter 9 will closely assess the other side of the coin: the proportionality review.[169] Overall, it can already be noted that the margin of appreciation in the gambling cases remained very wide in the post-*Gambelli* decisions. The Court of Justice largely stuck to the special use of the margin of appreciation specific to games of chance.[170] This overall view must, however, be split in different aspects: the use of the margin as well as the corresponding proportionality review vary between different aspects. In general terms, the practice of the Court since *Placanica*[171] can be summarised as follows.

There are some aspects for which Member States enjoy unlimited discretion. This is the case for the desired protection level against gambling-related risks, such as gambling addiction and various forms of crime. In principle, Member States are furthermore free in their choice of the regulatory licensing model. A Member State can prohibit gambling offers or allow them. If it decides to legalise them, it enjoys almost unlimited discretion with regard to the regulatory model. It can install an exclusive right holder with public or private ownership, a tightly or more liberally regulated licensing model or even a model that does not require an authorisation. Member States can allow some games while prohibiting others (for example, online games); they can regulate some types of games more strictly than others. Ultimately, it is up to the Member States' discretion whether they want to recognise the standards ensured by regulation and surveillance in other Member States.

For other aspects of games of chance or under certain conditions, this unlimited margin of appreciation may be narrowed. The Court narrows the margin of appreciation where inconsistencies become obvious in the national policy on games of chance. Where governments allow their own operators(s) to significantly

---

[167] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

[168] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633.

[169] Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

[170] Becker, T., and Dittmann, A., "Gefährdungspotentiale von Glücksspielen und regulatorischer Spielraum des Gesetzgebers" in *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, pp. 113–151, at 139.

[171] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

expand or heavily advertise their offers while claiming public policy concerns like gambling-related crime, the Court of Justice no longer feels bound to the very wide margin of appreciation. Similarly, the Court of Justice held in recent decisions such as *Zeturf* or *Dickinger & Ömer* that gambling monopolies could only be justified in relation to a particularly high level of consumer protection. The Court appeared to narrow the margin of appreciation where the justification ground related to crime concerns rather than gambling addiction concerns (namely, addiction concerns relating to online gambling). The Court of Justice still grants very wide discretion when it comes to games of chance played via the Internet.

The margin of appreciation is small in relation to licensing procedures. If the Member State does not opt for an exclusive right holder, the Court reviews the national measures much more closely. The duties of transparency and non-discrimination play a central role in this context. Similarly, where a licensing system involves restrictions to prevent forms of crime, such as seat requirements for companies or a ban on stock-registered companies, the margin of appreciation becomes small.

Overall, the Court of Justice has still applied a wide margin of appreciation in the case law since *Placanica*. Some aspects enjoy an unlimited or hardly limited margin of appreciation while others are granted a narrower margin. In more recent cases, however, a relativisation of the wide margin of appreciation and occasionally a change of tonality could be observed, including in *Markus Stoss*, *Zeturf*, *Dickinger & Ömer* and *Costa & Cifone*.

8.5.4 EFTA Court

The EFTA Court dealt in two cases with gambling services, one direct action[172] and one advisory opinion.[173] The direct action concerned the compatibility of the Norwegian nationalisation of the gaming machine market; the advisory opinion related to all other forms of games of chance in Norway.

In relation to the use of the margin of appreciation, the EFTA Court quoted the Court of Justice with the latter's statement that gambling involved cultural, religious and moral aspects and harmful consequences.[174] The EFTA Court also granted a certain margin of appreciation to national authorities:

> Moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming, may serve to

[172] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8.

[173] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86.

[174] The formula was already adopted in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039. The EFTA Court referred to two out of three factors by which the CJEU had argued a wide margin of appreciation: the moral, religious and cultural conglomerate and the harmful consequences. It did not refer to crime concerns to justify the margin of appreciation.

> justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order. The EEA Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures they impose must satisfy the conditions laid down in the case law of both the Court and the Court of Justice of the European [Union] as regards their proportionality […]. In that respect, the burden of proof is on the State responsible for the restriction.[175]

As will be shown in more detail in Chap. 9, the EFTA Court combined the margin of appreciation with an *effective proportionality review*.[176] In the direct action procedure, a somehow stricter review could be expected for procedural reasons. In this procedure, the EFTA Court was not only handing down an interpretation of EEA law, it was in the possession of all facts and under the legal obligation to decide on the merits of the case. Interestingly, the EFTA Court applied a stricter standard of review in the advisory opinion.[177] That ruling took a close look at potential inconsistencies and offered substantial guidance to the referring Norwegian court.

In *EFTA-Ladbrokes*, the EFTA Court made an express statement in relation to the extent of the margin of appreciation. The agents for the Norwegian government had pleaded that judicial review was limited in the area of gambling. The courts could assess the necessity of the measures only if they had reasons to believe that the national provisions were discriminatory or protectionist.[178] Similarly, in *ESA* versus *Norway*, the government position had been that it was only for the national authorities to assess the necessity, notwithstanding the fact that this was a direct action case.[179] The EFTA Court commented in detail on the use of the margin of appreciation in the area of gambling:

> This cannot be accepted. Even though the Contracting Parties do have discretion in setting the level of protection in the field of gambling, this does not mean that the measures are sheltered from judicial review as to their necessity […].

---

[175] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 42.

[176] The stricter review – in comparison to the CJEU – prompted a Norvegian scholar to ask whether the EFTA Court was more Catholic than the Pope: Fredriksen, H.H. (2009). "Er EFTA-domstolen mer katolsk enn paven? – noen betraktninger om EFTA-domstolens dynamiske utvikling av EØS-retten og streben etter dialog med EF-domstolen", *Tidsskrift for Rettsvitenskap, 122*(4–5), 507–576.

[177] This EFTA Court case is referred to as '*EFTA-Ladbrokes*' to avoid confusion with the '*Ladbrokes*' case decided by the CJEU.

[178] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 55.

[179] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 22: "the Defendant asserts that if a national gambling restriction is found to be legitimate and suitable, then, as a consequence of the margin of appreciation conferred on them, it is for the national authorities to assess whether it is also necessary."

> To the extent the legislation at issue is deemed suitable, it must be assessed whether the measures at issue go beyond what is necessary to meet the aims pursued. As with regard to suitability, the necessity of the measures must, at the outset, be assessed in relation to each legitimate objective. […]
>
> The necessity test consists in an assessment of whether the exclusive rights system is functionally needed in order to achieve the legitimate objectives of the legislation at the level of protection chosen by the Contracting Party concerned, or whether this could equally well be obtained through other, less restrictive means […]. Thus, where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection."[180]

In contrast to the approach of the Court of Justice, the EFTA Court underlined that it needed to be shown that a regulatory model such as a monopoly was *functionally needed to achieve a certain objective*.[181] It also referred to "other, less restrictive means," the characteristic test behind the notion 'necessity', which the Court of Justice has normally avoided to mention.[182]

The guidance offered by the EFTA Court in *EFTA-Ladbrokes* was much more substantial than in the gambling case law of the Court of Justice at that time. This could be particularly well observed in relation to the criterion of a *consistent and systematic policy* and the protection level that was sought *in practice*:

> The restrictions placed on the monopoly provider must be taken into account when identifying the level of protection actually sought by Norwegian authorities under the current exclusive rights system. A low level of protection exists if the Norwegian authorities tolerate high numbers of gaming opportunities and a high level of gaming activity. Important factors in this regard are restrictions on how often per week or per day games are on offer, restrictions on the number of outlets which offer games of chance and on sales and marketing activities of the outlets, as well as restrictions on advertising and on development of new games from Norsk Tipping.
>
> With regard to marketing, several factors have to be taken into account by the national court. In particular, it will have to look into the extent and effect of marketing and development of games of chance, inter alia how much Norsk Tipping spends in that regard as well as the form and content of the marketing and the susceptibility of the targeted groups. Moreover, the national court must ascertain whether the advertising of the gambling and betting services is rather informative than evocative in nature.

---

[180] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, paras 55–58.

[181] The CJEU finally adjusted its approach towards this direction in C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069; C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633.

[182] Cf. however C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 84; cf. also the opinion of Advocate General Mazák in C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, para. 27.

> In its assessment of necessity the national court will have to examine, in particular, whether Norsk Tipping has less economic incentives to breach the rules regulating the sector of games of chance or less of an interest in an aggressive marketing strategy than a commercial operator under a licensing system. Furthermore, the national court will have to evaluate whether effective control may be exercised and is actually being exercised by the State on Norsk Tipping and whether private service providers operating under a licensing system cannot be subjected to the same kind of control.[183]

It follows that the *margin of appreciation applied by the EFTA Court in the area of gambling differed*, overall, from that practised by the Court of Justice. For some aspects, the margin of appreciation was *narrower*, and the proportionality of the measures was generally more closely reviewed.

8.5.5 Principles and Criteria from the European Court of Human Rights Applied to the Gambling Case Law of the Court of Justice of the EU

8.5.5.1 General Considerations

Sections 8.2, 8.3 and 8.4 established the principles and criteria that the Strasbourg Court has followed in its use of the margin of appreciation. They serve to avoid an arbitrary and incoherent use of the doctrine. It is now examined whether these principles and criteria support the width of the margin of appreciation as practised by the Court of Justice in its gambling jurisprudence. The established overriding principles of the ECtHR relate to the motivation of the decision, the importance of the right concerned and the possible existence of a special nature of the justification ground.

The fundamental freedoms form part of the essential principles of the Single Market and are of central importance. Absolute, permanent or otherwise far-reaching restrictions are generally strictly reviewed and seldom approved. The Court of Justice went as far as to define EU fundamental freedoms as supreme to fundamental rights protected under national constitutional law.[184] Even though that position was later relativised by the development of EU fundamental rights in the case

[183] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, paras 60–62. An emphasis on how the public monopoly is run *in practice* could also be noted in the opinion of Advocate General Mazák in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, paras 49–53.

[184] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

law,[185] the protection of the fundamental freedoms certainly enjoys utmost importance within the process of European integration.

The next overriding principle concerns the possible existence of a special nature of the justification ground. The ECtHR only recognises this in relation to a few grounds. In this context, it is noteworthy that the Court of Justice since *Schindler* has referred to *gambling services as showing a peculiar nature*. According to the Court, there were "particular factors" that justified a "sufficient degree of latitude."[186] These factors were threefold and regarded "moral, religious or cultural aspects of gambling," "high risk of crime or fraud" and "damaging individual and social consequences."[187] The Court of Justice summarised various concerns under two main justification grounds in the gambling cases: consumer protection and the maintenance of order in society. The concerns behind these grounds relate to health issues (gambling addiction), the prevention of crime and public morality.

It must be assessed whether these concerns are of a special nature. According to the jurisprudence of the ECtHR, the former concerns, namely health and crime, do not show a special nature that would a priori justify a wide margin of appreciation. With regard to public morality, this may be different. In the following, the criteria in relation to these three concerns are briefly revisited and applied to the situation of the gambling jurisprudence.

8.5.5.2 Crime Concerns

While certain forms of crime (in the broadest sense) profit or may profit from a wide margin of appreciation (public emergencies; to a lesser extent national security and prevention of terrorism), *other forms of crime do not*. Two characteristic elements justify a wide margin of appreciation: *the time factor* (*urgency*) *and the severity of the threat*. These two factors are typical for public emergency cases and may also be present in constellations regarding national security or terrorism. By contrast, the forms of crime commonly referred to in the gambling jurisprudence are *fraud and money laundering*. Particular urgency and severity are not characteristic for policies relating to these two forms of crime. They do *not show a special nature* that would justify a wide margin of appreciation.

---

[185] More recently, the CJEU has engaged in lengthy balancing exercises involving EU fundamental freedoms and EU fundamental rights. Cf. e.g. C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609; C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659.

[186] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 59 and 61.

[187] Ibid., para. 60.

8.5.5.3 Health Concerns

The jurisprudence of the ECtHR in relation to the well-being and health of persons shows that very restrictive measures, such as permanent or absolute measures, are hard to argue on health grounds. Situations where health concerns justify a wide margin of appreciation involve an element of *urgency and severity*: the initial decision to put a child in public care when serious mental or physical harm is imminent or the initial placement of a mentally unsound person in an institution when the person may harm himself or others.

No particular margin is granted for other situations that do not involve those characteristic features of urgency and severity. Yet, the ECtHR grants what is referred to as '*medical discretion*'. Medical authorities enjoy wide discretion in deciding upon the therapeutic methods. Where state authorities have to *weigh complex facts*, some degree of discretion is granted too.

The Court of Justice has repeatedly dealt with gambling and the addiction to games of chance as showing a peculiar nature. As to the addiction to gambling, it still needs to be inquired whether this disorder effectively shows a peculiar nature (see Sect. 9.1.1). So far, the considerations regarding the criteria in relation to health do not justify a wide margin of appreciation in the gambling case law – *except if a peculiar nature* of gambling addiction were to be discovered in the following chapter. Apart from this *caveat*, gambling addiction concerns do not generally involve the factors of urgency and severity. It was previously noted that addiction to games of chance is an old and well-known phenomenon. The severity of this disorder will be studied in Sect. 9.1.2.2.

Important is the notion of *medical discretion*. Under certain conditions, there are good reasons to offer wide discretion to medical experts and national authorities when assessing scientific findings and medical options. This discretion is subject to criteria that will be closely assessed in the next chapter on the practice of the proportionality review.

8.5.5.4 Public Morality Concerns

Public morality concerns have been pleaded in the gambling cases. Among the three group of concerns assessed here, this is the sole justification ground seen by the Strasbourg Court as showing a *special nature*; this could justify a wide margin of appreciation. The specificity of this ground is that issues of morality can hardly be assessed in an objective way. Moral views are *subjective* and vary by culture, time, geography and religion.

This general policy of granting a wide margin knows two limitations that serve as safeguards against the abuse of the public morality justification. The ECtHR grants wide discretion only if the facts of the case *exclusively concern public morality* and no other justification ground; in the language of the earlier presented

twofold model: *core cases of morality*. Furthermore, no wide margin applies if there is a broad consensus as regards this issue of morality.

In regard to the first limitation, it is clear from the outset that the gambling cases do not exclusively involve public morality concerns. The main concerns repeatedly argued by the parties, the Advocates General and the Court of Justice as well as the EFTA Court relate to gambling addiction and crime concerns. Section 7.3 inquired whether gambling-related risks were an issue for public morality. While the Court of Justice did indeed use language that occasionally left the impression that gambling-related risks were primarily a moral issue,[188] it was concluded that science was better suited to inform policies in relation to these risks. The auxiliary role of moral concerns regarding gambling was illustrated in a model consisting of two categories of public morality concerns. Concerns about gambling relate to *potential detrimental side effects* but not to the activity as such. Gambling does not constitute one of the core cases of morality to which the wide discretion of the ECtHR would apply. Consequently, the wide margin of appreciation granted by the Court of Justice in the gambling jurisprudence does not find support in the criteria relating to public morality concerns.

8.5.5.5 Results

The wide margin of appreciation, and for some aspects even unlimited margin, which the Court of Justice has applied in the case law on gambling, is not supported by the doctrine on the margin of appreciation as practised by the ECtHR. The criteria that steer the use of the margin of appreciation do not support the view that gambling is (primarily) a matter for public morality. The urgency and severity factors that are sometimes identified in relation to certain crime and health concerns are also not present. It remains to be assessed *whether Chap. 9 will establish a peculiar nature of gambling* that – according to the criteria of the ECtHR – could justify a wide margin of appreciation.

The use of the *margin of appreciation by the EFTA Court* finds more support in the criteria of the ECtHR. While the EFTA Court did a priori grant some discretion to national authorities, it combined it with an effective proportionality review. It *offered substantial guidance* to national courts by outlining, in quite some detail, the meaning of certain criteria, such as 'consistent and systematic policy'. As a result, the EFTA Court gave the discretion enjoyed by national authorities primarily in the hands of the *national courts* (see Sect. 8.5.4). These aspects will be more closely analysed in the following chapter.

[188] The CJEU has used expressions such as 'a social evil', 'an activity of questionable morality' or 'squander money on gambling'.

Chapter 9
Proportionality Review in EU Gambling Law

Chapter 8 looked into the use of the margin of appreciation and noted a general tendency of the Court of Justice of leaving wide discretion to national authorities in the field of gambling. The previous chapter also showed that the doctrine of the margin of appreciation is supposed to go hand in hand with judicial review. Accordingly, Chap. 9 examines to which extent the granted discretion was accompanied by an effective proportionality review. Apart from this legal analysis, it also assesses the Court's review practice from an empirical perspective. It inquires to which extent the Court's views on gambling addiction are supported by empirical evidence on this mental disorder (Sect. 9.2). The Court's approach to games of chance is subsequently compared to cases involving similar consumer protection concerns (Sect. 9.3.1). Finally, the causes (Sect. 9.3.2) and consequences (Sect. 9.3.3) of the Court's diverging approach are examined. In view of inquiring the aforementioned aspects, Chap. 9 must start with an introduction to the *nature and mechanisms of gambling addiction* according to the current state of research (Sect. 9.1).

9.1 Gambling Addiction: An Introduction into Nature and Mechanisms

This section opens with a few remarks on the alleged peculiar nature of gambling addiction, followed by an introduction to the notion of gambling addiction and the global epidemiology of this mental disorder. Subsequently, the commonalities between gambling addiction and other forms of addiction are outlined. Finally, the different stages of the development of the disorder are explained.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*, Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_9,

9.1.1 A Peculiar Nature?

Among the justification grounds pleaded in the gambling cases, the protection of consumers from gambling-related harm is an important, if not the central concern. There can be no doubt that protecting consumers from gambling addiction is a *highly legitimate motive* that can justify restrictions to cross-border trade in gambling services. Until recently, the pan-European discussion in the legislative branch was very limited, and the Internal Market Courts consequently became the main 'fora of discussion' of gambling issues. In line with the adversarial setting of court proceedings and the financial consequences that are at stake,[1] private operators and public monopolies have usually continued their quarrel outside the courtroom immediately after the release of a new ruling. The aim has been to gain the high ground regarding the 'correct interpretation' of the judgment and to highlight alleged points of victory.[2]

According to prevalent views, gambling and gambling addiction appear to be fundamentally different from other risks and therefore need a different, separate regulatory approach. Both the EU legislator and EU judiciary have repeatedly emphasised a peculiar or special nature of gambling. The Services Directive states "[g]ambling activities […] should be excluded from the scope of this Directive in view of the specific nature of these activities."[3] Counsels of governments have repeatedly argued this specific nature, be it in court hearings or public presentations.[4] This could for instance be observed in *Anomar* where the Portuguese government pointed at the 'special nature' of gaming.[5] Similarly, from the beginning the Court of Justice accepted the idea of gambling being a special case, referring in its first gambling case to "the peculiar nature of lotteries, which has been stressed by many Member States."[6] The following observations shall

[1] The Gross Gaming Revenues (i.e., stakes less prizes but including bonuses) during 2008 were estimated to be around 75.9 billion Euros in the EU. The online gambling services accounted for 6.16 billion Euros, i.e., 8 % of the overall gambling market. In Malta, the gambling revenues amounted to 8 % of the national Gross Domestic Product (GDP). For many Member States, the gambling revenues amounted to around 1 % of the GDP. This seemingly small part is taxed at a much higher level (licensees) than other goods and services or is directly provided by an exclusive right holder: Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 8–9.

[2] For obvious procedural reasons, these post-judgment quarrels can be noted in particular in cases that follow the preliminary ruling procedure as the case is referred back to the national court to decide on the merits: Planzer, S. (2009). "Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning", *European Law Reporter, 11*, 368–374, at 370.

[3] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive'), Preamble, para. 25.

[4] *Ex multis*, Vlaemminck, and Hubert, *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at gambling conference), at 1 and 17.

[5] C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 78.

[6] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

inter alia serve to establish whether gambling addiction is peculiar in comparison to other mental health disorders.[7]

9.1.2 Notion and Epidemiology

9.1.2.1 Gambling Disorder

There are many notions that describe gambling addiction or related states,[8] with 'problem gambling' arguably being the most prominent term.[9] A commonly accepted definition of the disorder can only be found in the two leading medical manuals, which refer to '*pathological gambling*' (old term) or '*gambling disorder*' (new term). Until the next revision of the manual, the term pathological gambling will continue to be used in the International Statistical Classification of Diseases and Related Health Problems (ICD); this term was also used in the Diagnostic and Statistical Manual of Mental Disorders (DSM) until the latter's most recent revision.

The *ICD* classifies diseases and medical conditions and is published by the World Health Organization (WHO).[10] The currently applicable ICD-10 (version 2010), which is under revision,[11] lists pathological gambling as a 'mental and behavioural disorder' consisting of "frequent, repeated episodes of gambling that dominate the

[7] Verbeke correctly noted that much gambling legislation was based on assumptions regarding the nature of gambling addiction: Verbeke, "Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy", at 257.

[8] Gambling addiction, problem gambling, disordered gambling, compulsive gambling, excessive gambling, intemperate gambling, in-transition gambling, at-risk gambling, *et cetera*.

[9] *Ex multis*, cf. the website of the US National Council of Problem Gambling, at "FAQs – Problem Gamblers", available at http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=3315 (accessed 1 June 2012).

[10] The ICD is updated by comprehensive as well as partial reviews with ICD-10 (10th revision, version 2010) being the currently applicable version. Simple updates are approved annually, but comprehensive revisions take many years. The first edition was known as the 'International List of Causes of Death', which was adopted by the International Statistical Institute in 1893. WHO took over the responsibility for the ICD in 1948 with the Sixth Revision. The current version, ICD-10, was endorsed in May 1990. ICD-11 is due to be released in 2015. The revisions of DSM and ICD are closely coordinated between the two task forces. The classification of disorders in DSM-5 for instance has been harmonised with the ICD coding system. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, preface, at xli; World Health Organization, "Classifications – International Classification of Diseases (ICD)", available at http://www.who.int/classifications/icd/en/ (accessed 1 June 2012); World Health Organization, "Classifications – The International Classification of Diseases 11th Revision is due by 2015", available at http://www.who.int/classifications/icd/revision/en/index.html (accessed 1 June 2012).

[11] 10th revision, version 2010: "International Statistical Classification of Diseases and Related Health Problems 10th Revision", available at http://apps.who.int/classifications/icd10/browse/2010/en (accessed 1 June 2012).

patient's life to the detriment of social, occupational, material, and family values and commitments."[12]

As opposed to the ICD, the *DSM offers diagnostic criteria*. This manual is the standard classification of mental disorders in the US[13] and is used globally by mental health professionals. Its most recent revision, *DSM-5*, incorporated important changes and will also shape the forthcoming ICD-11.

DSM-IV used to classify 'pathological gambling' as an 'impulse-control disorder not elsewhere classified', next to disorders like kleptomania or pyromania for too little was known about pathological gambling at the time of its initial classification. DSM-5 reclassified the disorder and renamed it to '*gambling disorder*'. This term is very likely to be used by ICD-11 as well. Therefore, it is the most frequently used term in this chapter, except where other terms seem to be more appropriate.[14] DSM-5 offers *nine diagnostic criteria* in relation to the diagnosis 'gambling disorder':[15]

A. Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:

   1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement.
   2. Is restless or irritable when attempting to cut down or stop gambling.
   3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
   4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble).
   5. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
   6. After losing money gambling, often returns another day to get even ("chasing" one's losses).
   7. Lies to conceal the extent of involvement with gambling.
   8. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
   9. Relies on others to provide money to relieve desperate financial situations caused by gambling.

B. The gambling behavior is not better explained by a manic episode.[16]

---

[12] ICD-10, Sect. F63.0, as reproduced on: "International Statistical Classification of Diseases and Related Health Problems 10th Revision: Pathological gambling", available at http://apps.who.int/classifications/icd10/browse/2010/en#/F63.0 (accessed 1 June 2012). F63.0 further states that this category excludes: 'excessive gambling by manic patients (F30.-) gambling and betting NOS (Z72.6) gambling in dissocial personality disorder (F60.2)'.

[13] http://www.psychiatry.org/practice/dsm (accessed 1 June 2012).

[14] In relation to the *persons affected* by the disorder the still commonly recognised term 'pathological gamblers' is used since 'gamblers with gambling disorder' is linguistically unsuitable.

[15] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 585. The notion 'gambling disorder' is preferable to the initially suggested term 'disordered gambling' since 'disordered gambling' has been used by scholarship to include sub-clinical forms of disordered gambling behaviour. Cf. below.

[16] Ibid., at 585.

Apart from removing one diagnostic criterion and minor linguistic adjustments, the revision to DSM-5 did not significantly alter the diagnosis. The past year (12 months) is now expressly mentioned as the relevant diagnostic period.[17] The initial classification as impulse-control disorder, used until DSM-IV-TR, was criticised by many experts.[18] DSM-5 *reclassified* gambling disorder under the heading '*substance-related and addictive disorders*', categorising it together with substance use disorders. This new categorisation is based on solid empirical evidence. Other *behavioural* addictive disorders such as sex addiction, exercise addiction or shopping addiction will in the future be considered as potential additions to this category. However, at the time of the DSM-5 revision, there was insufficient peer-reviewed evidence to define diagnostic criteria and course descriptions for these disorders.[19] For the moment, only 'Internet gaming disorder' was provisionally included in DSM-5 under the heading 'conditions for further study'.[20]

The definition of 'gambling disorder' only catches those persons who fulfil *four (or more) out of nine diagnostic criteria*.[21] The dominating view in scholarship and treatment is that harm caused by disordered behaviour exists on a *continuum* from no gambling problems to severe problems.[22] Shaffer et al. proposed to additionally use the terms 'problem gambling' and 'disordered gambling'.[23] A Level 2 Gambler

---

[17] The removed criterion was "has committed illegal acts such as forgery, fraud theft, or embezzlement to finance gambling". The diagnostic cut was changed to 4 out of 9 criteria (formerly 5 out of 10): BehaveNet, "Glossaries – Pathological Gambling", available at http://www.behavenet.com/pathological-gambling#301 (accessed 1 June 2012).

[18] *Ex multis*, for the discussion of categorising pathological gambling as addiction versus impulse-control disorder, cf. Petry, N.M., and Madden, G.J., "Discounting and Pathological Gambling" in *Impulsivity: The Behavioral and Neurological Science of Discounting*, Madden, G.J., and Bickel, W.K. (Eds.), Washington DC: American Psychological Association, 2010, pp. 273–294, at 276, and the therein cited literature regarding overlapping aspects of impulsivity. Cf. also Fineberg, N.A., Potenza, M.N., Chamberlain, S.R. et al. (2010). "Probing Compulsive and Impulsive Behaviors, from Animal Models to Endophenotypes: A Narrative Review.", *Neuropsychopharmacology, 35*(3), 591–604; Brewer, J.A., and Potenza, M.N. (2008). "The Neurobiology and Genetics of Impulse Control Disorders: Relationships to Drug Addictions", *Biochemical Pharmacology, 75*(1), 63–75.

[19] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 481. Professor Charles O'Brian, Chairman of the Substance-Related Disorders Work Group, at the annual NCRG conference in Las Vegas in November 2010.

[20] Ibid., at 795.

[21] Under DSM-IV-TR the diagnostic cut was 5 out of 10 criteria.

[22] Whelan, J., Steenbergh, T., and Meyers, A., *Problem and Pathological Gambling*, Cambridge, MA, 2007, at 2; Shaffer, H.J., Hall, M.N., and Vander Bilt, J., *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, Cambridge, MA: Harvard Medical School, 1997.

[23] Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, at table 2. This approach has been widely adopted in scholarship; cf. e.g. National Research Council, *Pathological Gambling: A Critical Review*, Washington DC: National Academy Press 1999.

(in-transition gambler, problem gambler) experiences some sub-clinical signs or symptoms and rarely shows up for treatment.[24] A Level 3 Gambler (pathological gambler) represents the most severe and stable form. The term '*disordered gambler*' serves as overarching term. Scholars regularly use this tripartite terminology.[25]

For reasons of consistency, the present book uses these terms according to the aforementioned definitions.[26] Gambling addiction is used as a popular synonym for gambling disorder (formerly: pathological gambling).

9.1.2.2 Epidemiology

Epidemiology is the field of research that attempts to determine the prevalence of a disorder (namely, what proportion of the population has the disorder) as well as the incidence (that is, the number of new cases that appear in a given time period). While an individual can receive the diagnosis 'pathological gambler', epidemiological screens (questionnaires) can only find the *probable spread* of a disorder in a given population.[27] The first step in understanding a disorder is to measure how widespread it is and to determine who is affected by it, either life-time or past-year.[28] The first team to study the prevalence of disordered gambling also developed the first epidemiological screen at the end of the 1970s.[29] Many others have been composed,[30] but their results should not be confused with clinical

[24] Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, table 2; Petry, N.M., *Pathological Gambling: Etiology, Comorbidity, and Treatment*, Washington DC: American Psychological Association, 2005, at 11.

[25] Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, table 2. The percentage figures refer to the past year prevalence in the general population. They are the result of a meta-analysis of 120 prevalence studies. Petry, N.M., "Impulsivity and Its Association With Treatment Development for Pathological Gambling and Substance Use Disorders" in *What Is Addiction?*, Ross, D., Kincaid, H., Spurret, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 335–347, at 335.

[26] American Psychological Association (Ed.), "DSM-5 Development – R 37 Gambling Disorder", available at http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210 (accessed 1 June 2012).

[27] Cunningham-Williams, R.M., Cottler, L.B., and Womack, S.B., "Epidemiology" in *Pathological Gambling – A Clinical Guide to Treatment*, Grant, J.E., and Potenza, M.N. (Eds.), American Psychiatric Publishing, Inc., 2004, pp. 25–36, at 33.

[28] Ibid., at 25.

[29] Kallick, M., Suits, D., Dielman, T. et al., *A Survey of American Gambling Attitudes and Behavior,* Research Report Series, Survey Research Center, Institute for Social Research, Ann Arbor, MI: University of Michigan Press, 1979; Shaffer, H.J., and Korn, D.A. (2002). "Gambling and Related Mental Disorders: A Public Health Analysis", *Annual Review of Public Health, 23*, 171–212, at 181.

[30] For an overview, cf. Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*. A widely used screen has been the South Oaks Gambling Screen (SOGS); cf. Lesieur, H.R., and Blume, S.B. (1987). "The South Oaks Gambling Screen (SOGS): A New Instrument for the Identification of Pathological Gamblers", *American Journal of Psychiatry, 144*(9), 1184–1188. The SOGS has been widely

accuracy.[31] As these screens consist of different questions, they may lead to varying prevalence rates of gambling disorder.[32]

While the data situation regarding the prevalence of gambling disorder is poor in most countries, it is well established in the US and Canada.[33] Studies conducted in various countries around the globe indicate similar prevalence rates as in North America.[34] The life-time prevalence rates of gambling disorder range from about 0.5 % to 2.0 % in the general population.[35] The range is largely due to differences in samples, instruments, methodology and the actual availability of gambling.[36] Petry found the estimates to be relatively consistent globally and concluded that prevalence rates of life-time Level 3 Gambling (gambling disorder) most often range from about 1 % to 2 % and life-time rates of Level 2 Gambling (problem gambling) from 2 % to 5 %. She also found past-year prevalence rates to be about 40–60 % lower than life-time rates,[37] that is, 0.25–1 % of the general population experienced gambling disorder within the past year. These findings were also confirmed by other studies. A review of over 100 prevalence studies spanning more than 20 years of research showed a gambling disorder rate of approximately 1 %.[38] Among the

---

criticised for producing inflated rates; cf. Ferris, J.A., and Wynne, H.J., *The Canadian Problem Gambling Index: Final Report*, Canadian Centre on Substance Abuse 2001, cited in Weinstock, J., Ledgerwood, D.M., Modesto-Lowe, V. et al. (2008). "Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment", *Revista Brasileira de Psiquiatria, 30*(1), 3–10. Further instruments include the DSM-IV Screen for Gambling Problems (NODS) or the Canadian Problem Gambling Index. Shortly after 2000, already more than 27 such screens were known: cf. Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis", at 181.

[31] Szasz, T. (1991). "Diagnoses Are Not Diseases", *The Lancet, 338*(8782), 1574–1576.

[32] For a detailed discussion of screens, cf. Chap. 14: 'Screening and Assessment Instruments', in Grant, J.E., and Potenza, M.N., *Pathological Gambling – A Clinical Guide to Treatment*, American Psychiatric Publishing, Inc., 2004.

[33] Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16.

[34] Ibid., at 16.

[35] Weinstock, Ledgerwood, Modesto-Lowe et al., "Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment", and the cited prevalence studies; Bland, R.C., Newman, S.C., Orn, H. et al. (1993). "Epidemiology of Pathological Gambling in Edmonton", *The Canadian Journal of Psychiatry/La Revue canadienne de psychiatrie, 38*(2), 108–112; Petry, N.M., Stinson, F.S., and Grant, B.F. (2005). "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", *Journal of Clinical Psychiatry, 66*(5), 564–574; Volberg, R.A., Abbott, M.W., Rönnberg, S. et al. (2001). "Prevalence and Risks of Pathological Gambling in Sweden", *Acta Psychiatrica Scandinavica, 104*(4), 250–256; Welte, J., Barnes, G., Wieczorek, W. et al. (2001). "Alcohol and Gambling Pathology among U.S. Adults: Prevalence, Demographic Patterns and Comorbidity", *Journal of Studies on Alcohol, 62*(5), 706–712.

[36] Weinstock, Ledgerwood, Modesto-Lowe et al., "Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment", at 4–5.

[37] Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 20.

[38] Wiebe, J., and Volberg, R.A., *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, 2007, available at http://www.canadiangaming.ca/images/stories/media_releases/problem_gambling_prevalence_research_a_critical_overview.pdf, at 13. The report only took into account 'severe problem gambling': in other words high levels

jurisdictions included, only the rates in Hong Kong, Macao and Singapore were substantially higher with approximately 2 %.[39]

In North America, several studies of high quality and large sample sizes have addressed the prevalence in the general population nationally.[40] The first national prevalence study was already published in 1979 by Kallick et al., one year before 'pathological gambling' (now: 'gambling disorder') was included in DSM-III. The study had been commissioned in view of the increasing appearance of new forms of legalised gambling,[41] which mainly concerned the booming casino industry in Nevada, in particular along 'the strip' in Las Vegas. Kallick et al. indicated life-time rates of 0.7 % for 'probable compulsive gambling', which comes closest to 'gambling disorder', and 2.3 % for the less severe form of 'potential compulsive gambling'. About 61 % of the people had gambled within the last year and 68 % at least once in their life.[42]

The next estimate was delivered by Shaffer et al.[43] who conducted a meta-analysis of all prevalence studies in Canada and the US between 1975 and 1997 that met minimum requirements regarding methodology and data samples. According to the 120 identified studies, 4 % qualified as life-time and 2.8 % as past-year Level 2 Gamblers (problem gambling), and 1.5 % as life-time and 1.1 % as past-year Level 3 Gamblers (gambling disorder). A committee of the National Research Council reanalysed these findings and found very similar rates.[44]

The third national study was conducted by Gerstein et al. and commissioned by the National Gambling Impact Study Commission.[45] Its results are seen as being of limited utility due to methodological and data sample reasons.[46] Only a few years later, Welte et al. found a rate of 2.0 % for life-time gambling disorder and 1.35 % for past-year gambling disorder.[47] The study thus confirmed the findings from the

---

such as probable pathological (SOGS), pathological (NODS), severe problem gambling (PGSI) and compulsive gambling (GA-20), regardless of the instrument used. Arguably, 'severe' in this study comes close to the clinical term 'pathological gambling' but is not identical. The report focused on past year prevalence rates exclusively.

[39] Ibid., at 13.

[40] Petry, *Pathological Gambling: Etiology*, *Comorbidity*, *and Treatment*, at 14.

[41] Ibid., at 14–15.

[42] Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

[43] Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*.

[44] National Research Council, *Pathological Gambling: A Critical Review*, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

[45] Gerstein, D., Murphy, S., and Toce, M., *Gambling Impact and Behavior Study: Final Report to the National Gambling Impact Study Commission*, University of Chicago National Opinion Research Center 1999, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

[46] Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 26; Petry, *Pathological Gambling: Etiology*, *Comorbidity*, *and Treatment*, at 16.

[47] Welte, J.B., Barnes, G.M., Wieczorek, W.F. et al. (2002). "Gambling Participation in the U.S. – Results from a National Survey", *Journal of Gambling Studies, 18*(4), 313–337, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

meta-analysis by Shaffer et al.[48] In sum, these studies showed a trend of increasing prevalence rates.

Where researchers used well-developed instruments in Canada, they found rates similar to those reported in most US surveys.[49] Several studies on gambling disorder indicated life-time rates of Level 3 Gambling from 0.8 % to 1.7 %.[50] Older prevalence rates used to be over 1 % (prior to 1997), with more recent Canadian studies reporting past year prevalence as low as 0.5 %.[51]

The North American epidemiological data situation is the most solid globally and shows a highly interesting and relevant phenomenon. Until the beginning of the new millennium, a trend could be identified. The participation in some form of gambling had clearly increased over time and so had the prevalence rates of gambling disorder. The rates from the first US national study in 1979 (0.7 % for life-time 'compulsive gambling', 2.3 % for 'probable compulsive gambling', 1979) had more than doubled to reach those in 2002 (2.0 % for life-time gambling disorder). However, subsequent studies with large samples found significantly lower rates. Petry et al.'s analysis of a large sample from the National Epidemiological Survey on Alcohol and Related Conditions (NESARC) found a life-time prevalence rate for gambling disorder of only 0.4 % and a life-time prevalence rate for problem gambling of 0.9 %.[52] Kessler et al. analysed data from the National Comorbidity Survey Replication (NCS-R) and found a life-time prevalence rate for gambling disorder of 0.6 % and life-time problem gambling rate of 2.3 %.[53]

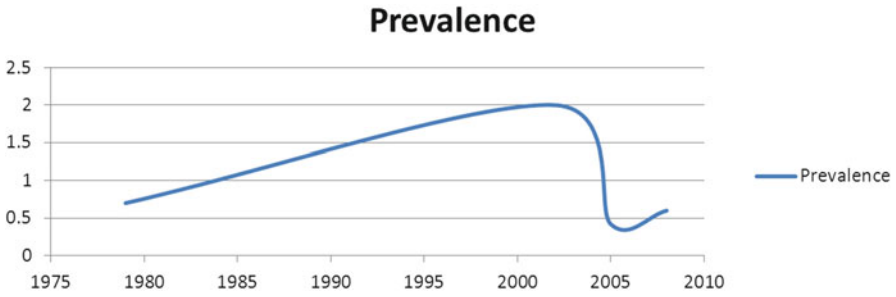

Fig. 9.1 Life-time prevalence of gambling disorder in the US

[48] Petry, *Pathological Gambling: Etiology*, *Comorbidity*, *and Treatment*, at 16.

[49] Ibid., at 16.

[50] Ibid., at 16.

[51] Derevensky, J., Gupta, R., and Csiernik, R., "Problem Gambling: Current Knowledge and Clinical Perspectives" in *Responding to the Oppression of Addiction – Canadian Social Work Perspectives* Csiernik, R., and Rowe, W. (Eds.), 2nd ed., Toronto: Canadian Scholars Press, 2003, pp. 359–378, at 360.

[52] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

[53] Kessler, R.C., Hwang, I., LaBrie, R.A. et al. (2008). "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication", *Psychological Medicine, 38*(9), 1351–1360.

In other words, the prevalence rates from most recent years are similar to those found at the end of the 1970s. At first sight, this must be surprising since gambling offers at that time were far less prevalent and limited to a few states. Scholarship has explained this phenomenon with the capacity of populations to adapt to the exposure to environmental factors (see Sect. 9.2.5.2).

The epidemiological data situation in Europe is quite poor, with many countries featuring either one or even no study.[54] Petry found that many studies suffer from methodological deficits.[55] A study comparing rates from both North America and Europe found them to be remarkably similar, given the range of methods and measures.[56] A recent research project, which collected the available prevalence rates from 1997 to 2010 of all EU and EFTA countries, found a mean past-year prevalence of 0.57 % (weighted for sample size: 0.44 %).[57] These results are reminiscent of the aforementioned global prevalence rates (0.25–1 %).

Another remarkable fact is that some European countries, similar to the development in North America, have seen their rates stabilising over time, with some of them even showing decreased levels.[58] The UK serves as an example. Within one decade, the prevalence rates of gambling disorder have remained quite stable in spite of increased exposure to games of chance.[59] The last few years have brought a substantial liberalisation of the gambling market, including licensing of online operators and relaxation of advertising rules.[60]

---

[54] Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Meyer, G., Hayer, T., and Griffiths, M., *Problem Gambling in Europe: Challenges*, *Prevention*, *and Interventions*, New York: Springer, 2009.

[55] Petry, *Pathological Gambling: Etiology*, *Comorbidity*, *and Treatment*, at 20.

[56] Shaffer, H.J., LaBrie, R.A., LaPlante, D.A. et al. (2004a). "The Road Less Traveled: Moving from Distribution to Determinants in the Study of Gambling Epidemiology", *Canadian Journal of Psychiatry, 49*(8), 504–516, at 509.

[57] Planzer, S., Gray, H., and Shaffer, H. (2014). "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe", *International Journal of Law and Psychiatry, 37*(2); for the prevalence rates, cf. Planzer (ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

[58] Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Wiebe, and Volberg, *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, at 13.

[59] Sproston, K., Erens, B., and Orford, J., *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*, 2000. The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % (DSM-IV). Wardle, H., Sproston, K., Orford, J. et al., *British Gambling Prevalence Survey 2007*, National Centre for Social Research 2007. The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV). Wardle, H., Moody, A., Spence, S. et al., *British Gambling Prevalence Survey 2010*, National Centre for Social Research 2011.

[60] UK Gambling Act.

9.1.3 Commonalities Between Gambling Disorder and Other Expressions of Addiction

This section elaborates on the nature and mechanisms of gambling disorder and broadens the scope to the bigger concept of addiction. It first investigates whether substances cause addiction. It presents the manifold commonalities that exist between substance-related disorders and gambling disorder. The commonalities are illustrated by the diagnostic criteria of DSM-5 and an accumulation of empirical evidence.

9.1.3.1 Is the Object to Blame?

Most people have either tried alcohol in their lives or seen people drinking alcohol.[61] Alcohol, such as wine, may energise people's behaviour. This can be noticed in a social setting such as a reception or a dinner. It may lower inhibitions and increase the willingness to engage in conversations with other guests. Yet, the same substance is unlikely to result in an energising effect when consumed home alone: the same person may feel relaxed (positive), tired (neutral) or even melancholic or depressed (negative). If the two situations involve the very same person and the very same amount and kind of substance, why do they lead to different emotional experiences? Why do some people manage to handle their alcohol consumption while others do not? These considerations already show that alcohol, a substance associated both with recreational and addictive consumption, does not have the same effect on every person and in every situation.

In the 1970s, Zinberg showed that there was no direct causal link between drug consumption and drug addiction. He described case studies of heroin users who had managed over many years to use heroin in a stable and controlled manner. A necessary element of addiction is the *loss of control* over the consumption. Subjects of the study had not developed the characteristic symptoms associated with addiction.[62] Zinberg's findings forced the research community to take a new angle towards addiction research. There had to be other factors that were capable of influencing people's experiences.[63]

---

[61] The following example is informed by a discussion with Professor Howard Shaffer of Harvard Medical School and serves as introduction into the topic.

[62] Zinberg, N.E., and Jacobson, R.C. (1976). "The Natural History of "Chipping"", *American Journal of Psychiatry, 133*(1), 37–40.

[63] In the long history of addiction research, most attention has been paid to drugs (agent) and consumers (host). More recently, the relevance of the social setting has been increasingly recognised in the literature. While certain substances correlate more strongly with addiction than others, they do not determine the outcome. For the varying *potential* of addiction of different substances, cf. Linden, D.J., *The Compass of Pleasure: How Our Brains Make Fatty Foods, Orgasm, Exercise, Marijuana, Generosity, Vodka, Learning, and Gambling Feel So Good*, New York: Penguin Books, 2011, at 46–54.

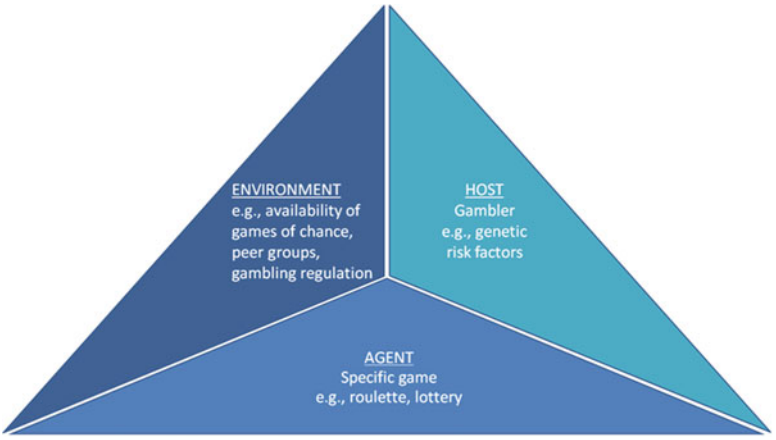

Fig. 9.2 Triad model of disease transmission

9.1.3.2 Triad Model of Disease Transmission: Agent, Host, Environment

Empirical evidence shows that the mental health disorder 'addiction' is not specific to a certain object or substance. Shaffer expressed the object non-specificity of addiction as follows:

> If drug using were the necessary and sufficient cause of addiction, then addiction would occur every time drug using was present. Similarly, if drug using was the only cause of addiction, addictive behaviors would be absent every time drug using was missing.[64]

Research over several decades has established that the focus on the object fails to explain the nature and mechanisms of addiction. Various factors have been identified that contribute to the development of addiction. These factors relate to the host (subject), the agent (object) and the environment and interrelate in complex ways. Empirical evidence on substance-related disorders is older than on gambling disorder. The findings from the former can provide valuable information in situations where gaps of research regarding gambling disorder occur.[65]

The public health model of disease transmission illustrates the interplay of the various factors relating to host, agent and environment. In this model, gambling regulation can be seen as an environmental factor that impacts people's behaviour (Fig. 9.2).[66]

---

[64] Shaffer, H.J., "What is Addiction?: A Perspective".

[65] During a presentation in Vienna in 2007, Professor Howard Shaffer estimated that about half of the research publications on gambling disorders dated from 1999 onwards.

[66] Planzer, S., and Wardle, H., *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, Report prepared for the Responsible Gambling Fund 2011.

9.1.3.3 Commonalities in DSM-5

Since its introduction in DSM-III in 1980, 'pathological gambling' (now: gambling disorder) was classified, in the absence of a better option and along with other disorders, as an impulse-control disorder.[67] *DSM-5 reclassified gambling disorder*: substance use disorders and gambling disorder are now listed under the *same category of* '*substance-related and addictive disorders*'. Even prior to the most recent revision towards DSM-5, the close relationship of substance-related addiction and gambling addiction was already evident from the diagnostic criteria.[68] Table 9.1 shows the striking similarity of the diagnostic criteria of gambling disorder and substance use disorders. In order to facilitate the comparison, the commonalities are highlighted in the table. Alcohol use disorder and tobacco use disorder are used as examples. It should be noted that any other substance-related disorder could be used as well (opioids, cannabis, inhalents, etc.) since the diagnostic criteria are largely identical.[69]

As Table 9.1 illustrates, most diagnostic criteria of the substance use disorders find similar equivalents in the diagnostic criteria of gambling disorder. Notably, *only two (of eleven) criteria* must be fulfilled to meet the diagnosis for a mild alcohol or tobacco use disorder and *only four (of nine) criteria* to meet the diagnosis for a mild gambling disorder. As a result, in a situation where one patient is diagnosed for 'alcohol use disorder', another patient for 'tobacco use disorder' and yet another one for 'gambling disorder', *all three patients are likely to meet similar diagnostic criteria*. Even though the agents (objects of addiction) are different, the diagnosed signs and symptoms are very similar (Table 9.1).

The exact wording of the criteria of gambling and substance-related disorders slightly differs, which has obvious reasons.[70] In substance, however, their diagnostic

---

[67] DSM-IV-TR defined 'Impulse-Control Disorders' as follows: "Individuals with these mental disorders suffer from recurrent failure to resist impulsive behaviors that may be harmful to themselves or others. These include: Intermittent Explosive Disorder, Kleptomania, Pathological Gambling, Pyromania, Trichotillomania." BehaveNet, "Glossaries – Impulse-Control Disorders", available at http://www.behavenet.com/capsules/disorders/impulsecntrldis.htm (accessed 1 June 2012).

[68] Although the term 'addiction' is commonly used in many countries, DSM-5 still preferred to use the term 'disorder' for the various expressions of addictive disorders. This is to reflect the wide range of addictive disorders that exist in a continuum from mild forms to severe forms. DSM-IV-TR used to distinguish between 'abuse' (mild) and 'dependence' (severe); DSM-5 now specifies the severity as mild (2–3 symptoms for substance-related disorders; 4–5 symptoms for gambling disorder), moderate (4–5 symptoms; 6–7 symptoms) and severe (6 or more symptoms; 8–9 symptoms). 'Addiction' is commonly associated with severe problems in relation to substance-related or behavioural disorders. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 485.

[69] Ibid., at 483–585.

[70] Criterion 8 of alcohol and tobacco use disorder is not well suited for the gambling environment: gambling behaviour does generally not take place in physically hazardous situations. This may be different with certain remote channels (e.g., use of mobile devices behind the wheel). With regard

Table 9.1 Diagnostic criteria of alcohol use disorder, tobacco use disorder, and gambling disorder according to DSM-5

Alcohol use disorder	Tobacco use disorder	Gambling disorder
A problematic pattern of alcohol use leading to clinically significant impairment of distress, as manifested by at least two of the following, occurring within a 12-month period:	A problematic pattern of tobacco use leading to clinically significant impairment of distress, as manifested by at least two of the following, occurring within a 12-month period:	A. Persistent and recurrent problematic gambling behaviour leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:
1. Alcohol is often taken in **larger amount or over a longer period** than was intended	1. Tobacco is often taken in **larger amount or over a longer period** than was intended	3. Has made repeated **unsuccessful efforts to control**, cut back, or stop gambling
2. There is a persistent desire or **unsuccessful efforts to cut down or control** alcohol use	2. There is a persistent desire or **unsuccessful efforts to cut down or control** tobacco use	3. Has made repeated **unsuccessful efforts to control**, cut back, or stop gambling
3. A **great deal of time** is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects	3. A **great deal of time** is spent in activities necessary to obtain or use tobacco	4. Is **often preoccupied** with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble)
4. Craving, or a **strong desire or urge** to use alcohol	4. Craving, or a **strong desire or urge** to use tobacco	(*Feelings of craving and compulsion are not object-specific. They are characteristic of addictive consumption in general. The* ***feeling of compulsion****, in particular in situations of escape, is expressed in criterion 5*: **Often gambles when feeling distressed** (e.g., helpless, guilty, anxious, depressed)
5. Recurrent alcohol use resulting in a failure to fulfil major role obligations at work, school, or home	5. Recurrent tobacco use resulting in a failure to fulfil major role obligations at work, school, or home (e.g., interference with work)	(*This criterion is similar to criterion 7 of alcohol and tobacco use disorder. The failure to fulfil the role ultimately leads to jeopardizing or losing a significant relationship, job or educational or career opportunity, confer criterion 8 of gambling disorder. The criterion is not object-specific, but characteristic of addictive consumption in general*)
6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol	6. Continued tobacco use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of tobacco (e.g., arguments with others about tobacco use)	(*Continuation of consumption despite detrimental consequences is not object-specific. They are characteristic of addictive consumption in general*)

7. Important **social**, **occupational**, **or recreational** activities **are given up or reduced** because of alcohol use	7. Important **social**, **occupational**, **or recreational** activities **are given up or reduced** because tobacco use	8. Has **jeopardized or lost a** significant **relationship**, **job or educational or career opportunity** because of gambling
8. Recurrent alcohol use in situations in which it is physically hazardous	8. Recurrent tobacco use in situations in which it is physically hazardous (e.g., smoking in bed)	(*Gambling generally takes place in a safe setting, in particular in casinos. Remote channels (e.g., mobile phones) may be more suited to involve physically hazardous situations (e.g., behind the wheel*)
9. Alcohol use in continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol	9. Tobacco use in continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by tobacco	(*Continuation of consumption despite knowledge of gambling as the source of problem is not object-specific. It is characteristic of addictive consumption in general*)
10. **Tolerance**, as defined by either of the following:	10. **Tolerance**, as defined by either of the following:	1. Needs to gamble with **increasing amounts** of money in order **to achieve the desired excitement**
a. A need for **markedly increased amounts** of alcohol to achieve **intoxication or desired effect**	a. A need for **markedly increased amounts** of tobacco to achieve **the desired effect**	
b. A markedly diminished effect with continued use of the same amount of alcohol	b. A markedly diminished effect with continued use of the same amount of tobacco	
11. **Withdrawal**, as manifested by either of the following:	11. **Withdrawal**, as manifested by either of the following:	2. Is **restless or irritable** when attempting to cut down or stop gambling
a. The characteristic withdrawal syndrome for alcohol (refer to Criteria A and B of the criteria set for alcohol withdrawal, pp. 499–500)	a. The characteristic withdrawal syndrome for tobacco (refer to Criteria A and B of the criteria set for tobacco withdrawal)	
b. Alcohol (or closely related substance, such as benzodiazepine) is taken to relieve or avoid withdrawal symptoms	b. Tobacco (or closely related substance, such as nicotine) is taken to relieve or avoid withdrawal symptoms	

DSM-5, pp. 490, 571 and 585. Bold emphasis and comments with italic emphasis added.

criteria reflect loss of control, continued use in spite of negative consequences as well as craving or compulsion that are characteristic of addiction. Similar to substance-related disorders, impaired control (criteria 3–5 of gambling disorder), social impairment (criterion 8) and pharmacological criteria (criteria 1–2) can be observed among gambling addicts as well.[71]

Finally, the diagnostic criteria of alcohol and tobacco use disorder (4, 5, 6 and 9) that do not find direct equivalents in the wording of the criteria regarding gambling disorder are characteristic of addiction in general. They reflect situations of life where the *compulsive nature of the addictive consumption or behaviour* (criterion 4) results in *adverse consequences* (criteria 5, 6 and 9). The shared compulsiveness and adverse consequences among different addicts become obvious where a 'severe' severity level is diagnosed.[72] Zinberg noted early on that the self-destructive addiction process makes different addicts look very similar.[73] They regularly share deviant behaviour, social drift and delinquency (see Sect. 9.1.3.5 *i.f.*).

9.1.3.4 Addiction Versus Dependence

Dependence and addiction are often used as interchangeable terms in popular literature but *their nature is significantly different*.

Addiction was traditionally associated with drugs. Yet, in its definition of 'addict' already DSM-IV-TR recognised that there may be addictive behavioural patterns beyond the in-take of drugs:

> This term may refer to one who suffers from any **drug addiction** and sometimes to individuals with **other compulsive problem behaviors**.[74]

Shaffer offers a *definition of addiction* that embeds both substances and behaviours. There are a few characteristic 'C-aspects' to addiction. Addiction is characterised by:

---

to the criteria for gambling disorder, there are criteria that specifically relate to the gambling setting:

6. After losing money gambling, often returns another day to get even ("chasing" one's losses).
7. Lies to conceal the extent of involvement with gambling.
9. Relies on others to provide money to relieve desperate financial situations caused by gambling.

[71] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, pp. 483-484.

[72] For this point, namely regarding severity and addiction, cf. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 484–485.

[73] Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use*.

[74] BehaveNet, "Glossaries – addict", available at http://www.behavenet.com/addict (accessed 1 June 2012). Bold emphasis added.

- Behavior that is motivated by emotions ranging along the **Craving** to **Compulsion** spectrum
- **Continued** use in spite of adverse **consequences** and
- **Loss of Control**.[75]

The intense urge to re-engage in the use of a substance or behaviour is characteristic of any form of addiction. Brain imaging is a particularly good way of documenting similar craving-related brain activity for different expressions of addiction. Investigations in the neural correlates of craving states in gambling disorder compared to those in cocaine-use disorder confirmed the general literature on gambling addiction and substance-related addiction.[76]

Dependence differs significantly from the nature of addiction. Not every person who experiences signs and symptoms of dependence is addicted. Patients treated over a certain time with the pain killer methadone, a synthetic opioid that impacts the opioid receptors similar to heroin, may experience neuroadaptive phenomena like tolerance and withdrawal. In the case of *tolerance*, the same amount of methadone, over time, no longer produces the same positive effect as it initially did. In the case of *withdrawal*, the patient reacts restlessly and irritably when trying to reduce methadone intake. The tolerance and withdrawal symptoms in these situations are normal responses to prescribed medication and a mere expression of *physiological dependence*. These responses do not turn patients into methadone addicts. *The physiological dependence will fade over time*.[77]

In stark contrast, an addict has to overcome addiction, that is, a mental health disorder that comes with massive mental and physical challenges as well as very high rates of relapse. Correctly, DSM-5 no longer counts tolerance and withdrawal for those taking medications under medical supervision.[78] The work group concluded that the confusion of dependence and addiction had resulted in withholding adequate doses of opioids from patients with severe pain because of *the fear of* '*producing addiction*'.[79]

9.1.3.5 Commonalities in Empirical Research

The aforementioned reclassification of gambling disorder and reformed understanding of addiction is based on empirical evidence accumulated over several

[75] Shaffer, "What is Addiction?: A Perspective".

[76] Potenza, M.N. (2008). "The Neurobiology of Pathological Gambling and Drug Addiction: An Overview and New Findings", *Philosophical Transactions of the Royal Society London Biological Sciences, 363*(1507), 3181–3189, at 3186.

[77] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, Preface, at xlii.

[78] Ibid., Preface, at xlii.

[79] American Psychological Association (Ed.), "DSM-5 Development – R 37 Gambling Disorder", available at http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210 (accessed 1 June 2012). See also Sect. 9.1.3.5 'Comorbidity'.

decades.[80] That evidence shows manifold commonalities between *substance-related forms of addiction and behavioural addiction* like gambling disorder. These parallels show that public policy on gambling addiction must be considered in and informed by a greater policy on addiction. A *holistic perspective on addiction* dismisses an isolated view on gambling addiction.

Neurobiological Processes and Dopamine Reward System

Research has established that both substances and behaviour can stimulate neurobiological systems. This has been particularly shown in relation to the *dopamine* reward system.[81] The neurotransmitter dopamine is largely seen as a key player in the development and maintenance of drug and behavioural addiction, and the neurobiological circuitry of the central nervous system as the common pathway for addiction.[82] People suffering from different addictive disorders show a similar *pre-use thrill*. Different objects of addiction stimulate similar neurobiological pathways: the biochemical reactions in the brain are similar.[83] Research with magnetic resonance imaging (MRI) has demonstrated an anticipation or pre-use thrill for different objects. Pathological gamblers show the same kind of excitement when shown pictures of casino tables comparable to the effect on cannabis addicts when shown a joint. Former pathological gamblers who had not played for five years show only weak reactions.[84] This shows that the pre-use thrill experience is not chronic and that, *with successful recovery*, *neurobiological reactions fade out over time*. It was further shown that beauty and money can stimulate the dopamine reward system in similar ways as the anticipation of cocaine use in the case of cocaine users.[85] Our reward system is open to accommodate many different substances and behaviours that we may

---

[80] Section 9.1.3.5 and the therein cited literature are largely based on Shaffer, H.J., LaPlante, D.A., LaBrie, R.A. et al. (2004b). "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology", *Harvard Review of Psychiatry, 12*(6), 367–374.

[81] Betz, C., Mihalic, D., Pinto, M.E. et al. (2000). "Could a Common Biochemical Mechanism Underlie Addictions?", *Journal of Clinical Pharmacy and Therapeutics, 25*(1), 11–20; Wise, R.A. (1996), "Addictive Drugs and Brain Stimulation Reward", *Annual Review of Neuroscience, 19*, 319–340; Hyman, S.E. (1994), "Why Does the Brain Prefer Opium to Broccoli?", *Harvard Review of Psychiatry, 2*(1), 43–46; Daigle, R.D., Clark, H.W., and Landry, M.J. (1988). "A Primer on Neurotransmitters and Cocaine", *Journal of Psychoactive Drugs, 20*(3), 283–295.

[82] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[83] Potenza, M.N. (2001). "The Neurobiology of Pathological Gambling", *Seminars in Clinical Neuropsychiatry, 6*(3), 217–226.

[84] "*Kaufen bis der Arzt kommt*", NZZ am Sonntag, 22 April 2007.

[85] Breiter, H.C., Aharon, I., Kahneman, D. et al. (2001). "Functional Imaging of Neural Responses to Expectancy and Experience of Monetary Gains and Losses", *Neuron 30*(2), 619–639; Aharon, I., Etcoff, N., Ariely, D. et al. (2001). "Beautiful Faces Have Variable Reward Value: fMRI and Behavioral Evidence", *Neuron, 32*(3), 537–551.

experience in some positive way. Next to dopamine, various other neurochemical factors have been described.[86] Neurobiological research can serve to improve cognitive-behavioural treatments.[87]

Comorbidity: Psychopathology and Addiction

It is important to note that gambling disorder and other addictive disorders are regularly *accompanied by additional disorders*. Prevalence rates of substance-related disorders in North American studies that are similar or higher than those of gambling disorder include opioid '*dependence*'[88] 1.4 %,[89] cocaine dependence 2.8 %,[90] and amphetamine dependence 2.0 %.[91] Among those rates relating to psychopathology, one can find anti-social personality disorder 3.6 %,[92] obsessive-compulsive disorder 1.6 %,[93] schizophrenic disorders 0.6 %,[94] anorexia nervosa 0.6%[95] and bulimia nervosa 1.0 %.[96]

---

[86] Bellegarde, J.D., and Potenza, M.N., "Neurobiology of Pathological Gambling" in *What is Addiction?*, Ross, D., Kincaid, H., Spurret, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, 27–51, at 31–35.

[87] Potenza, M.N., Balodis, I.M., Franco, C.A. et al., "Neurobiological Considerations in Understanding Behavioral Treatments for Pathological Gambling", *Psychology of Addictive Behaviors*, Advance online publication: 2013, April 15.

[88] Up to DSM-IV-TR, substance use disorder used to be categorised as substance ‚abuse' (mild forms) and substance ‚dependence' (more severe forms). DSM-5 uses the overarching term substance use disorder, with the severity ranging from mild to moderate and severe. The DSM-IV-TR severity level dependence corresponds to the DSM-5 levels moderate (4–5 diagnostic criteria) and severe (6 or diagnostic criteria). See also Sect. 9.1.3.4.

[89] Conway, K.P., Compton, W., Stinson, F.S. et al. (2006). "Lifetime Comorbidity of DSM-IV Mood and Anxiety Disorders and Specific Drug Use Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", *Journal of Clinical Psychiatry, 67*(2), 247–257.

[90] Ibid.

[91] Compton, W.M., Conway, K.P., Stinson, F.S. et al. (2005). "Prevalence, Correlates, and Comorbidity of DSM-IV Antisocial Personality Syndromes and Alcohol and Specific Drug Use Disorders in the United States: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", *Journal of Clinical Psychiatry, 66*(6), 677–685.

[92] Ibid.

[93] Kessler, R.C., Berglund, P., Demler, O. et al. (2005). "Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication", *Archives of Clinical Psychiatry, 62*(6), 593–602.

[94] Goldner, E., Hsu, L., Waraich, P. et al. (2002). "Prevalence and Incidence Studies of Schizophrenic Disorders: A Systematic Review of the Literature", *Canadian Journal of Psychiatry, 47*(9), 833–843.

[95] Hudson, J.I., Hiripi, E., Pope Jr., H.G. et al. (2007). "The Prevalence and Correlates of Eating Disorders in the National Comorbidity Survey Replication", *Biological Psychiatry, 61*(3), 348–358.

[96] Ibid.

European studies too confirm that gambling disorder is one mental disorder among many other mental disorders. As noted earlier, the past-year prevalence of gambling disorder varies in Europe between 0.25 % and 1 % (see Sect. 9.1.2.2 *i.f.*). *Wittchen* et al. measured the *size and burden of mental disorders in Europe*. They identified past-year prevalence rates for alcohol '*dependence*'[97] (3.4 %), cannabis dependence (1.05 %) and opioid dependence (0.25 %). Prevalence rates similar to those of gambling disorder related to Borderline Personality Disorder (0.7 %) and Eating Disorders (0.85 %). By far the most prevalent mental disorders were anxiety disorders (14 %) and major depression (6.9 %).[98]

How do various mental disorders relate to each other? Scholarship has established the so-called phenomenon of *comorbidity*, that is, the occurrence of one or several disorders in addition to a primary disorder. High rates of comorbidity between psychiatric and substance use disorders have been found in studies relating to the general population[99] as well as to specific sub-groups.[100] People suffering from substance use disorders show increased levels of psychopathology, including the aforementioned highly prevalent depressions and anxiety disorders.[101] Other studies

[97] Up to DSM-IV-TR, substance use disorders used to be categorised as substance ‚abuse' (mild forms) and substance ‚dependence' (more severe forms). DSM-5 uses the overarching term substance use disorder, with the severity ranging from mild to moderate and severe. The DSM-IV-TR severity level dependence corresponds to the DSM-5 levels moderate (4 or more diagnostic criteria) and severe. See also Sect. 9.1.3.4.

[98] Wittchen, H.U., Jacobi, F., Rehm, J. et al. (2011). "The Size and Burden of Mental Disorders and Other Disorders of the Brain in Europe", *European Neuropsychopharmacology, 21*(9), 655–679.

[99] Cunningham-Williams, R.M., Cottler, L.B., Compton, W.M.I. et al. (1998). "Taking Chances: Problem Gamblers and Mental Health Disorders – Results from the St. Louis Epidemiologic Catchment Area Study", *American Journal of Public Health, 88*(7), 1093–1096, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 29.

[100] Relating to adult drug users, in or out of treatment, cf. Cunningham-Williams, R.M., Cottler, L.B., Compton, W. et al. (2000). "Problem Gambling and Comorbid Psychiatric and Substance Use Disorders among Drug Users Recruited from Drug Treatment and Community Settings", *Journal of Gambling Studies, 16*(4), 347–376; Hall, G.W., Carriero, N.J., Takushi, R.Y. et al. (2000). "Pathological Gambling Among Cocaine-Dependent Outpatients", *American Journal of Psychiatry, 157*(7), 1127–1133; relating to homeless persons seeking treatment for substance use disorders, cf. Shaffer, H.J., Freed, C.R., and Healea, D. (2002). "Gambling Disorders among Homeless Persons with Substance Use Disorders Seeking Treatment at a Community Center", *Psychiatric Services, 53*(9), 1112–1117, or adolescent outpatients: Petry, N.M., and Tawfik, Z. (2001). "Comparison of Problem-Gambling and Non-Problem-Gambling Youths Seeking Treatment for Marijuana Abuse", *Journal of the American Academy of Child and Adolescent Psychiatry, 40*(11), 1324–1331, all cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 29.

[101] Lapham, S.C., Smith, E., C'De Baca, J. et al. (2001). "Prevalence of Psychiatric Disorders among Persons Convicted of Driving while Impaired", *Archives of General Psychiatry, 58*(10), 943–949; Silk, A., and Shaffer, H. (1996). "Dysthymia, Depression, and a Treatment Dilemma in a Patient with Polysubstance Abuse", *Harvard Review of Psychiatry, 3*(5), 279–284; Tomasson, K., and Vaglum, P. (1996). "Psychopathology and Alcohol Consumption among Treatment-Seeking Alcoholics: A Prospective Study", *Addiction, 91(*7), 1019–1030; Kessler, R.C., Crum, R.M., Warner, L.A. et al. (1997). "Lifetime Co-occurrence of DSM-III-R Alcohol Abuse and Dependence With Other Psychiatric Disorders in the National Comorbidity Survey", *Archives of General Psychiatry, 54*(4), 313–321.

have confirmed that people engaging in substance abuse[102] have higher rates of psychopathological disorders such as anxiety and depression,[103] and vice versa.[104]

Comorbidity was also demonstrated in relation to gambling disorder. Petry found in the national epidemiologic survey on alcohol and related conditions that *most pathological gamblers suffered from co-occurring disorders*. Of the pathological gamblers, 75 % had an alcohol use disorder, 60 % had nicotine use disorder and 38 % had a drug use disorder.[105] Other studies on gambling disorder have found clearly increased rates of substance use disorders too.[106] Similarly, people with psychoactive substance abuse as the primary disorder have clearly increased rates of gambling disorder.[107]

---

[102] Up to DSM-IV-TR, the term 'abuse' was used up to describe mild forms of substance-related disorders; severe forms were described as 'dependence. DSM-5 uses the term 'disorder' with the possibility of specifying severity levels ranging from mild over moderate to severe. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 484–485.

[103] Rado, S. (1933). "The Psychoanalysis of Pharmacothymia (Drug Addiction)", *Psychoanalytic Quarterly, 2*(1), 1–23; Lapham, Smith, C'De Baca et al., "Prevalence of Psychiatric Disorders among Persons Convicted of Driving while Impaired"; Silk, and Shaffer, "Dysthymia, Depression, and a Treatment Dilemma in a Patient with Polysubstance Abuse"; Feigelman, W., Wallisch, L.S., and Lesieur, H.R. (1998). "Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study", *American Journal of Public Health, 88*(3), 467–470; Kessler, Crum, Warner et al., "Lifetime Co-occurrence of DSM-III-R Alcohol Abuse and Dependence With Other Psychiatric Disorders in the National Comorbidity Survey"; Tomasson, and Vaglum, "Psychopathology and Alcohol Consumption among Treatment-Seeking Alcoholics: A Prospective Study".

[104] Merikangas, K.R., Mehta, R.L., Molnar, B.E. et al. (1998). "Comorbidity of Substance Use Disorders with Mood and Anxiety Disorders: Results of the International Consortium in Psychiatric Epidemiology", *Addictive Behaviors, 23*(6), 893–907; Regier, D.A., Farmer, M.E., Rae, D.S. et al. (1990). "Comorbidity of Mental Disorders with Alcohol and Other Drug Abuse. Results from the Epidemiologic Catchment Area (ECA) Study", *JAMA – The Journal of the American Medical Association, 264*(19), 2511–2518; Whalen, C.K., Jamner, L.D., Henker, B. et al. (2001). "Smoking and Moods in Adolescents with Depressive and Aggressive Dispositions: Evidence from Surveys and Electronic Diaries", *Health Psychology, 20*(2), 99–111; Feigelman, Wallisch, and Lesieur, "Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study".

[105] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions".

[106] Black, W., and Moyer, T. (1998). "Clinical Features and Psychiatric Comorbidity of Subjects With Pathological Gambling Behavior", *Psychiatric Services, 49*(11), 1434–1439; Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis"; Feigelman, Wallisch, and Lesieur, "Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study"; Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication"; Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions".

[107] Lesieur, H.R., and Heineman, M. (1988). "Pathological Gambling Among Youthful Multiple Substance Abusers in a Therapeutic Community", *British Journal of Addiction, 83*(7), 765–771; Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis"; Feigelman, Wallisch, and Lesieur, "Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study".

Pathological gamblers also have increased levels of psychopathology. Petry found that around 61 % of the pathological gamblers experienced a personality disorder (for example, schizoid, antisocial), almost 50 % a mood disorder (for example, depression) and around 41 % an anxiety disorder (for example, social phobia).[108] Comorbidity was also present among compulsive shoppers where increased levels of substance disorders and psychiatric disorders were identified.[109] The conclusion is that people suffering from a substance-related or behavioural disorder are much more likely to exhibit (an) additional disorder(s).[110] While the co-existence is well established, the chronological order between psychopathology, substance-related and behavioural disorders has only been partly discovered.[111]

Comorbidity is a well-established phenomenon in relation to gambling disorder. The National Comorbidity Study Revised discovered important findings with regard to the order of gambling disorder and co-morbid diseases. In this study, participants reported in 75 % of cases that the 'other' disorder preceded gambling disorder. The study further showed that many people did seek and received treatment for their various disorders, except for their gambling problems for which no formal treatment was received.[112] This may attest to a low awareness of specialised programmes or to their limited existence.

Addiction Hopping

A phenomenon that somehow reminds of comorbidity is 'addiction hopping'. It describes the fact that addicts may quit one form of addiction *simply to engage in another form*. They may also lower the level of consumption of the old form while

---

[108] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions".

[109] Lejoyeux, M., Ades, J., Tassain, V. et al. (1996). "Phenomenology and Psychopathology of Uncontrolled Buying", *American Journal of Psychiatry, 153*(12), 1524–1529; Baker, A., *Serious Shopping: Essays in Psychotherapy and Consumerism*, Free Association Books, 2000; Christenson, G.A., Faber, R.J., de Zwaan, M. et al. (1994). "Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity", *Journal of Clinical Psychiatry, 55*(1), 5–11.

[110] Caetano, R., Schafer, J., and Cunradi, C.B. (2001). "Alcohol-Related Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States", *Alcohol Research and Health, 25*(1), 58–65; Shaffer, H.J., and Hall, M.N. (2002). "The Natural History of Gambling and Drinking Problems among Casino Employees", *The Journal of Social Psychology, 142*(4), 405–424; Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis".

[111] For instance, it is suggested that anxiety is a significant predisposed factor for gambling and alcohol addiction: Premper, V., and Schulz, W. (2008). "Komorbidität bei Pathologischem Glücksspiel", *SUCHT-Zeitschrift für Wissenschaft und Praxis/Journal of Addiction Research and Practice, 54*(3), 131–140; this publication is part of an earlier doctoral thesis: Premper, V., *Komorbide psychische Störungen bei pathologischen Glücksspielern – Krankheitsverlauf und Behandlungsergebnisse*, Lengerich: Pabst Science Publishers, 2006.

[112] Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

starting or increasing the consumption of a new form.[113] Addiction hopping has been shown for gambling disorder and substance abuse[114] as well as for various substances,[115] like alcohol and narcotics.[116] The availability of *some* objects of addiction in people's environment appears to be more decisive than personal preferences for certain objects of addiction.[117]

Vulnerability

The term 'vulnerability' describes the *likeliness of a person or population group to be affected by a certain disease*. *Risk factors and protective factors* can be found 'in' the host (for example, genes, neurobiological factors) and the environment (for example, psychosocial factors, availability). Some people have to learn to live with a higher vulnerability than others. While anybody can develop disordered gambling, studies show that its prevalence varies between population groups. Particularly vulnerable are:[118] *adolescents*, *substance abusers*, *casino employees (to some extent)*, *males*, *widowed*, *separated or divorced persons*, *and ethnic minorities*, *for instance African-Americans and Native Americans*.[119] Higher prevalence rates can also be noted with people *who start gambling at a young age*.[120]

---

[113] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[114] Blume, S.B. (1994). "Pathological Gambling and Switching Addictions: Report of a Case", *Journal of Gambling Studies, 10*(1), 87–96.

[115] Çepik, A., Arikan, Z., Boratav, C. et al. (1995). "Bulimia in a Male Alcoholic: A Symptom Substitution in Alcoholism", *International Journal of Eating Disorders, 17*(2), 201–204; Shaffer, H.J., and LaSalvia, T.A. (1992). "Patterns of Substance Use among Methadone Maintenance Patients. Indicators of outcome", *Journal of Substance Abuse Treatment, 9*(2), 143–147; Conner, B.T., Stein, J.A., Longshore, D. et al. (1999). "Associations Between Drug Abuse Treatment and Cigarette Use: Evidence of Substance Replacement", *Experimental and Clinical Psychopharmacology, 7*(1), 64–71.

[116] Hser, Y.I., Anglin, M.D., and Powers, K. (1990). "Longitudinal Patterns of Alcohol Use by Narcotics Addicts", *Recent Developments in Alcoholism: An Official Publication of the American Medical Society on Alcoholism, the Research Society on Alcoholism, and the National Council on Alcoholism, 8*, 145–171.

[117] Harford, R.J. (1978). "Drug Preferences of Multiple Drug Abusers", *Journal of Consulting and Clinical Psychology, 46*(5), 908.

[118] For a general overview, cf. Whelan, Steenbergh, and Meyers, *Problem and Pathological Gambling*, at 7–11, and the therein cited literature.

[119] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions".

[120] Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication". Regarding adolescent gamblers, cf. in particular Derevensky, J.L., *Teen Gambling: Understanding a Growing Epidemic*, Lanham, MD: Rowman & Littlefield Publishers, 2012.

Socioeconomic factors play an important role,[121] such as education and income.[122] People who have committed illegal acts have also a higher probability for disordered gambling.[123] The financial constraints lead many disordered gamblers to engage in criminal activities. The self-help group Gamblers Anonymous[124] claims that more than half of all pathological gamblers eventually turn to some form of financial crime.[125]

Immediate family members of pathological gamblers have a higher risk of developing the disorder themselves.[126] In particular, *parental gambling disorder* is known to be a risk factor: children of pathological gamblers have a higher probability to develop gambling disorder (trans-generational transmission).[127]

Genetic Risks

Neurobiologists have noted that genetic contributions to gambling disorder seemed substantial.[128] Genetic factors, which increased the risk of abusing a certain substance among male twins, also increased the likelihood of abusing another substance.[129] Similarly, genetic and environmental factors were found to be significant for disordered substance use *in general* among female twins. No evidence was found for a heritability of problematic use of only one specific substance.[130] Shared genetic vulnerability has been expressly demonstrated between alcohol disorder and gambling disorder[131] but also as widespread as the range from drug addiction to

---

[121] Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 28–29.

[122] Whelan, Steenbergh, and Meyers, *Problem and Pathological Gambling*, at 7–11, and the therein cited literature.

[123] Johansson, A., Grant, J.E., Kim, S.W. et al. (2009). "Risk Factors for Problematic Gambling: A Critical Literature Review", *Journal of Gambling Studies, 25*(1), 67–92.

[124] "Gamblers Anonymous", available at http://www.gamblersanonymous.org.

[125] Bulkeley, W.M., "*Video Betting, Called 'Crack of Gambling', Is Spreading*", Wall Street Journal, 14 July 1992, cited in: Davidson, D.K., *Selling Sin: The Marketing of Socially Unacceptable Products*, 2nd ed., Westport, CT: Praeger Publishers, 2003.

[126] Black, D.W., Monahan, P.O., Temkit, M.H. et al. (2006). "A Family Study of Pathological Gambling", *Psychiatry Research, 141*(3), 295–303.

[127] Hayer, T., Berhart, C., and Meyer, G. (2006). "Kinder von pathologischen Glücksspielern: Lebensbedingungen, Anforderungen und Belastungen", *Abhängigkeiten: Forschung und Praxis der Prävention und Behandlung, 12*(2), 60–77.

[128] Williams, W.A., and Potenza, M.N. (2008). "The Neurobiology of Impulse Control Disorders", *Revista Brasileira de Psiquiatria, 30*(1), Supplement, S24–S30.

[129] Kendler, K.S., Jacobson, K.C., Prescott, C.A. et al. (2003a). "Specificity of Genetic and Environmental Risk Factors for Use and Abuse/Dependence of Cannabis, Cocaine, Hallucinogens, Sedatives, Stimulants, and Opiates in Male Twins", *American Journal of Psychiatry, 160*(4), 687–695.

[130] Karkowski, L.M., Prescott, C.A., and Kendler, K.S. (2000). "Multivariate Assessment of Factors Influencing Illicit Substance Use in Twins From Female Female Pairs", *American Journal of Medical Genetics, 96*(5), 665–670.

[131] Slutske, W.S., Eisen, S., True, W.R. et al. (2000). "Common Genetic Vulnerability for Pathological Gambling and Alcohol Dependence in Men", *Archives of General Psychiatry, 57*(7), 666–674.

compulsive running.[132] This suggests that the presence of a general addictive tendency in persons is not object-specific.[133] Genetic risk factors are therefore responsible for an *increased risk to develop some form of addiction*.[134] There is ample brain, behavioural and genetic evidence pointing to shared vulnerabilities that underlie the pathological pursuit of substance and non-substance rewards.[135]

Risks Linked to the Environment

The environment has been shown to influence the probability of developing substance-related or behavioural disorders. Increased vulnerability has been demonstrated in relation to substance abuse for college students.[136] Many heroin *addicted Vietnam veterans* recovered surprisingly quickly once they found themselves in a different social setting.[137] Beside risk factors, the social environment too offers protective factors such as *social support and religiosity*.[138] There are also factors beyond social environmental ones. *Laws and other norms* may impact people's behaviour as well. An increasingly important function of law in the welfare state is the *regulation of risks*. Gambling regulation constitutes an environmental

---

[132] Werme, M., Lindholm, S., Thorén, P. et al. (2002). "Running Increases Ethanol Preference", *Behavioural Brain Research, 133*(2), 301–308; Nestler, E.J., Barrot, M., and Self, D.W. (2001). "FosB: A Sustained Molecular Switch for Addiction", *Proceedings of the National Academy of Sciences of the United States of America, 98*(20), 11042–11046; Werme, M., Thorén, P., Olson, L. et al. (2000). "Running and Cocaine Both Upregulate Dynorphin mRNA in Medical Caudate Putamen", *European Journal of Neuroscience, 12*(8), 2967–2974.

[133] Bierut, L.J., Dinwiddie, S.H., Begleiter, H. et al. (1998). "Familial Transmission of Substance Dependence: Alcohol, Marijuana, Cocaine, and Habitual Smoking", *Archives of General Psychiatry, 55*(11), 982–988.

[134] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[135] Frascella, J., Potenza, M.N., Brown, L.L. et al. (2010). "Shared Brain Vulnerabilities Open the Way For Nonsubstance Addictions: Carving Addiction At a New Joint?", *Annals of the New York Academy of Sciences, 1187*(1), 294–315.

[136] Christiansen, M., Vik, P.W., and Jarchow, A. (2002). "College Student Heavy Drinking in Social Contexts Versus Alone", *Addictive Behaviors, 27*(3), 393–404; Wechsler, H., Davenport, A.E., Dowdall, G.W. et al. (1997). "Binge Drinking, Tobacco, and Illicit Drug Use and Involvement in College Athletics: A Survey of Students at 140 American Colleges", *Journal of American College Health, 45*(5), 195–200.

[137] Robins, L.N. (1993). "The Sixth Thomas James Okey Memorial Lecture. Vietnam Veterans' Rapid Recovery from Heroin Addiction: A Fluke or Normal Expectation?", *Addiction, 88*(8), 1041–1054.

[138] Bilt, J.V., Dodge, H.H., Pandav, R. et al. (2004). "Gambling Participation and Social Support among Older Adults: A Longitudinal Community Study", *Journal of Gambling Studies, 20*(4), 373–389; Kendler, K.S., Liu, X.Q., Gardner, C.O. et al. (2003b). "Dimensions of Religiosity and Their Relationship to Lifetime Psychiatric and Substance Use Disorders", *American Journal of Psychiatry, 160*(3), 496–503; Vance, T., Maes, H.H., and Kendler, K.S. (2010). "Genetic and Environmental Influences on Multiple Dimensions of Religiosity: A Twin Study", *The Journal of Nervous and Mental Disease, 198*(10), 755–761.

factor.[139] Yet, gambling regulation may not be *the* decisive environmental factor as often assumed in calls for regulation; at least, that is what the results of a pan-European study cautiously suggest.[140]

Addicts Experience Neuroadaptation, Psychosocial Sequelae and Deviant Behaviour

Zinberg stated, "the experience of addiction diminishes personality differences and makes all compulsive users seem very much alike."[141] Addicts share similar experiences. Neuroadaptive processes (tolerance and withdrawal) have been shown for substance-related and behavioural addiction. Tolerance is the experience of the diminution of the sought after effect due to changes of biochemical brain processes. Besides many substance-related forms of addiction, this has been evidenced in the case of gambling disorder too.[142] Pathological gamblers regularly show a need to gamble at increased frequency or dose (higher amounts), and the activity increasingly dominates their schedule.[143] Withdrawal is known in the context of a sudden abstinence from an addictive behavioural pattern. Pathological gamblers show similar withdrawal symptoms as people addicted to substances.[144]

Addicts also share common *psychosocial sequelae*.[145] They experience negative feelings of guilt and shame or mood disorders like dysthymia. Such sequelae have been demonstrated for gambling disorder. Deviant behaviour, social drift and delinquency can regularly be found among addicts. The *compulsive nature of addiction* is the dominating element in their lives.[146] Delinquency is only a

---

[139] Planzer, S., and Alemanno, A. (2010). "Lifestyle Risks: Conceptualizing an Emerging Category of Research", *European Journal of Risk Regulation 4*, 335–337.

[140] Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe".

[141] Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use*.

[142] Wray, I., and Dickerson, M.G. (1981). "Cessation of High Frequency Gambling and 'Withdrawal' Symptoms", *British Journal of Addiction, 76*(4), 401–405.

[143] Cf. the diagnostic criteria in DSM-5:

"1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement. […]

4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble). […]"

American Psychological Association (Ed.), "DSM-5 Development – R 37 Gambling Disorder", available at http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210 (accessed 1 June 2012).

[144] Wray, and Dickerson, "Cessation of High Frequency Gambling and 'Withdrawal' Symptoms"; cf. criteria DSM-5: "2. Is restless or irritable when attempting to cut down or stop gambling".

[145] Sequela is a condition that results from another disease or injury.

[146] Vaillant, G.E., *The Natural History of Alcoholism: Causes, Patterns, and Paths to Recovery*, Cambridge, MA: Harvard University Press, 1983; Christenson, Faber, de Zwaan et al., "Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity"; Black, and Moyer, "Clinical Features and Psychiatric Comorbidity of Subjects With Pathological Gambling Behavior"; Shaffer, and Hall, "The Natural History of Gambling and Drinking Problems among Casino Employees".

consequence of the addiction since the maintenance of many forms of addictive consumptions or behaviours demands financial means.

9.1.4 Shared Development of Addiction

9.1.4.1 The Positive Experience

There is a fundamental aspect to addiction that is all too often neglected. *No addict is seeking* addiction, but every addict is longing for *the positive experience* that he initially discovered.[147] Scholarship refers to this experience as the 'desirable subjective shift'.[148] Each addict finds something in the addictive behavioural pattern that he engages in and is longing to re-experience this positive effect over and over again. He wishes to capture the bliss of the high that he initially experienced.[149]

Khantzian and Albanese concluded that addiction can be described as a form of *self-medication*. Human distress and psychological suffering are at the root of addictive disorders. The interaction with objects of addiction can offer relief, sooth, calm and change distress. This emotional effect – not the object as such (sic!) – gives objects of addiction, in a given psychosocial environment, an enormous power to dominate a person's life. Akin to substance use disorders, the authors see behavioural disorders as serving to offer relief from enduring painful feelings.[150]

The *motives* of addicts are all too often neglected. They can be manifold: an adolescent suffering from social exclusion may by engaging in alcohol abuse to seek recognition by his peer group.[151] Elder people may suffer from boredom, and by visiting gambling venues the may experience a decrease in loneliness. These strategies are of course not sustainable and based on the distorted perception that the chosen behaviour only produces positive effects. In this sense, *addiction is an undesired side effect of self-medication*.

The idea of self-medication also *rejects the moral condemnation* that addicts often experience. Many are inclined to condemn people who engage in disordered behaviour, such as alcoholics, nicotine or heroin addicts. Their addiction is seen as a failure of character. What makes it worse for people suffering from a behavioural

---

[147] Lambert, C. (2000). "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction", *Harvard Magazine, 102*(4), 60–68.

[148] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[149] Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

[150] Khantzian, and Albanese, *Understanding Addiction as Self Medication: Finding Hope behind The Pain*.

[151] Regarding the relevance of mood and motives among adolescents specifically, cf. Goldstein, A.L., Stewart, S.H., Hoaken, P.N.S. et al., "Mood, Motives, and Gambling in Young Adults: An Examination of Within- and Between-Person Variations Using Experience Sampling", *Psychology of Addictive Behaviors*, Advance online publication: 2013, June 17.

addiction like gambling disorder is that there is no psychoactive substance that could be co-blamed for the addict's behaviour. This further encourages adopting a judgmental moral stance towards pathological gamblers.[152]

9.1.4.2 Stage Changes

Vaillant observed that the 'addictive personality' did not exist, but addiction tended to distort personality.[153] Empirical evidence indeed supports a 'natural history of addiction': stage changes that addicts typically share.[154] In the early 1970s, a literature review evidenced similar relapse patterns for alcohol, tobacco and heroin, despite the substantial biochemical differences of these substances.[155] As early as in the 1980s, the theoretical basis for the stage change model was already established.[156]

The stage changes of behavioural addictive disorders are similar to those of substance-related addiction.[157] Casino employees, who suffer from excessive gambling, drinking or both, largely show identical histories of relapse, improvement and remission.[158] While the sequence of stages is similar among all addicts, the intensity and duration of each stage varies from person to person.[159] Building on the aforementioned earlier findings on stage changes, Shaffer divided the course of addiction into six stage changes. His model also takes into account the transition phases between stages.[160]

---

[152] This paragraph profited from a discussion with Dr Richard LaBrie of Harvard Medical School.

[153] George Vaillant, interviewed in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

[154] Section 9.1.4.2 and the therein cited literature are largely based on Shaffer, H.J., "The Psychology of Stage Change: The Transition from Addiction to Recovery" in *Substance Abuse: A Comprehensive Textbook*, Lowinson, J.H., Ruiz, P., Millman, R.B., et al. (Eds.), 3rd sub-edition, Baltimore, MD: Lippincott Williams & Wilkins, 1997.

[155] Hunt, W.A., Barnett, L.W., and Branch, L.G. (1971). "Relapse Rates in Addiction Programs", *Journal of Clinical Psychology, 27*(4), 455–456.

[156] For substantial contributions to this concept, cf. Prochaska, J.O., and DiClemente, C.C., "Common Processes of Self-Change in Smoking, Weight Control, and Psychological Distress" in *Coping and Substance Abuse: A Conceptual Framework*, Shiffman, S., and Wills, T. (Eds.), Academic Press, 1985; Vaillant, *The Natural History of Alcoholism: Causes, Patterns, and Paths to Recovery*; cf. also Vaillant, G.E., *The Natural History of Alcoholism Revisited*, Cambridge, MA: Harvard University Press, 1995; Shaffer, H.J., and Jones, S.B., *Quitting Cocaine: The Struggle against Impulse*, Cambridge, MA: Lexington Books 1989; Maisto, S.A., and Connors, G.J., "Assessment of Treatment Outcome" in *Assessment of Addictive Behaviours*, Donovan, D.M., and Marlatt, G.A. (Eds.), 1988, pp. 421–453.

[157] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[158] Shaffer, and Hall, "The Natural History of Gambling and Drinking Problems among Casino Employees".

[159] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

[160] (1) The initiation and emergence of addiction. (2) The realisation that the substance or behaviour produces positive experiences. (3) Over time, the adverse consequences emerge. (4) An increasing feeling of ambivalence: addiction serves while it destroys. The addict finally reaches the turning point and the evolution into quitting can begin. (5) The active quitting process, where the addict pursues behavioural changes and a reorganisation of his lifestyle. Finally, (6) relapse prevention. Cf. ibid., at 100–106.

Initiation

The initiation of addiction necessarily involves a repeated interaction between host and agent. Without this interaction, the specific form of addiction cannot develop; however, this does not mean that no other form of addiction would be developed. Madras estimated that only about 5–10 % of those experimenting with a drug effectively become compulsive users.[161] The large majority of those who try psychoactive substances do not proceed to problematic stages.[162]

Subjective Shift: The Positive Experience

If the intake of a drug were not associated with some positive experience, it would not be continued to the extent that addicts pursue.[163] The same is true for other substances and behaviour. The subjective shift consists in the realisation of an initially positive experience. Khantzian and Albanese argued that the object of addiction serves as medication of at-risk persons who experience *relief from their psychological suffering*.[164] The power of objects of addiction lies not in a specific biochemical composition but in the positive effect that the at-risk persons *experience*.

Adverse Consequences Emerge

Over time, the positive experience is joined by adverse consequences. This is a crucial moment: the *majority of people now manage to restrict*, *regulate or modify their behaviour*. They either moderate or fully stop their behaviour.[165] Addicts, however, fail to adjust their behaviour.

At this point, the dual nature of addiction emerges. The addictive behaviour *serves while it destroys*. This dilemma is the characteristic predicament of addiction:[166] the object of addiction continues to produce (some) positive effects, but the negative effects become more and more dominent.[167] Denial is prevalent: the

---

[161] Bertha Madras in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

[162] Shaffer, H.J., and Gambino, B. (1989). "The Epistemology of "Addictive Disease": Gambling as Predicament", *Journal of Gambling Studies, 5*(3), 211–229; Shaffer, and Jones, *Quitting Cocaine: The Struggle against Impulse*.

[163] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

[164] Khantzian, and Albanese, *Understanding Addiction as Self Medication: Finding Hope behind The Pain*.

[165] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

[166] Shaffer, and Gambino, "The Epistemology of "Addictive Disease": Gambling as Predicament".

[167] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 100–105; Shaffer, H.J., "Denial, Ambivalence and Countertransference Hate" in *The Dynamics and Treatment of Alcoholism: Essential Papers*, Levin, J.D., and Weiss, R.H. (Eds.), Northdale, NJ: Jason Aronson Inc., 1994, pp. 421–437.

addict denies that the adverse consequences result from his detrimental behaviour.[168] Other people or circumstances are blamed as the source of the problems.[169] The uncontrolled and continued pursuit of the detrimental behaviour leads to a *vicious circle*: to minimise the increasingly adverse consequences the detrimental behaviour is continued and intensified.[170] The positive experience is increasingly fading due to *neuroadaptation* (*tolerance*). For that reason, the dose or frequency is augmented.

Ambivalence and Turning Point

The addict reaches the awareness that his addictive behaviour is the sole cause for his problems.[171] He leaves victimisation and denial behind and assumes personal responsibility for his negative life situation. However, this awareness is preceded by a central sub-stage: the characteristic feeling of ambivalence. The addict experiences a *simultaneous desire of both wanting and not wanting to change*.[172] Addicts seem to badly want their substance or behaviour, despite the detrimental consequences.[173] There is an ambivalent aspect to the addict's 'rationality': what the addict desires (emotionally) is not what he actually wants (rationally). He wants to get rid of the detrimental effects of addiction but nevertheless desires the positive interaction with the substance or behaviour. In other words, he wants to keep the positive effects without having to cope with the negative consequences.

Over time, the addict realises two things: first, the adverse consequences of the addiction largely exceed the positive effects and secondly, he cannot get rid of the costs without losing the benefits too. It is often only after that painful realisation process that quitters reach out for assistance. This phase is accompanied by feelings of self-loathing or deterioration of personal values[174] as well as fears relating to a life without the object of addiction. A strong *motivational factor* to quit can be the fear of losing something important in life: a relationship, a child or a job. The experience of 'hitting rock bottom' can function as a wakeup call.[175] At which point in time hitting rock bottom is experienced depends also on environmental factors such as family support, economic and social status.

---

[168] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

[169] Shaffer, H.J., and Robbins, M., "Psychotherapy for Addictive Behavior: A Stage-Change Approach to Meaning Making" in *Psychotherapy and Substance Abuse: A Practitioner's Handbook*, Washton, A. (Ed.), New York: The Guilford Press, 1995, pp. 103–123.

[170] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

[171] Ibid., at 101.

[172] Ibid., at 102.

[173] Schroeder, T. "Irrational Action and Addiction" in *What Is Addiction?*, Ross, D., Kincaid, H., Spurret, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 391–407, at 391.

[174] Shaffer, and Jones, *Quitting Cocaine: The Struggle against Impulse*.

[175] George Vaillant in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

Active Quitting

Active quitting is characterised by subsequent observable action. Old behaviours become devalued, new ones become meaningful. There are two main approaches to quitting: 'tapered' and 'cold turkey'. The majority of quitters fall into one approach or the other.[176] Environmental protective factors are crucial; people and institutions can offer support. The latter can be found in the family circle, religious circle or in a newly built or regained circle of friends who are not associated with the (former) addictive behavioural pattern. Forms of self-development such as sports, music or professional re-orientation can offer further support. The addict must have a clear strategy of how to overcome the urge to gamble.[177]

Relapse and Recovery

Only few addicts manage to avoid relapse.[178] *High relapse rates* of up to 90 % are common.[179] A single slip of reengaging in the old addictive behaviour can lead to full relapse.[180] It is important for the recovering person to maintain the newly gained behavioural patterns. Their integration in daily routine is crucial for the prevention of a relapse.[181] Quitters need to substitute old behavioural patterns with meaningful new ones as the *initial motives* are still present and want to be satisfied. The addict must identify an alternative to the former detrimental behaviour.[182] Where research gaps on successful treatment still exist, treatment for gambling disorder can be informed by experiences from substance-related disorders.[183] Unsurprisingly, *addiction hopping* is a frequently observed phenomenon, and *co-morbidity* forms an adverse factor for relapse prevention. Some may also seek relief in *pharmacological products* as substitutes; a risky option that generally backfires.[184]

---

[176] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 102.

[177] For successful strategies, cf. Strategies for Managing Your Gambling.

[178] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 102.

[179] Gene Heyman indicated estimates of 67–90 % for alcohol, opiate, cocaine and tobacco: Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

[180] Marlatt, G.A., and Gordon, J.R., *Relapse Prevention: Maintenance Strategies in the Treatment of Addictive Behaviors*, New York: Guilford Press, 1985.

[181] Brownell, K.D., Marlatt, G.A., Lichtenstein, E. et al. (1986). "Understanding and Preventing Relapse", *American Psychologist, 41*(7), 765–782.

[182] Gene Heyman in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

[183] Petry, N.M. (2002). "How Treatments for Pathological Gambling Can Be Informed by Treatments for Substance Use Disorders", *Experimental and Clinical Psychopharmacology, 10*(3), 184–192.

[184] Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 102.

9.1.5 Addiction as Syndrome

Various models and theories on addiction were presented in the past.[185] While most scientists agree that addiction is multi-factorial, they disagree on how far any particular influence can explain key aspects of addiction.[186] This chapter has shown that *gambling addiction is not peculiar*; on the contrary, there are striking commonalities between different forms of addiction. After a review of the literature on addictive disorders, Shaffer et al. suggested the syndrome model of addiction.[187]

Addiction is understood as a syndrome that shows *multiple opportunistic expressions* but has a common aetiology.[188] The notion syndrome stands for "a cluster of symptoms and signs related to an abnormal underlying condition."[189] The addiction syndrome can develop into different expressions of addiction, behavioural or substance-related. They all feature *unique sequelae* (for instance, lung cancer in the case of tobacco addiction) as well as *shared manifestations* (for instance, neuroadaptation). The abnormal underlying condition is the same.

As syndrome models typically do, the addiction syndrome model describes major phenomena that can be observed; *characteristic signs and symptoms are put in association to each other*. Syndrome models are regularly used where the cause of the underlying condition is not yet known. The most well known syndrome arguably is AIDS: the Acquired Immune Deficiency Syndrome. A more recent example includes SARS (Severe Acute Respiratory Syndrome). The view of separate and independent 'addictions' is reminiscent of the view espoused in the early days of AIDS diagnosis. Only an increase of independent, separate diseases was initially noted (for instance, pneumonia and herpes).[190] AIDS was originally associated exclusively with homosexuals before it became known that the disease also affects heterosexuals. AIDS was described as a syndrome with characteristic signs and symptoms – and a yet unknown causality. It was only several years later that the aetiology of the syndrome became clear: the HIV (human immunodeficiency virus) caused the various opportunistic sequelae (Fig. 9.3).

---

[185] For a listing of various (and often out-dated) models and theories, cf. Aasved, M.J., *The Biology of Gambling,* The Gambling Theory and Research Series, Vol. III, Springfield, IL: Charles C Thomas Publisher Ltd., 2003.

[186] Ross, and Kincaid, "Introduction: What Is Addiction?", at vi-vii.

[187] Section 9.1.5 is largely based on Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[188] Ibid., at 367–368.

[189] Ibid.

[190] Ibid.

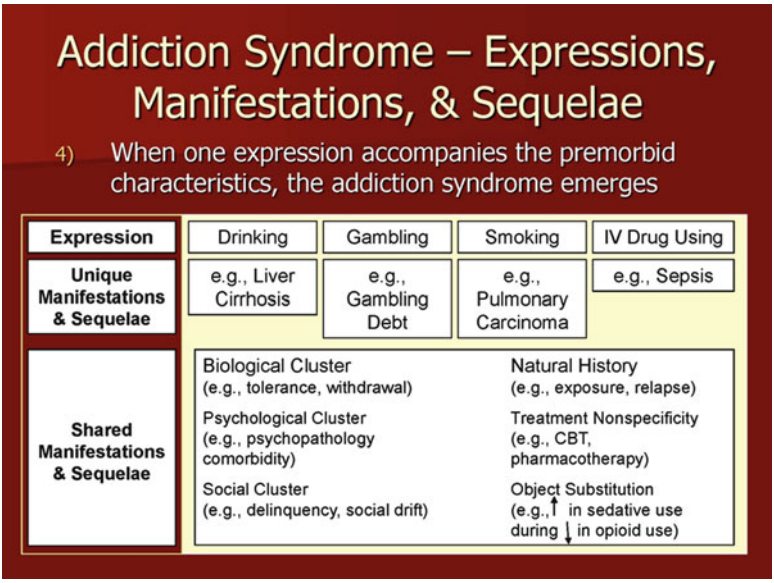

Fig. 9.3 Addiction syndrome (Reproduced from Shaffer et al. (2004b))

9.1.6 Results

Section 9.1 gave an introduction to the empirical evidence regarding the nature and mechanisms of gambling addiction. It had a two-fold purpose. First, it *laid the ground for* Sect. 9.2, which will analyse the proportionality review practice in the gambling cases through the prism of empirical evidence. Secondly, it addressed the question whether empirical evidence on gambling addiction justified a perception of gambling addiction as being of '*peculiar nature*'.

Gambling addiction is known in the leading medical manuals (DSM, ICD) as *gambling disorder* (*pathological gambling*). DSM-5 describes gambling disorder as a "[p]ersistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress." It offers nine diagnostic criteria; four must be fulfilled to meet the diagnosis. Sub-clinical problems (less than four criteria met) are often referred to as 'problem gambling'; the term 'disordered gambling' is used as an overarching term (problem gambling and gambling disorder). *DSM-5 reclassified gambling disorder under* '*Substance-Related and Addictive Disorders*', thus jointly with substance use disorders.

Next, the global epidemiology of gambling disorder was presented: many studies around the globe show that *0.5 to 2.0 % of the general population* experienced gambling disorder in their life. 'Past-year' rates are about 50 % lower. *North America* has the most solid epidemiological data situation. The first study in 1979 found a rate of life-time gambling disorder of 0.7 % and rates more than doubled until 2002. The most recent studies found only rates of 0.4 and 0.6 %. The rates are

therefore even slightly lower than in 1979 in spite that a bigger percentage of people gamble today, and the exposure to games of chance is much bigger. Similar observations have been made in Europe; researchers explain this phenomenon with *social adaptation* processes (see Sect. 9.2.5.2).

This section showed the *manifold commonalities* that exist between substance-related expressions of addiction and gambling disorder. The addiction to games of chance is not peculiar but very similar to other expressions of addiction. DSM-5 offers *very similar diagnostic criteria for substance use disorder and gambling disorder*. Somebody addicted to a substance is likely to meet similar diagnostic criteria as a pathological gambler.

Besides the criteria in DSM-5, the manifold commonalities between different forms of addiction were briefly presented. The numerous parallels include (a) similar *neurobiological* processes (people addicted to different objects show a similar pre-use thrill and similar processes of the dopamine reward system), (b) *comorbidity*: addictive disorders are regularly accompanied by other forms of addiction or psychopathological disorders like anxiety), (c) *addiction hopping* (addicts may quit one form of addiction simply to engage in another form of addiction), (d) *vulnerability and genetic risks* (some population groups are more likely to be affected by pathological gambling, genetic risk factors are responsible for an increased risk to develop *some* form of addiction, not just a specific form of addiction), (e) risks linked to the *environment*, (f) addicts experience *neuroadaptation*, *psychosocial sequelae and deviant behaviour* (people addicted to different objects experience tolerance and withdrawal symptoms as well as psychosocial sequelae like shame or mood disorders).

This section also demonstrated that people addicted to different objects go through similar stages. In chronological order: (a) *initiation* (repeated interaction between host and agent), (b) *subjective shift*: the positive experience (wish to re-experience the positive effect that was once discovered, generally the positive effect relates to a relief from psychological suffering), (c) *adverse consequences* emerge (while the majority of people at this stage restrict their behaviour, addicts fail to do so; vicious circle: to minimise the increasingly adverse consequences the detrimental behaviour is continued at increasing intervals or doses), (d) *ambivalence and turning point* (awareness that addictive behaviour is the sole cause for problems; addict wants to get rid of the detrimental sides of addiction but also does not want to lose the positive effects), (e) *active quitting* (the addict takes observable action and leaves old behavioural patterns behind), (f) *relapse and recovery* (the vast majority of quitters experience relapse; addiction hopping is common; co-morbidity makes quitting even harder).

Of all these characteristic traits of gambling addiction, empirical evidence does not support the view of gambling addiction showing a ‘peculiar nature’. More recently, addiction was described as a *syndrome* that shows multiple opportunistic expressions but shares a common causality. The expressions can be different (e.g. alcoholism, nicotine, gambling) and each expression shows unique sequelae (e.g. lung cancer in the case of nicotine addiction) as well as shared manifestations (e.g. neuroadaptation). The underlying condition is the same.

9.2 Empirical Views on the Proportionality Review of the Court of Justice of the EU

After the general introduction to the nature and mechanisms of gambling addiction, Sect. 9.2 now analyses the proportionality review practice of the Court of Justice through the prism of empirical evidence on gambling addiction. It is inquired to which extent the Court of Justice combined the earlier noted wide margin of appreciation with a meaningful proportionality review. Since the Court of Justice has practised *different standards of review to different (gambling) topics*, this section discusses the Court's proportionality review practice by grouping it into different topics. Where these topics relate to gambling addiction, they are additionally analysed with findings from empirical evidence on gambling addiction.

9.2.1 Definition of Protection Level and Choice of Regulatory Model

In line with its general case law on fundamental freedoms, the Court of Justice has left it to the Member States to define the protection level, which they pursue (see Sects. 3.2 and 3.3). They can also choose the regulatory model that they find appropriate – as long as these choices do not discriminate on grounds of nationality. The corner stones were already set in *Schindler*:

> Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and […] to maintain order in society […] [I]t is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[191]

Until recently, the Court of Justice did not question the necessity of a regulatory model, including that of an exclusive right holder. It did not apply the criterion of the less or least restrictive measure that usually forms part of the necessity test as observed in Sect. 3.3. The presence of less restrictive regulatory models in other countries, which pursue a similar protection level, was irrelevant in the view of the Court of Justice:

> However, the power to determine the extent of the protection to be afforded by a Member State on its territory […] forms part of the national authorities' power of assessment […]. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

[191] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 61.

> In those circumstances, the mere fact that a 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 are intended to provide.[192]

The EFTA Court recognised this in similar terms:

> The EEA Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought.[193]

However, it will be shown that the latter court reviewed more closely whether the Member State pursued *in practice* a consistent and systematic policy. This includes in particular reviewing whether the protection level was indeed as high in practice as argued by the Member State.

9.2.2 Exclusive Right Model versus Licensing Model

9.2.2.1 Case Law

In principle, the Member States are *free to choose* between various regulatory models: total or partial prohibition, exclusive right holder (public or private monopolist), very limited or quite liberal licensing system or even no requirement of authorisation:

> The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States.[194]

The Court of Justice has regularly added that these choices had to be proportionate and could not discriminate on grounds of nationality. While it has reviewed the latter criterion,[195] its reference to the proportionality criterion until recently remained *rhetoric*. It barely reviewed whether the protection level was high in practice and whether an exclusive right system was necessary to reach the *practised* protection level. More recently, the Court significantly adjusted its stance; this development could be noted since *Carmen Media* where it found the monopoly in question no

[192] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 35–36.

[193] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 42.

[194] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 39.

[195] Cf. C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519 where the Finnish tax legislation was found to discriminate on grounds of nationality.

longer suitable to achieve the objective.[196] In *Zeturf*, it further held that a monopoly could only be justified in order to ensure a particularly high level of protection. It asked the referring court to determine

> whether the national authorities genuinely sought, at the material time, to ensure a particularly high level of protection and whether – having regard to the level of protection sought – the establishment of a monopoly could actually be considered necessary.[197]

The Court of Justice also took a stance in regard to the effectiveness of monopolistic regulatory models in general. It found that an exclusive right holder was "given the risk of crime and fraud, [.] certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities."[198] This is not an isolated statement but reflects a general tendency of the Court to assume that a *monopolistic structure protects consumers more effectively*. This view has been reconfirmed in several judgments. In *Markus Stoss*, the Court highlighted that the Member States were

> entitled to take the view, within the margin of discretion which they have in that respect, that granting exclusive rights to a public body whose management is subject to direct State supervision or to a private operator over whose activities the public authorities are able to exercise tight control is likely to enable them to tackle the risks connected with the gambling sector and pursue the legitimate objective of preventing incitement to squander money on gambling and combating addiction to gambling more effectively than would be the case with a system authorising the business of operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework.[199]

With regard to the review of monopolistic gambling regimes, the Court of Justice has therefore applied far-reaching self-restraint.[200] It is noteworthy that, according to the Court, it is not necessary that the monopoly is run or owned by public authorities. It may as well be a *private monopolist under strict control*.[201] In the aforementioned paragraph, the Court expressly recognised that authorities could tackle *gambling addiction* risks more effectively under a monopolistic structure.

---

[196] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 68 and 71.

[197] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 46–47. The new approach was confirmed in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 53–54 and 71.

[198] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 41.

[199] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 81.

[200] Buschle, D. (2003). "Der Spieler – Schreckgespenst des Gemeinschaftsrechts", *European Law Reporter, 12*, 467–472, at 472.

[201] Cf. hereto the Dutch licensing model in C-203/08 Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, as well as in C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757.

While the Court more recently started to question whether the protection level and controls were *in practice* truly as high as argued by the Member State, it has *abided by the assumption* that monopolistic operators protected consumers more effectively.[202]

The EFTA Court took a somehow different position than the Court of Justice. In *ESA v Norway*, it distinguished between crime concerns and gambling addiction concerns. The EFTA Court did not seem convinced of the necessity of a monopoly in relation to crime concerns. While it shared the view of the Court of Justice that a monopoly protects more effectively against gambling addiction, it argued the point differently. It started its argument by referring to the Court of Justice's opinion that public interest objectives had to be 'considered as a whole'[203] and found that it was

> reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than a commercial operator or organisations whose humanitarian or socially beneficial activities partly rely on revenues from gaming machines. Furthermore, it is plausible to assume that in principle the State can more easily control and direct a wholly State-owned operator than private operators. Through its ownership role, the State has additional ways of influencing the behaviour of the operator besides public law regulations and surveillance.[204]

The Court of Justice accepted it as a *reality of life* that a monopolistic structure serves consumer protection better. The EFTA Court openly declared that it was taking an *assumption*; it further emphasised that "the effectiveness of public control and enforcement of a genuinely restrictive approach to machine gaming are the focal point of the proportionality assessment in this case."[205]

The EFTA Court rightly held that – since the legislative reform had not yet taken effect – it could not assume that public control and policy enforcement would not satisfy these requirements. The EFTA Court left the door open in case the assumption should not prove accurate upon the implementation of the Norwegian legislation. In that sense, the ruling takes a *Solange* character.[206]

The *standard of review* defined by the EFTA Court in *ESA v Norway* has over all been significantly stricter than that applied by the Court of Justice. As seen earlier, the latter originally did not review – nor did it ask the referring court to review – the necessity of gambling monopolies. It only recently started to raise questions in this regard. The EFTA Court prominently underlined the *necessity test* and the *burden of proof*:

---

[202] Recently confirmed in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 49, as well as in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 30.

[203] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 51.

[204] Ibid., para. 51.

[205] Ibid., para. 51.

[206] Ibid.; Planzer, S. (2007). "Les jeux ne sont pas (encore) faits, Judgment of the EFTA Court in case E-1/06", *European Law Reporter, 4*, 126–131.

> the necessity test consists in an assessment of whether the monopoly option is functionally needed in order to reduce the problems to the level opted for, or whether this reduction could equally well be obtained through other, less restrictive means such as admitting private operators under a stricter licensing regime. The necessity of the contested legislation thus requires that the introduction of a monopoly leads to a more effective achievement of the aims set than other less restrictive measures […] [T]he Defendant has failed to demonstrate that a licensing scheme allowing private operators, if necessary with more restrictive rules on who may qualify, will not be equally effective as an exclusive right for Norsk Tipping in preventing money-laundering and embezzlement.[207]

As noted, the EFTA Court ultimately approved the pending nationalisation of the gaming machines sector since it could not be assumed that the future implementation of the law would not be in conformity with EEA law. In the EFTA Court's view, the restrictions could be seen as *proportionate in relation to gambling addiction concerns* but not in relation to crime concerns.

The EFTA Court further elaborated on the necessity test in its *EFTA-Ladbrokes* decision. In contrast to the Court of Justice, it expressly adhered to the *principle of the less restrictive measure*:

> where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection.[208]

The EFTA Court encouraged the referring Norwegian court to *carefully review the level of protection*. In view of defining the *de facto* protection level, the restrictions on the exclusive right holder needed to be considered, such as opening hours, number of outlets, advertising and the development of new games. The Court seemed particularly alarmed by the *advertising practices* and asked the referring court to take into account the extent, effect, amount, form and content, namely whether marketing practices were informative rather than evocative in nature. It would also be for the national court to evaluate whether *effective control could and was in fact exercised* by Norwegian authorities over the state monopolist Norsk Tipping. Again, the EFTA Court underlined in this context the principle of the less restrictive measure as the referring court was asked to verify whether private operators under a licensing system could not be subject to the same kind of control.[209]

The Court of Justice originally chose not to review the necessity of monopolies. It was only since *Markus Stoss* that the Court of Justice *has reviewed the proportionality of a monopoly*. Without expressly quoting the EFTA Court, the Court of Justice held in line with its sister court that a monopoly could be justified only to ensure a *particularly high level of consumer protection*. The exclusive right system also needed to be accompanied by suitable regulation that ensured that a particularly high level of protection was pursued in a consistent and systematic

---

[207] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, paras 49–50.

[208] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 58.

[209] Ibid., para. 62.

manner. Hereto, the supply needed to be quantitatively measured and qualitatively planned and subject to strict control by public authorities.[210] The Court of Justice's new approach has been reconfirmed in subsequent decisions.[211]

9.2.2.2 Empirical Evidence

According to the Court of Justice, an *exclusive right holder is more effective* in pursuing the goal of combating gambling addiction. It remains to be assessed whether this assumption is supported by empirical evidence. A literature review in 2011 established the available empirical evidence regarding the *comparative effectiveness of regulatory approaches to gambling*. Upon an extent review of the literature relating to this question, the report concluded that there was currently no published empirical evidence available, which would directly address this issue. Consequently, the report also discussed literature that deals with this question only indirectly or that reflects opinions of scholars.[212]

LaBrie and Shaffer for instance argued that effective regulatory approaches must include primary intervention such as public awareness programmes, advertising restrictions and similar preventive measures. They analysed regulation from eleven states in the US and found that only five states addressed primary intervention efforts, including the State of Nevada.[213] Chambers and Wilcox reviewed the level of compliance of online operators with the UK Gambling Act. They assessed the fifteen most popular UK licensed online gambling operators. All companies complied with the age restrictions and showed careful practices regarding the age limits of their users.[214] A Swiss study compared prevalence levels prior and posterior to the introduction of land-based casino gambling in Switzerland. The regulatory approach changed from an almost full prohibition of casino games to a system with a number of licensees. By this regulatory shift, Switzerland reached one of the

[210] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 83. Cf. also C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 68 and 71, as well as C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 46.

[211] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 46–47; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 71.

[212] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

[213] LaBrie, R.A., and Shaffer, H.J. (2003). "Toward a Science of Gambling Regulation: A Concept Statement", *AGA Responsible Gaming Lecture Series, 2*(2), 1–7.

[214] Chambers, C., and Willox, C. (2009). "Gambling on Compliance with the New 2005 Act: Do Organisations Fulfil New Regulations?", *International Review of Law, Computers & Technology, 23*(3), 203–215.

highest densities of casinos per capita in Europe. The prevalence rates remained stable upon the introduction of casinos.[215]

In general, the discussion about monopolies versus licensing system has received *surprisingly little attention in the scientific literature on gambling addiction*. Empirical scholars have not delivered direct evidence regarding the effectiveness of monopolies or licensing systems. Some publications nevertheless argued approaches that emphasise either more 'informed individual choice' or more 'restrictive state intervention'. It is noteworthy that the authors' preferences *correlate with the authors' views on gambling more broadly*. Adams, Orford and Light consider gambling as inherently dangerous, as an 'addictive consumption industry'. They advocate a *strict limitation of gambling offers*. By contrast, Blaszczynski, Ladouceur, Shaffer and Korn do not perceive gambling as inherently addictive and observe that the majority of people do not develop disordered gambling. They advocate an *informed choice approach*.[216] The example illustrates that one should not confuse opinions of scholars with conclusive empirical evidence.

In any event, the available empirical research makes it *difficult to advocate the view that games of chance as such are addictive*. Section 9.1 explained that there are manifold object non-specific factors that impact the development of addiction. The idea of an 'addictive agent' is reductive and simplistic, even in relation to expressions of addiction that involve the intake of a drug. Prevalence studies consistently demonstrate that only a small minority of those who gamble experience gambling disorder. Section 9.1 showed that the global prevalence of past-year gambling disorder *mostly ranges from 0.25 to 1 %*. In recent years, the *prevalence rates in several countries were stable or decreasing* in spite of an increasing exposure to games of chance, including over the Internet. This is explained with social adaptation mechnisms. The example of the US, a country with a solid epidemiological data situation, further illustrated this point (see Sects. 9.1.2.2 and 9.2.5.2).

In legislative and judicial proceedings, the effectiveness of monopolies versus licensees will certainly remain a controversial issue.[217] As noted, such contrasting

[215] Bondolfi, G., Jermann, F., Ferrero, F. et al. (2008). "Prevalence of Pathological Gambling in Switzerland after the Opening of Casinos and the Introduction of New Preventive Legislation", *Acta Psychiatrica Scandinavica, 117*(3), 236–239. Unfortunately, the samples of the study were rather small.

[216] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37–38.

[217] This book considers empirical fields of study that cover the medical side of gambling addiction research. Scholars from other fields may have additional and different arguments to offer. Economists for instance may argue that it is generally accepted that state monopolies perform significantly worse than private operators (including private monopolies) with regard to output (quantity as well as quality, for instance innovation). In this logic, the legislator may wish to install a state monopoly system with the intention to cripple the gambling market. While an economic perspective falls outside the scope of this book, it can be noted that this logic rests at least on two assumptions: first, lower output of gambling offers leads to lower prevalence of gambling addiction, and second, less innovation regarding games of chance leads to lower prevalence of gambling addiction. For some answers from public health and epidemiological research, see Sects. 9.2.4.2

juxtaposition has received little attention among addiction scholars. One reason could be that, *from an empirical perspective*, *the relevant questions may actually relate to the concrete responsible gambling measures*, irrespective of the abstract regulatory model.

A recent pan-European study nevertheless attempted to shed some light on the effectiveness of different regulatory models. The research investigated *correlations between different regulatory gambling policies and prevalence rates of disordered gambling*. The collected data covered a time frame from 1997 until 2010 in 30 European jurisdictions. Beside other aspects, correlational analyses were run regarding different licensing models (prohibition, public monopoly, closed licensing system, open licensing system, no licence required). No statistically relevant correlations could be identified. In other words, the prevalence rates associated with public monopolies were similar to those associated with other regulatory models. As in other studies, there are limitations to be considered. For instance, sample size was rather small due to the fact that only 22 prevalence studies in twelve jurisdictions were available. The law on the books may not be properly enforced in practice (for instance, prohibition policies), and regulation is only one environmental factor among others that may impact people's behaviour. Most importantly, even if correlations can be found, that does not necessarily mean causation.[218]

From an empirical perspective, *hardly any research* has directly addressed the question of the comparative effectiveness of exclusive right holders versus licensees with regard to gambling addiction. From a legal perspective, the burden of proof in the general law on the fundamental freedoms is with the Member States (see Sect. 3.3). However, in the absence of conclusive empirical evidence, the Court of Justice assumed that exclusive right holders were *per se* more effective in combating gambling addiction. Thus, the Court effectively shifted the burden of proof to the private operators.

9.2.3 Channelling: A Scientific Term?

The so-called channelling argument was introduced in the *Läärä* case. The UK authorities in *Schindler* had taken a prohibitive approach towards lottery services. The Finnish authorities in *Läärä* allowed offers of gaming machines, yet only

---

and 9.2.5.2. For an introduction to basic principles of economics, cf. e.g. Mankiw, N.G., *Principles of Economics*, 4th ed., South Western: Thomson, 2007, at Part 5: 'Firm Behavior and the Organization of Industry'. Finally, for a discussion whether demand for gambling services is elastic or inelastic, among players in general and disordered players in particular, cf. Forrest, D., "Online Gambling: An Economics Perspective" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 29–45, at 37–40.

[218] Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe".

provided by an exclusive right holder. Based on concerns in relation to black market offers, the Court of Justice approved of the channelling argument.

> Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those [public interest] objectives.[219]

The role that moral judgments have played in the perception of games of chance by the Court of Justice will be discussed in more detail in Sect. 9.3.2. At this point, the language can already be noted: What does a "need to confine the desire to gamble" suggest? Are people generally affected by a desire to gamble that is hard to keep under control?

Empirical evidence does not support an alarming stance. Section 9.1 looked at prevalence rates of gambling disorder. It was noted that around *0.25 to 1 % of the population experience past-year gambling disorder*. Many people choose not to gamble or gamble only occasionally. Among those who gamble regularly, the *large majority do not develop a disordered gambling behaviour*.

Eventually, the channelling argument evolved from *"channelling the human desire"* into the necessity of *"channelling gambling offers."* In any event, the Court of Justice has adhered to the channelling argument also in recent decisions.[220] While the argument has been regularly used and evolved regarding its shape, one question has never really been addressed in the rulings of the Court of Justice: What is channelling supposed to channel and what is it supposed to mean? Shall it channel the human desire to gamble or simply gambling offers? Does channelling mean to impose strict rules on operators? Does it mean to attract consumers to legal offers? Does it mean that gambling can only take place in certain venues (for example, casinos)? Does channelling necessarily involve an exclusive right holder?

If channelling were an empirically verified concept, it would be discussed in the scientific literature on gambling addiction, in particular where the literature discusses appropriate regulatory approaches. A vivid discussion on a channelling policy cannot be observed among researchers studying gambling disorder; the term is not prevalent in the scientific literature.[221] The recommendations that are argued by scientists regularly relate to *concrete aspects of regulation* (for example, restrictions of advertising or imposition of minimum age) *rather than an abstract notion of channelling*.

---

[219] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 37.

[220] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 56, 67–71; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 65 and 68; C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, para. 65; C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 25.

[221] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

The notion 'channelling', if not closely reviewed, represents an *empty shell*, which remains undefined. Different meanings can be interpreted into it.[222] The Court of Justice has not reviewed the actual content of the channelling argument. In its jurisprudence, the argument has mainly been used to justify the regulatory model of an exclusive right holder as well as the expansion and advertising of gambling offers of this exclusive right-holder. The empty shell character of channelling can be illustrated by its *diverging use by the EFTA Court and in other jurisdictions*. In *EFTA-Ladbrokes*, the EFTA Court interpreted channelling broadly *as a way of exercising control* over the gambling sector.

> If it turns out that the national authorities have opted for a rather low level of protection […] it is more likely that less restrictive means, for instance in the form of a licensing system which would allow an operator such as the Plaintiff to enter the market, could suffice. In this context, it is also relevant to assess whether channelling, to the extent the national court deems this to be relevant, could equally well be achieved under a licensing system.[223]

The diverging use of the term between different bodies can also be seen in its use by other jurisdictions. Channelling or concentrating gambling is a term used in documents relating to the Swiss gambling sector. The governmental bill to the parliament referred to concentrating all forms of games of chance.[224] The term does not refer to any of the aforementioned concepts. The objective of the legislation was to *channel all forms of gambling into casino venues*.[225] This was a central motive for the Swiss Supreme Court to disallow poker tournaments outside of casinos.[226] Casinos in Switzerland are run by various *commercial operators under a licensing system* ('Konzessionen');[227] in other words, a regulatory approach that substantially differs from an exclusive right system while still referring to the same notion of channelling or concentrating.

9.2.4 Detrimental Nature of Competition

9.2.4.1 Case Law

It was noted that the Court of Justice adhered to the view that a state-run operator would *per se* protect consumers more effectively than private licensees. In recent

[222] The German term 'Leerformel' catches this phenomenon better.

[223] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 59.

[224] Government Bill regarding the Federal Law on Games of Chance and Casinos of 26 February 1997 ('Botschaft zum Bundesgesetz über das Glücksspiel und über die Spielbanken' (Spielbankengesetz, SBG), 1997, Bundesblatt vol. 149, no III.

[225] With the exception of lottery and sports betting since those games of chance fall within the ambit of cantonal (regional) powers.

[226] ATF 136 II 291 Schweizer Casino Verband gegen X. und Eidgenössische Spielbankenkommission [2010].

[227] The number of licences can be reconsidered by the federal government in the course of time.

years, Advocate General Bot went a step further, and the Court of Justice adopted his view: *competition in the field of gambling services had detrimental effects*. In the relevant Dutch case *Sporting Exchange*, it was the referring Council of State that had suggested this view. It had voiced that a system of an exclusive right holder simplified not only the supervision of that operator[228] but also prevented strong competition between licensees. Such competition would result in an increase in gambling addiction. Advocate General Bot adopted this point in his opinion. The Court of Justice in turn quoted the Advocate General's position and did not reject it. The Court found it

> important to distinguish the effects of competition in the market for games of chance, the detrimental nature of which may justify a restriction on the activity of economic operators, from the effects of a call for tenders for the award of the contract in question. The detrimental nature of competition in the market, that is to say, between several operators authorised to operate the same game of chance, arises from the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction.

The argument of the detrimental effect of competition is related to the aforementioned argument of *channelling* but takes a different quality. Whereas the channelling argument states that an exclusive right holder will protect consumers more effectively, the *'detrimental competition' argument* goes beyond this position. It argues a *chain of causality*, which follows the subsequent logic: When private operators compete in the same market, they attempt to make their respective offers more attractive. As a consequence, consumer expenditure increases and accordingly the risk of consumers to become addicted to the game.[229]

The belief that competition leads to detrimental consequences in the gambling sector goes all the way back to Advocate General Gulmann's opinion in *Schindler*. He discussed the detrimental nature of competition from a different angle. He asked the Court to consider the *practical consequences* that its ruling will have.

---

[228] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, para. 31. The simplified supervision refers to the (lowered) administrative burden that public authorities carry. It should be noted that the CJEU did not reject this argument in *Sporting Exchange*. By contrast, this argument is almost irrelevant for the ECtHR: see Sect. 8.3.2.2 *i.f.* and Clayton, and Tomlinson, *Law of Human Rights*, at 834 and 932–933. It was only in *Zeturf* that the CJEU remembered its stricter standard that it usually applies (para. 48): "the mere fact that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than supervision of a single operator is irrelevant. […] administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom." Cf. for further cases e.g. C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften [2006] ECR I-8203, para. 48; C-318/07 Hein Persche v Finanzamt Lüdenscheid [2009] ECR I-359, para. 55.

[229] Recently confirmed in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 45.

Competition would hurt the *interests of smaller lotteries* since bigger lotteries could offer bigger prizes, which in turn would render them more attractive to consumers.[230]

Both Advocates General used the argument that competition leads to detrimental effects. While Gulmann argued detrimental *financial effects for Member States*, Bot argued detrimental *health effects for consumers*.

9.2.4.2 Empirical Evidence

Does competition necessarily lead to increased levels of gambling addiction? The aforementioned literature review inquired the comparative effectiveness of regulatory approaches, including that of licensing systems where operators compete for market shares. At that time, no study had directly examined potential detrimental effects of competition in the gambling sector.[231] The results of a subsequent pan-European study could not find statistically relevant differences with regard to the prevalence of disordered gambling associated with state monopolies on the one hand and private licensees on the other.[232]

If the assumption regarding competition were accurate, every country with a gambling licensing system should clearly show higher prevalence rates of gambling disorder. The discussion of the epidemiology of gambling disorder in Sect. 9.1.2.2 noted that the data situation of prevalence studies in many European countries is poor. In many jurisdictions either no prevalence study or only one is available.[233] The situation in the UK is better with three national surveys from 1999 to 2010, involving large samples. Globally, North America has the most solid epidemiological data situation to offer. Both the US[234] and the UK[235] have widespread gambling offers. While exclusive right holders operate some games of chance in these countries (mostly, lotteries), *competitive licensing systems are prevalent both in the UK and the US for the majority*

---

[230] Opinion of Advocate General Gulmann in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 112.

[231] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

[232] Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe". Regarding some limitations of the study, see Sect. 9.2.2.2 *i.f.*

[233] Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Meyer, Hayer, and Griffiths, *Problem Gambling in Europe: Challenges, Prevention, and Interventions*.

[234] For a brief introduction to the US regulatory regime in the area of gambling, cf. Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 42 *et seq.*

[235] For a brief introduction to regulatory regime in the area of gambling, cf. ibid., at 53 *et seq.*; Miers, D., "A View from the British Isles" in *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling*, Littler, A., Hoekx, N., Fijnaut, C., (Eds.), Leiden/Boston: Martinus Nijhoff Publishers, 2011, 119–152, at 158 *et seq.*

of games of chance.[236] The most recent epidemiological data from these countries do not support the view that a competitive licensing system necessarily leads to increased prevalence of gambling disorder. Petry et al.'s analysis of a large sample from the National Epidemiological Survey on Alcohol and Related Conditions (NESARC) found a life-time prevalence rate for gambling disorder of only 0.4 %.[237] Kessler et al.'s analysis found a life-time prevalence rate for gambling disorder of 0.6 %.[238] Competition between operators for market shares and the number of States permitting gambling offers increased over time. Meanwhile, the data show that the prevalence of gambling disorder went down in the last decade (see Sects. 9.1.2.2 and 9.2.5.2).

The 2005 Gambling Act liberalised the gambling sector in Great Britain. This included *inter alia* the introduction of a competitive licensing system for online games.[239] In the last decade, the prevalence rates of gambling disorder have remained quite stable in spite of a significantly increased exposure to games of chance.[240] The most recent British survey found past-year prevalence rates for gambling disorder of 0.9 % (DSM-IV-based screen) and 0.7 % respectively (Problem Gambling Severity Index, PGSI). According to the authors, these rates are similar to those found in Germany and Norway,[241] who have organised their gambling sector largely by exclusive right systems. Similar to North America, many European countries have seen stabilising or even decreasing rates *in spite of the trend of an increase in gambling offers*.[242]

These figures can be compared to the global prevalence of gambling disorder as discussed in Sect. 9.1. Several researchers suggested that life-time prevalence rates of gambling disorder range globally from 0.5 % to 2 % in the general population.[243] Petry concluded that prevalence rates of past-year gambling disorder

---

[236] GamblingCompliance, *Market Barriers: A European Online Gambling Study*; Gambling Compliance, *Market Barriers: US Internet Gaming*, GamblingCompliance 2010.

[237] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

[238] Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

[239] UK Gambling Act.

[240] Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*; Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*; Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

[241] Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

[242] Wiebe, and Volberg, *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, at 13.

[243] Weinstock, Ledgerwood, Modesto-Lowe et al., "Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment", and the therein cited prevalence studies; Bland, Newman, Orn et al., "Epidemiology of Pathological Gambling in Edmonton"; Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions"; Volberg, Abbott, Rönnberg et al., "Prevalence and Risks of Pathological Gambling in Sweden"; Welte, Barnes, Wieczorek et al., "Alcohol and Gambling Pathology among U.S. Adults: Prevalence, Demographic Patterns and Comorbidity".

were about 40 to 60 % lower than life-time rates.[244] This rough overview shows that the *most recent rates from the UK and the US are not higher than global rates*. In the case of the US, the recent rates even appear to be slightly lower.

These considerations show that the reality of epidemiology of disordered gambling is *more complex than a simple causality between competition and increased gambling addiction*. The assumption regarding the detrimental effect of competition resulting in (more) attractive games should be put in perspective with another element found in the jurisprudence. Whereas the competitive form of "making games more attractive" is seen as detrimental, making games attractive in another regulatory setting seems to have positive effects according to the jurisprudence. On several occasions, the Court of Justice has acknowledged that an exclusive right holder may need to offer and to *advertise a wide range of attractive games to* draw players away from the black market. In this context, the attractiveness of games is perceived as beneficial.[245]

9.2.5 Consistent and Systematic Policy: Controlled Expansion and Advertising

9.2.5.1 Case Law

As opposed to a prohibitive approach, an exclusive right system raises questions whether protectionist motives could also be behind the chosen regulation. Early on, Advocates General expressed their doubts, for instance Advocate General La Pergola in *Läärä*. Nevertheless, up to the *Gambelli* decision, the Court of Justice did not proceed to a proportionality review.

It was with the Italian cases in *Gambelli* and *Placanica* that it became almost impossible for the Court of Justice to ignore inconsistencies in the Italian gambling policy. This was even more the case since Advocate General Fennelly had already pointed out at inconsistencies in the earlier Italian case *Zenatti*.[246]

---

[244] Petry, *Pathological Gambling: Etiology, Comorbidity*, *and Treatment*, at 20.

[245] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55: "in order to achieve that objective [of drawing players away from clandestine betting and gaming], authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques." Recently confirmed in C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 68.

[246] Cf. the reference of the CJEU to Advocate General Fennelly's criticism in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36: "as the Advocate General observes […], such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted."

The Court of Justice started to review the proportionality of the Italian measures in the *Gambelli* case. It held that national restrictions had to be suitable for achieving the legitimate objectives, "inasmuch as they must serve to limit betting activities in a consistent and systematic manner."[247]

> In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.[248]

The decisions in *Gambelli* and *Zenatti* were significantly different in that the Court of Justice no longer expressly approved of the proportionality of the national measures. It *left it to the referring court* to decide whether the national measures were genuinely directed to realising the stated objectives and proportionate to these objectives.[249]

It was noted that one practice defended with the *'channelling' argument* was the *expansion of and advertising for gambling services* of the exclusive right holder. The doubts in the Italian cases related to the policy of expending the offer of games and their advertising.

In the *Placanica* case the Court of Justice approved of a controlled expansion of games and advertising. It found it

> possible 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 […] to activities which are authorised and regulated. […] in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.[250]

The Italian gambling cases mainly regarded concerns relating to organised crime such as *fraud or money laundering*. The argument of *'controlled expansion and advertising'* was first only used in relation to this justification ground. Later on, in *Ladbrokes*, the Court of Justice also approved this argument in relation to *gambling addiction*. The authorised operator had to represent an attractive alternative to the black market. Hereto, an extensive range of games, advertising and additional distribution techniques could be necessary to curb gambling addiction.[251]

It is unclear whether this criterion has effectively supported national courts in assessing whether a national gambling policy was consistent and systematic. In any

---

[247] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67.

[248] Ibid., para. 69.

[249] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 37; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 75.

[250] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

[251] C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 25–27.

event, a significant number of referred cases were lodged at the Court of Justice after the *Placanica* ruling. A close look at the relevant decisions reveals that the guidance offered by the Court of Justice was not as clear as it may seem at first sight. A comparison of the different statements on expansion and advertising demonstrates this point.

According to the *Gambelli* decision, national authorities were not allowed to "incite and encourage consumers to participate" in gambling offers.[252] In *Placanica*, however, the Court found that "a policy of controlled expansion […] may be entirely consistent […]. [An attractive offer] may […] necessitate […] advertising on a certain scale."[253] Finally in *Ladbrokes*, the Court found that a Member State was not allowed to pursue a policy of "substantially expanding" gambling by "excessively inciting and encouraging consumers to participate" in these offers.[254] The conclusion to be drawn from this is that a state can expand its gambling offers and advertise them (*Placanica*). It is not allowed to incite and encourage consumers (*Gambelli*). The exception established is if a State does 'not excessively' incite and encourage consumers (*Ladbrokes*).[255]

The EFTA Court also reviewed advertising practices in its two gambling decisions, and demonstrated a significantly stricter review. It took a rather critical stance in *ESA v Norway* towards marketing efforts.

> Restrictions based on legitimate grounds of overriding public interest must be consistent with similar measures already taken. […] In accordance with this principle, a State must not take, facilitate or tolerate measures that would run counter to the achievement of the stated objectives of a given national measure. […] the Defendant has chosen to fight gambling addiction through the reduction of gambling opportunities by subjecting the operation of gaming machines to a State-owned monopoly. In order to be consistent, the Defendant may not at the same time endorse or tolerate measures, such as extensive marketing, which could lead to an increase of gambling opportunities.[256]

In *EFTA-Ladbrokes*, the EFTA Court appeared to be even less approving of extensive marketing practices and emphasised the *burden of proof*.[257] It held that the national court had to consider

> whether the State takes, facilitates or tolerates other measures which run counter to the objectives pursued […]. Such inconsistencies may lead to the legislation at issue being unsuitable for achieving the intended objectives. It is for the State to demonstrate that its measures in the field of games of chance fulfil these requirements.[258]

---

[252] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69.

[253] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

[254] C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

[255] Planzer, S. (2010). "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach", *European Journal of Risk Regulation, 1*(3), 289–295, at 294.

[256] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 43.

[257] Lavranos, N., "Gambling and EC Law. Rien ne va plus?", *European Current Law – Yearbook*, (2007), xi–xvi, at xvi.

[258] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 51.

The EFTA Court further addressed the relationship of suitability, advertising and gambling addiction. It found

> the marketing activities and the development of new games by Norsk Tipping [.] relevant for the assessment of the consistency of the gaming policy. A system of exclusive rights can only be suitable as a means of fighting gambling addiction if it is required to operate in a way which serves to limit gaming activities in a consistent and systematic manner […]. In this context, the development and marketing of addictive games by the monopoly provider are relevant. This may be at odds with the aim of fighting gambling addiction.[259]

In more recent decisions, the Court of Justice started to review the proportionality of advertising measures more closely. Its approach appears to be influenced by some of the aforementioned elements in the jurisprudence of the EFTA Court. The ajustead approach could be noted since *Markus Stoss* and *Carmen Media*. In these cases, the referring courts had raised doubts as to the consistency of the policy since the state monopolist on sports betting was engaging in intensive advertising campaigns.[260] In *Markus Stoss*, the Court alluded to some of the statements of the EFTA Court and found it important that

> any advertising issued by the holder of a public monopoly remain measured and strictly limited to what is necessary in order thus to channel consumers towards authorised gaming networks. Such advertising cannot, however, in particular, aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours.[261]

According to the Court of Justice, if the national courts noted such developments, the public monopoly could no longer be justified with the objectives of preventing incitement to squander money on gambling and combating gambling addiction.[262] The imcompatible national legislation, establishing the public monopoly, could not continue to apply during a transitional period.[263] This stricter review was mostly

---

[259] Ibid., para. 54.

[260] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 100; C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 56.

[261] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 103.

[262] Ibid., para. 106.

[263] C-409/06 Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim [2010] ECR-8015, para. 69; confirmed in the opinion of Advocate General Mazák as well as in the case C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)

reconfirmed in subsequent decisions[264] – but partly not[265] – and somehow further intensified in *Dickinger & Ömer* where the referring court expressed doubts regarding the advertising policy of the Austrian lottery monopolist. There were allegations of a continual increase in the advertising expenditure directed to new targets, particularly of young people. The Court of Justice therefore asked the referring court to consider in its proportionality review in particular the scale of advertising and the creation of new games. [266] Importantly, the Court drew a new distinction that should guide the assessment whether the monopolist was going beyond a mere (permitted) channelling of consumers:

> In particular, a distinction should be drawn between strategies of the holder of a monopoly which are intended solely to inform potential customers of the existence of products and serve to ensure regular access to games of chance by channelling gamblers into controlled circuits, and those which invite and encourage active participation in such games. A distinction must therefore be drawn between a restrained commercial policy seeking only to capture or retain the existing market for the organisation with the monopoly, and an expansionist commercial policy whose aim is to expand the overall market for gaming activities.[267]

9.2.5.2 Empirical Evidence Regarding Controlled Expansion

Exposure

The Court of Justice accepts that a controlled expansion of gambling services may be in line with a consistent and systematic gambling policy. It must be assessed whether empirical evidence supports the view that an increased exposure to gambling does not necessarily lead to an increase in gambling addiction. At first sight, it may appear questionable that a government aims to confine the prevalence of gambling addiction while simultaneously expanding gambling offers. This is due to the

---

[2013] nyr, paras 66–73 (opinion) and paras 38–43 (judgment). In this case, Mazák also critically commented on the "dynamic and expansive policy", the "scale of advertising" and the "creation of new games" of the Greek monopolist (paras 56–57).

[264] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 68; C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 71; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 68.

[265] Whereas Advocate General Mazák in *Stanleybet* openly criticised the Greek monopoly's "dynamic and expansive policy", the "scale of advertising" and the "creation of new games" (paras 56–57), the CJEU refused to look into these issues, leaving them to the national court: C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 32.

[266] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 59–65.

[267] Ibid., para. 69.

expectation that the higher the exposure to gambling, the higher the prevalence of gambling addiction must be in a population.

The effects of the exposure to certain substances, like germs and toxins, have been well identified. Already in the 1960s, it was suggested that social events could also represent a kind of equivalent to germs.[268] Exposure and infection processes relating to activities such as gambling may take similar patterns as in relation to germs and toxins. According to this view, the exposure of a population to gambling offers has the potential to infect people and adversely affect their health. If exposure to gambling was inherently toxic, then increased exposure should lead inevitably to increased levels of morbidity, as would be the case for instance with radiation.[269] In the *exposure model*, increased gambling exposure should therefore lead to proportionately increased levels of gambling disorder.[270] This model would thus support the theory that an increase of gambling services necessarily leads to higher prevalence rates of gambling disorder.

Section 9.1.2.2 outlined the global epidemiology of gambling disorder. The early data from North America seemed to support the exposure model with steadily increasing prevalence rates. The prevalence of life-time gambling disorder in the adult population in the late 1970s was 0.7 %. At the time, 'only' 68 % had ever gambled in their life.[271] Almost two decades later, a meta-analysis found that 95 % of the population (in US and Canada) had ever gambled and that 1.5 % were life-time pathological gamblers (1.1 % past-year). A few years later, the pace of the increase had slowed down but was at 2.0 % for life-time gambling disorder (1.35 % past-year).[272] It was already mentioned that the rates found in Canada were very similar to those in the US.[273]

Until the beginning of the third millennium, the figures suggested two things. Higher exposure to gambling leads to higher participation and gambling disorder

[268] McGuire, W., "Inducing Resistence to Persuasion" in *Advances in Experimental Social Psychology*, Berkowitz, L. (Ed.), vol. 1, New York: Academic Press Inc., 1964, pp. 191–229.

[269] Shaffer, H.J. (2005). "From Disabling to Enabling The Public Interest: Natural Transistions from Gambling Exposure to Adaptation and Self-Regulation", *Addiction, 100*(9), 1227–1230, at 1228.

[270] Shaffer, H.J., LaBrie, R.A., and LaPlante, D. (2004c). "Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin", *Psychology of Addictive Behaviors, 18*(1), 40–48, at 41. The following pages on exposure, adaptation and reasons for adaptation as well as the therein cited literature are largely based on the contribution: ibid.

[271] Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*, cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

[272] Welte, Barnes, Wieczorek et al., "Gambling Participation in the U.S. – Results from a National Survey", cited in Cunningham-Williams, Cottler, and Womack, "Epidemiology".

[273] Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16. As regards (mere) participation in gambling, it was for instance shown that the proportion of people engaging in gambling increased from 54 % to 63 % after casinos and video lottery terminals were introduced: Ladouceur, R., Jacques, C., Ferland, F. et al. (1999). "Prevalence of Problem Gambling: A Replication Study Seven Years Later", *Canadian Journal of Psychiatry, 44*(4), 802–804.

rates. *The rates had increased*.[274] The fast expansion of legalised gambling seemed to be accompanied by an increase in disordered gambling.[275] Considering the *massive* increase of exposure to games of chance in the US, the increase of disordered gambling could however hardly be proportionate.

Studies at state level also seemed to support this view. In Kallick's 1979 study, the State of Nevada showed a higher rate of gambling disorder than the rest of the US.[276] It should be noted that at the time of the study, Nevada was the only established casino State. New Jersey was second in line with the adoption of casino legislation in 1976 and the first casino opening in 1978. The nationwide spread of casinos only started in the early 1990s.[277] With the spread of gambling offers all over the country, other States such as Iowa or Missouri experienced increased problems too.[278]

Adaptation

A *changing trend became evident during the last decade*. More recent prevalence rates refuted the direct and proportionate link between exposure and infection. This trend suggests that a *population adapts over time* to the exposure to games of chance.

Petry et al. identified a prevalence rate of life-time gambling disorder at 0.4%[279] and Kessler et al. at a rate of 0.6 %. Despite an ever-increasing exposure, in particular as of the 1990s, life-time gambling participation had also dropped to 78 %.[280] Around three decades after the first prevalence study conducted by Kallick et al., *the rates for gambling disorder were back down at the same level* or even slightly under them.[281]

---

[274] Volberg, R.A. (1994). "The Prevalence and Demographics of Pathological Gamblers: Implications for Public Health", *American Journal of Public Health, 84*(2), 237–241; Volberg, R.A. (1996). "Prevalence Studies of Problem Gambling in the United States", *Journal of Gambling Studies, 12*(2), 111–128.

[275] Pietrzak, R.H., Ladd, G.T., and Petry, N.M. (2003). "Disordered Gambling in Adolescents: Epidemiology, Diagnosis, and Treatment", *Pediatric Drugs, 5*(9), 583–595.

[276] Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*.

[277] Dunstan, R., Gambling in California, California Research Bureau, California State Library, 1997.

[278] Shaffer, H.J., LaBrie, R.A., Caro, G. et al., *Disordered Gambling in Missouri: Regional Differences in the Need for Treatment*, Boston, MA: Harvard Medical School, Division on Addictions, 2004; Shaffer, H.J., LaBrie, R.A., LaPlante, D.A. et al., *Evaluating the Iowa Department of Public Health Gambling Treatment Program: Four Years of Evidence*, Boston, MA: Division on Addiction, Harvard Medical School, 2002.

[279] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

[280] Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

[281] LaPlante, D.A., and Shaffer, H.J. (2007). "Understanding the Influence of Gambling Opportunities: Expanding Exposure Models to Include Adaptation", *American Journal of Orthopsychiatry, 77*(4), 616–623; Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis".

Today, it appears that there are only two States left that do not allow legalised forms of gambling (Utah, Hawaii).[282] The nationwide spread of casinos starting in the 1990s and the (unlicensed) spread of Internet gambling in more recent years have led to much higher exposure to gambling offers. Kessler's and Petry's nationwide studies show prevalence rates similar to those of Kallick three decades ago when most US states still had anti-gambling legislation in place. The latter had been enacted during the early 1900s. Only in 1964, state lotteries were inaugurated. *The nationwide spread of casinos took place starting in the early 1990s,* with the State of Nevada (1931) and State of New Jersey (1976) being the exceptions. Already around 1999, casinos were operated in 27 states.[283]

The example of the UK is also instructive. It had been suggested that increased access to gambling offers in the UK would cause more disordered gamblers;[284] however, the epidemiological studies do not support this prediction. The 2005 Gambling Act *liberalised the UK market* and significantly increased the exposure to gambling offers to UK residents. Additional land-based venues opened and private operators were licensed to offer their services via the Internet. The *prevalence rates of disordered gambling have remained quite stable*.[285] The 1999 study found a rate of 0.7 % (average of two screens)[286] and the 2007 study a rate of 0.55 (average of two screens).[287] In 2010, a rate of 0.8 % (average of two screens) was found and the authors noted that this slight increase was at the margins of statistical significance.[288]

Another interesting case study is the *State of Nevada*. It is by far the most important gambling state in the US. Despite the fact that Macao surpassed Las Vegas in recent years, the latter is still referred to as the gambling capital of the world.[289] *Nevada residents* have a *uniquely high exposure to gambling offers* within their close vicinity. Shaffer et al. designed the Regional Index of Gambling Exposure

---

[282] GamblingCompliance, *Market Barriers: US Internet Gaming*.

[283] Petry, N.M., and Armentano, C. (1999). "Prevalence, Assessment, and Treatment of Pathological Gambling: A Review", *Psychiatric Services, 50*(8), 1021–1027.

[284] Volberg, R.A. (2000). "The Future of Gambling in the United Kingdom", *British Medical Journal, 320*(7249).

[285] The studies refer to 'problem gambling', but according to the aforementioned definitions, this equates to 'disordered gambling'. The three surveys used a threshold of 3 out of 10 DSM-IV criteria (instead of 5 of 10 criteria) or instruments that are similar to this threshold (SOGS). Moreover, their samples included people as of the age of 16 years. As disordered gambling is particularly high around adolescents, the inclusion of minors may impact the prevalence rates.

[286] Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*. The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % DSM-IV.

[287] Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*. The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV).

[288] Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

[289] Barboza, D., "*Macao Surpasses Las Vegas as Gambling Center*", New York Times, 23 January 2007.

(RIGE), a tool to measure the exposure to gambling for a population in a given region. It takes into account the dose (total number of gambling establishments and employees), potency (number of different types of games) and duration (length of time) of exposure.[290] The exposure to gambling offers in Nevada is around eight times higher than in the second most exposed State of New Jersey.[291] According to the exposure model, Nevadans should have uniquely high prevalence rates of disordered gambling.

Reviews of prevalence rates showed that the State of Nevada does not have proportionately higher disordered gambling rates.[292] Studies conducted in Nevada further found that *people who had recently moved to Nevada showed higher rates of disordered gambling* than people who had been residing in Nevada for 10 years or more.[293] Importantly, *Nevada youth did not gamble more nor did it gamble at an earlier age* than elsewhere in the nation.[294]

Studies on casino employees are also of high interest since that staff is exposed to gambling facilities on a daily basis. Staff that had been employed for a shorter period showed higher disordered gambling rates than staff that had been employed for a longer period.[295]

The aforementioned more recent national, regional and profession-related epidemiological results made it impossible to uphold the exposure model without adjustments. A recent literature review further confirmed this stance. Living close to gambling venues may increase likelihood to play games of chance, but a relationship with disordered gambling was not consistently found.[296]

Therefore, it was necessary to *complement the exposure model with a second model: the adaptation model*. The adaptation model integrates the aforementioned more recent empirical finding. People are capable of adjusting their behaviour over time.[297] The empirical evidence is growing that the two models need to be read in conjunction (see Fig. 9.4 below). The combined exposure and adaptation models

---

[290] Shaffer, LaBrie, and LaPlante, "Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin".

[291] Ibid.

[292] Ibid.

[293] Ibid.; Volberg, R.A., *Gambling and Problem Gambling in Nevada*, Report to the Nevada Department of Human Resources 2002.

[294] Volberg, *Gambling and Problem Gambling in Nevada*.

[295] Shaffer, LaBrie, and LaPlante, "Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin"; Shaffer, and Hall, "The Natural History of Gambling and Drinking Problems among Casino Employees".

[296] Disley, E.P., Alexandra, May Culley, D., and Rubin, J., *Map the Gap: A Critical Review of the Literature on Gambling-Related Harm*, Report prepared for the Responsible Gambling Fund 2011, at xv.

[297] Shaffer, LaBrie, and LaPlante, "Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin"; Shaffer, H.J., and Zinberg, N.E. (1985). "The Social Psychology of Intoxicant Use: The Natural History of Social Settings and Social Control", *Bulletin of the Society of Psychologists in the Addictive Behaviors, 4*(1), 49–55.

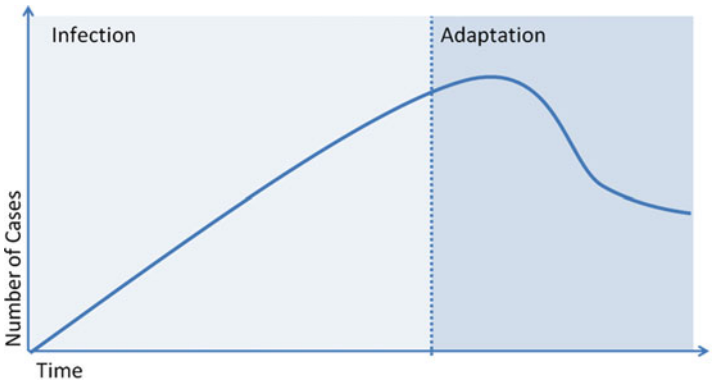

Fig. 9.4 Exposure and adaptation

suggest that an *initial infection* (by gambling offers) results in increased levels of disordered gambling. *Adaptation mechanisms* first slow down the increase of infections and subsequently stabilise and lower the prevalence of disordered gambling. Hence, populations unfamiliar with gambling offers (immature markets) may first experience a substantial infection before recovering from the exposure. By contrast, populations that are already familiar with gambling offers or certain types of gambling, may have eventually adapted to this environmental factor (Fig. 9.4).

These findings raise the question about the existence of *hormesis*. This is the phenomenon known in toxicology that low dose exposures to toxins create positive biochemical reactions in the body.[298] In this view, *low dose exposure would be preferable to both zero exposure and exposure with high doses*. Hormesis effects have been shown for several substances, in particular in toxicology.[299] Hormesis mechanisms are sought after in the field of immunology and are known under the term of *mithridatism*. In an attempt to make a subject immune against a toxin, he is exposed to small doses. Similarly, vaccinations are administered in order to create immunity to a disease. According to the aforementioned finding, the sudden exposure of a population unfamiliar with gambling to a great quantity of gambling offers may lead to an overwhelming infection of the population. Research on gambling disorder will need to examine these hormesis mechanisms more closely before conclusions can be made.

What remains unsolved is the question regarding the *reasons for the adaptation* process. Social learning may be a factor. When people are confronted with a new

[298] Calabrese, E.J. (2004). "Hormesis: A Revolution in Toxicology, Risk Assessment and Medicine", *European Molecular Biology Organization Reports, 5* (special issue), S37–S40.

[299] For research into hormesis, cf. e.g. the journal 'Dose-Response', "Dose–Response", available at http://www.dose-response.com/, published by the International Dose–Response Society in Amherst (MA).

phenomenon of life, they can learn to adjust their behaviour. After a while, people also discover the negative aspects of a new phenomenon, for example, opportunity costs: the time somebody spends on gambling, he cannot spend on something else. Adolescents may learn that the time they spend gaming on computers could also be used for other activities.

Novelty effects may also play a role. New things in life are generally appealing. The experience of a society with new products or behaviours may change and consequently, its legal status or social acceptance. Examples include cigarette smoking, which has gone from being en vogue – one only needs to think of countless Hollywood films featuring permanently smoking main characters – to becoming socially banned or even illegal. Likewise, the societal perception of absinth altered from being a chic drink in nineteenth century France into a dangerous intoxicant that was eventually banned.[300] To illustrate, the production of absinthe was also prohibited in Switzerland for several decades; the ban only added to the fascination of the consumption of absinthe. As of 2000, absinthe can again be legally produced.

The considerations show that there is growing empirical evidence for adaptation processes in populations that are exposed to gambling offers. The combination of the exposure and adaptation models suggests that the (abrupt) introduction of (new types of) games of chance may lead to an increased infection of the population with disordered gambling. Over time, the population manages to adapt to the exposure to gambling offers. Nevertheless, a certain percentage of the population will still experience gambling disorder.

As a consequence, the empirical evidence provides *support for a 'controlled expansion'* as argued by the Court of Justice. Importantly, the evidence is *not* limited to a specific regulatory model. The Court of Justice has argued controlled expansion in relation to exclusive right holders as part of a bigger 'channelling' policy. The epidemiological data from the US mainly relate to licensing models as the majority of games are run by private operators. Public operators mostly run lotteries.[301] From a scientific perspective, 'controlled expansion' has little to do with a particular regulatory model (for instance, monopoly, liberal or strict licensing system). There are no indications in the literature as to why adaptation processes would not occur under certain regulatory models.

A socially responsible 'controlled expansion' policy should in any case be scientifically accompanied. A series of continuous epidemiological studies allows analysing the development of disordered gambling subsequent to a change or continuation of gambling policies. It is also part of a responsible policy to allocate the necessary funds to enable an effective implementation of the policy goals, in

[300] For the example of absinthe, cf. Vogt, D.D., and Montagne, M. (1982). "Absinthe: Behind the Emerald Mask", *Substance Use & Misuse, 17*(6), 1015–1029.

[301] GamblingCompliance, *Market Barriers: US Internet Gaming*.

particular through preventive measures.[302] While some EU/EEA Member States have taken such financial commitment, others have not.[303]

9.2.5.3 Empirical Evidence Regarding Advertising

General Considerations

According to the case law, operators can expand their gambling offers and advertise them but are not allowed to excessively incite and encourage consumers.[304] An attractive offer may necessitate advertising on a certain scale.[305] Similar to the 'controlled expansion' argument, the Court of Justice linked this argument to practices of national exclusive right holders and the already discussed 'channelling' approach. In order to draw players away from the black market, expansion and advertising may be necessary.

Experiences from other fields indicate that a legal offer of games of chance is preferable to total prohibition. Where demand is inelastic, it generally does not pay to install and enforce a prohibitive approach. This has been concluded (even) for products much more controversial than gambling.[306] Where many people wish to consume a certain product, it will eventually be offered – legally or illegally – if financial gains are expected by the producers – or in the case of gambling – the operators.[307] Prohibitive approaches are problematic as they regularly lead to undesired side effects that are hard to control due to the illegality of the product or activity.[308] Zinberg observed already in the 1980s in relation to drug policy that public debates all too often ignored two related factors, which made the issue of permanent prohibition largely academic. Slightly provocative he stated that even

---

[302] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

[303] Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

[304] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55; C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

[305] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

[306] Becker, G.S., Grossman, M., and Murphy, K.M., "The Economic Theory of Illegal Goods: The Case of Drugs", *National Bureau of Economic Research Working Paper*, working paper 10976 (2004), available at SSRN http://ssrn.com/abstract=633635.

[307] For an introduction to the basic principles of economics, cf. e.g. Mankiw, *Principles of Economics*.

[308] For a recent account on the war on drugs, cf. Seidl, C., and Staun, H., "*Legalität als letzter Ausweg: Machen wir Frieden mit den Drogen*", Frankfurter Allgemeine Sonntagszeitung, 29 April 2012.

though drug use similar to pregnancy could be avoided by abstinence, it does not seem that mankind has opted for total continence in both cases. Furthermore, the prohibition of drug using in the US had not been any more effective than the earlier attempt to eliminate alcohol use in the 1920s.[309]

If a government decides to allow games of chance, the question arises *whether advertising should be allowed too*. Does advertising impact on the propensity of disordered gambling in society?

Within the earlier described public health model of disease transmission, games of chance and advertising for such games form *environmental factors* that have the potential to impact people's behaviour. A recent literature review assessed the empirical evidence regarding the *extent to which advertising impacts the propensity of gambling disorder*.[310] A discussion on this topic should start by acknowledging the *complexity* of measuring this relationship. There are classic problems such as measuring the counterfactual or the difference between self-assessment (questionnaire) and actual behaviour. In addition, the endeavour is further complicated by the fact that advertising may impact both conscious and sub-conscious levels. Bass noted in the 1960s, "there is no more difficult, complex, or controversial problem in marketing than measuring the influence of advertising on sales."[311]

While it is complex to show associations between advertising and sales, it is even more complex to show associations between advertising and *gambling disorder*. Binde accurately described these problems.[312] Upon recognition of the complexity of the exercise, Binde concluded that there was no reliable evidence regarding the impact of gambling advertising on gambling disorder. He also concluded that the overall impact on the general population was likely to be rather small. He argued that a *differentiation between different markets* was necessary. In a competitive licensing market, advertising is likely to affect the size of market share of competitors. In a monopolistic market by contrast, advertising is likely to affect the total sales in that market. The impact of advertising in mature markets is likely to be different from young markets. In the latter, advertising efforts for games of chance may increase the overall participation rate of a population; by contrast, advertising effects in a mature market may fade out. It may mainly lead to shifts between different operators or products (substitution effect).[313]

Recent prevalence data from the *UK* provide some support for this view. As a consequence of a liberalisation of the gambling sector by the 2005 Gambling Act, *gambling advertising has arguably expanded significantly* in recent years.

---

[309] Zinberg, N.E., "Reflections on Social Policy and Drug Research" in Drug, Set, and Setting: The Basis for Controlled Intoxicant Use, New Haven, CT: Yale University Press, 1984.

[310] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

[311] Bass, F.M. (1969). "A Simultaneous Equation Regression Study of Advertising and Sales of Cigarettes", *Journal of Marketing Research, 6*(3), 291–300.

[312] Binde, P. (2007). "Selling Dreams – Causing Nightmares?", *Journal of Gambling Issues, 20*, 167–192.

[313] Ibid.

If the impact of advertising upon gambling behaviour of the general population were indeed big, a significant increase in gambling participation should take place. If advertising led to increased levels of gambling disorder, a significant increase of those rates should also be noted. The participation rates in games of chance in 2010 were a return to those observed in 1999, and prevalence rates of gambling disorder remained quite stable over the last decade.[314] Binde noted more generally that countries with a sudden advertising increase or decrease did not report significant changes in disordered gambling rates.[315]

Impact on Disordered Gamblers

While it is very complex to measure the impact of advertising on the propensity of disordered gambling in the general population, researchers are more likely to be able to show effects of advertising on *certain population groups*. Relevant are in particular those studies that involve vulnerable population groups, namely *adolescents* and *disordered gamblers*. As adolescents show higher prevalence rates of disordered gambling than adults, it is of interest how they react to advertising. Since disordered gamblers already experience problems to keep their gambling under control, their reactions to advertising are of particular interest too.

Even though the evidence-base is not solid, there are indications that advertising works as a *trigger to gamble* for *some* disordered gamblers (while this does not seem to be the case for others). Advertising seems to work as external *stimuli* that produce an impulse to gamble (trigger). Grant et al. performed a study with 131 pathological gamblers in treatment. About half of them stated that advertising on billboards, television or radio triggered them.[316] A study by Binde found similar results. For some pathological gamblers, advertising worked as a *trigger to re-engage in gambling*. Advertising appeared to have the biggest impact during *escalation and relapse*. Some pathological gamblers would gamble more (escalation) or they reengaged in gambling when they were trying to cut down or quit gambling (relapse).[317] It was also shown that addicts and non-addicts react differently to gambling marketing tools.[318]

---

[314] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 68.

[315] Binde, "Selling Dreams – Causing Nightmares?".

[316] Grant, J.E., and Kim, S.W. (2001). "Demographic and Clinical Features of 131 Adult Pathological Gamblers", *Journal of Clinical Psychiatry, 62*(12), 957–962.

[317] Binde, P. (2009). "Exploring the Impact of Gambling Advertising: An Interview Study of Problem Gamblers", *International Journal of Mental Health and Addiction, 7*(4), 541–554.

[318] Narayanan, S., and Manchanda, P. (2011). "An Empirical Analysis of Individual Level Casino Gambling Behavior", *Stanford University Graduate School of Business Research Paper No 2003*, available at http://gsbapps.stanford.edu/researchpapers/library/RP2003.pdf.

Impact on Adolescents

In relation to adolescents, there are indications that this population group is *particularly susceptible of messages* created by advertising and counter-advertising. Advertising may significantly impact their perception of games of chance.[319] Derevensky et al. found that male and older adolescents in particular seemed to be influenced by the overly positive image created by gambling advertising.[320] Lee et al. studied the impact of gambling advertising on College students. They found that media gambling exposure led to positive attitudes towards gambling shows and gambling adverts. This furthered their intentions to gamble. It is also noteworthy that *anti-gambling media exposure* led to negative attitudes towards gambling advertisements and gambling shows. Both advertising and counter-advertising seem to influence adolescents.[321]

In view of the paucity of empirical evidence on the effects of gambling advertising, *research from related fields* that also involve health risks, such as tobacco and alcohol, may grant some guidance.[322] Certainly, there are differences: From a public health perspective, the eradication of smoking can be welcomed; by contrast, gambling and alcohol consumed in moderate doses is not known to have harmful effects on health.[323] Nevertheless, the experiences from this field regarding the effectiveness of advertising and counter-advertising can inform gambling policy. Friend et al. reviewed the empirical evidence on the effects of advertising and counter-advertising on *tobacco*. They found that tobacco advertising restrictions and counter-advertising impacted youth's attitudes and the smoking prevalence among minors. Pro-health messages in youth-oriented media appeared to be effective too.[324]

Content Analysis of Advertisement

Finally, content analysis studies show that gambling advertising (in some countries) may work with messages that contribute to *distorted perceptions* of games of chance (for example, the more you gamble, the better your chances of winning). Moneghan

---

[319] For the whole topic, cf. Derevensky, *Teen Gambling: Understanding a Growing Epidemic*.

[320] Derevensky, J., Sklar, A., Gupta, R. et al. (2010). "An Empirical Study Examining the Impact of Gambling Advertisements on Adolescent Gambling Attitudes and Behaviors", *International Journal of Mental Health and Addiction, 8*(1), 21–34.

[321] Lee, H.S., Lemanski, J.L., and Jun, J.W. (2008). "Role of Gambling Media Exposure in Influencing Trajectories among College Students", *Journal of Gambling Studies, 24*(1), 25–37.

[322] For a contribution regarding risk regulation in these three fields of public income, cf. Cnossen, S., *Taxation and Regulation of Smoking, Drinking and Gambling in the European Union*, The Hague: CPB Netherlands Bureau for Economic Policy Analysis, 2009.

[323] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 60.

[324] Friend, K.B., and Ladd, G.T. (2009). "Youth Gambling Advertising: A Review of the Lessons Learned from Tobacco Control", *Drugs: Education, Prevention, and Policy, 16*(4), 283–297.

et al. confirm that youth appears to be particularly vulnerable to the effects of advertising. Relying on the North American situation, they also argue that gambling is regularly portrayed and perceived by adolescents as a *harmless and credible activity and as an alternative to hard work*. Studies conducted in the 1990s found that a big share of the gambling advertising in the US and Canada was misleading.[325] Further content analysis studies confirmed that gambling advertising in North America aired at times or in programmes attractive to youth. Messages often *inter alia* related to *taking shortcuts to success and quick fixes to problems* (escape). While responsible gambling messages often accompanied the adverts, they could only get marginal attention as they were often shown only in very small print.[326] Distorted personal imagination can therefore be reinforced by deliberate deception.[327]

Results

The review of the literature on the empirical evidence relating to the effects of gambling advertising allows analysing the approach of the Court of Justice in light of empirical evidence. The Court noted that an attractive offer of an exclusive right holder might necessitate advertising on a certain scale;[328] the advertising should not (excessively) incite and encourage consumers.[329] In subsequent cases and similar to the approach of the EFTA Court, it started to review advertising practices more strictly. It considered the scale of advertising and – by way of quoting parties to the case – the (young) age of consumers targeted by the advertising. It differentiated between (restrained) informative versus (expensionist) encouraging advertising.[330]

The empirical evidence provides support for at least some of the Court of Justice's considerations. It was shown that *advertising* has a significant effect on

[325] Monaghan, S.M., Derevensky, J., and Sklar, A. (2009). "Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendations to Minimise Harm", *Journal of Gambling Issues, 22*, 252–274.

[326] McMullan, J.L., and Miller, D. (2010). "Advertising the "New Fun-Tier": Selling Casinos to Consumers", *International Journal of Mental Health and Addiction, 8*(1), 35–50; cf. also McMullan, J.L., and Miller, D. (2008). "All In! The Commercial Advertising of Offshore Gambling on Television", *Journal of Gambling Issues, 22*, 230–251.

[327] For a discussion, cf. Binde, P., ""You Could Become a Millionaire" – Truth, Deception, and Imagination in Gambling Advertising" in *Global Gambling: Cultural Perspectives on Gambling Organizations*, Kingma, S.F. (Ed.), New York: Routledge, 2010, pp. 171–194.

[328] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

[329] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55; C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

[330] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 59–65 and 69.

certain population groups. It can create or reinforce distorted views on gambling among adolescents. Therefore, inciting advertising can have different effects than informative messaging on the perception of gambling among adolescents. Studies further suggest that advertising functions as a trigger to gamble that is hard to resist for *some* disordered gamblers. Overall, empirical evidence therefore grants support for the Court's approach.

It is essential to be precise with regard to the evidence relating to gambling advertising. Until recently, the Court of Justice focused on the encouragement/incitement component of advertising. Only in *Dickinger & Ömer* the Court started to contrast these forms with policies seeking to *inform* consumers. The available empirical evidence suggests that this aspect is central, namely that people exposed to advertising – particularly adolescents – get *informed about the chances and risks* of gambling. Advertising that invites people to gamble or the fact that people hold positive views towards gambling is not *per se* something that will necessarily lead to higher prevalence of gambling disorder. An advertising policy becomes detrimental where it fails to strengthen the awareness of harmful effects of gambling.[331] What seems to matter is the *overall perception of gambling*, namely whether consumers of a given jurisdiction receive a balanced picture of gambling. They must also be aware of the risks that gambling involves.[332] Regulators can opt for different ways to achieve effective information of consumers and specifically vulnerable groups on gambling-related risks: counter-advertising messages can be included in advertising, authorities may run public education programmes or advertising possibilities may be restricted or prohibited. In this author's view, it makes little sense to allow for *unrestricted advertising* in terms of volume and message content followed by an attempt to *counter-balance it with (costly) public education programmes*. Where the legislator allows the advertising of activities that involve significant risks for consumers, it also takes up a certain responsibility[333] – irrespective of the actual regulatory model that it chooses (monopoly, limited or liberal licensing system).

9.2.6 Slot Machines

The cases before the Court of Justice and the EFTA Court show that parties have occasionally relied on the argument that certain types of games were more dangerous than others. More precisely, certain games were more addictive for

[331] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 63.

[332] What is more, there is evidence from behavioural research that questions the information paradigm. Well informed consumers to not necessarily make sound decisions. For an overview, see R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness,* New Haven CT/London: Yale University Press 2008.

[333] Planzer, and Alemanno, "Lifestyle Risks: Conceptualizing an Emerging Category of Research".

consumers. The legal relevance of this argument is two-fold. First, more addictive games may justify stricter limitations of fundamental freedoms. Government counsels would accordingly have an interest in pleading this point. Secondly, the criterion of a 'consistent and systematic' policy may require that the operation of addictive games is regulated more strictly than that of less or non-addictive games. Questions may arise where an addictive game is strongly advertised or substantially expanded, and at the same time, market access is also denied in relation to non-addictive games. Depending on the constellation, counsels for private operators may have an interest in making this point. While sports betting is also sometimes referred to as an addictive game, the issue of addictive games has been pleaded before the Internal Market Courts mainly in relation to slot machines and Internet gambling.

9.2.6.1 Case Law

In the early case law, the Court of Justice did not differentiate between different games. This was also in line with its general reluctance to review the proportionality of national measures. Due to the essentially unlimited margin of appreciation, government agents did not see a need to argue different addiction levels of games. In *Läärä*, the Court of Justice likened slot machines to lotteries because of similar economic elements.[334] *Zenatti* serves as an example of this overall approach.

> [B]ets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.[335]

On the EFTA side, two gambling cases were pending before the EFTA Court following the judgments in *Gambelli* and *Lindman*. In *Gambelli*, the Court of Justice had started to review the proportionality of national measures. Noting this shift of the review practice, the EFTA Court reviewed the Norwegian gambling regime closely. The direct action *ESA v Norway* concerned exclusively the sector of slot machines (gaming machines). The new legislation intended to nationalise the sector that was formerly run under a licensing system with charities. The agents for the Norwegian government pointed to gaming machines as the single most addictive game. The EFTA Court followed that argumentation and found gaming machines to be more addictive than other games.[336] This conclusion was informed by studies presented to the Court by the Norwegian government.

---

[334] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 17.

[335] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 18.

[336] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 45.

> [S]tudies in the field of gambling presented to the Court point at gaming machines as the single most potentially addictive form of gambling. These studies refer, inter alia, to the structural characteristics of the machines, such as rapid event frequency, the near miss, and light and sound effects.[337]

According to the interpretation of these studies, gambling disorder had occurred in Norway simultaneously with the increase of gambling on gaming machines. The large majority of an addiction helpline had reported problems with gaming machines.[338] These findings served to justify the nationalisation of the slot machine sector.

The second case before the EFTA Court, *EFTA-Ladbrokes*, raised the question of consistency. This case was about various forms of gambling, except for slot machines that were already dealt with in *ESA v Norway*. In *EFTA-Ladbrokes*, the EFTA Court voiced that the development and marketing of addictive games by the state-run exclusive right holder were to be taken into account since they could run counter the objective of fighting gambling addiction.[339] According to the judgment, the Norwegian government had suggested that lotto posed no appreciable threat to cause gambling addiction whereas there were highly addictive games on the other end of the scale like gaming machines. The EFTA Court left the detailed assessment of this question to the national court.[340]

Early on in the case law, the Court of Justice had also expressed its concerns regarding slot machines. It had noted a "tendency amongst most of them […] to play the game over and over again."[341] Recently, it found that increased prizes on gaming machines would lead to a greater risk of gambling addiction.[342]

9.2.6.2 Empirical Evidence

It must be assessed what empirical evidence has to report regarding the mechanisms of gambling disorder and addiction in general and how this relates to gaming machines being more addictive. While old-style slot machines are no longer quite prevalent, newer generations of electronic gaming machines (EGM's) have raised particular concerns. A recent lawsuit against Loto Québec was based on the

[337] Ibid., para. 45.

[338] Ibid., para. 45.

[339] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 54.

[340] Ibid., para. 57.

[341] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 17.

[342] C-213/11, C-214/11 and C-217/11 (Joined Cases) Fortuna sp. z o.o. (C-213/11), Grand sp. z o.o. (C-214/11), Forta sp. z o.o. (C-217/11) v Dyrektor Izby Celnej w Gdyni [2012] nyr, para. 39.

argument that manufacturers and operators composed gaming machines in a way to make people addicted.[343]

Features like rapid visual and sound effects may indeed have a potential to entice and stimulate a continuation to play on the machine.[344] It is also possible that many at-risk gamblers find more reward in EGM gaming than in other types of games. Several prevalence studies suggest that EGM's are amongst the preferred gambling activities of pathological gamblers.[345] It should be noted that a high correlation was found where EGM's were located *outside* of casinos such as in bars.[346] The *social environment*, including drinking habits, may significantly differ between bars and casinos and thus impact differently on people's behaviour. Recently, Disley et al. provided an extent literature review of research into structural features of gaming machines. The authors concluded that the available evidence was very limited; it was not clear whether electronic gaming machines contributed to the development and maintenance of disordered gambling.[347]

Section 9.1.3 described the interplay of different factors in the development of addiction. It showed that there is ample evidence for object non-specificity of addiction, that is, the role of the object is not as important as often assumed in the past. The aetiology of gambling addiction is indeed complex. The public health model of disease transmission in Sect. 9.1.3.2 illustrated that addiction develops in a complex interplay of host (gambler), agent (games) and environmental factors (for example, socio-economic factors). The EFTA Court alluded to this interplay of various factors in its ruling in *ESA v Norway*:

> Whether and to which extent a given game can lead to gambling addiction must be evaluated by taking into account the specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader socio-cultural environment.[348]

The interplay of factors was also confirmed in the aforementioned case in Quebec. Leading experts on gambling addiction testified in court and rejected the concept of games that make people addicted. The final settlement stated that

---

[343] GamblingCompliance, "*Loto-Quebec To Pay $50 m To Addicted Players*", 25 March 2010.

[344] Schüll, N.D., *Addiction by Design: Machine Gambling in Las Vegas*, Princeton, NJ: Princeton University Press, 2012.

[345] Cantinotti, M., and Ladouceur, R. (2008). "Harm Reduction and Electronic Gambling Machines: Does This Pair Make a Happy Couple or Is Divorce Foreseen?", *Journal of Gambling Studies, 24*(1), 39–54, at 39–40, and the therein cited literature.

[346] Ibid. at 39–40, and the therein cited literature.

[347] Disley, May Culley, and Rubin, *Map the Gap: A Critical Review of the Literature on Gambling-Related Harm*, at xv, 69–70, and 80–81. Moreover, an international consortium of researchers recently composed a framework with 43 groups of factors to be considered as relevant in relation to gambling addiction. Only three factors relate to the agent, that is, games of chance (see Abbott, M., Binde, P., Hodgins, D., et al., Conceptual Framework of Harmful Gambling: An International Collaboration. The Ontario Problem Gambling Research Centre (OPGRC), Guelph, Ontario, Canada, (2003)).

[348] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 44.

the gaming machines did not cause the gambling disorder of players.[349] Damages in this lawsuit were claimed based on the argument that the industry created and ran machines that made people addicted. The aetiology of addiction, however, is so complex that not even the leading experts of the field have final answers as to the causation in the emergence of addiction.[350] Operators certainly have an economic interest in offering games that are attractive to gamblers. Very different, however, is the assumption that operators can create machines that make people addicted.

9.2.7 Internet Gambling

9.2.7.1 Case Law

Games of chance played over the Internet are the second category that parties to court proceedings have occasionally considered as particularly dangerous.[351] The Court of Justice held that this way of gambling combined

> so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto.[352]

As opposed to land-based games of chance, the Court of Justice *did not further distinguish between the different types of games* that are played online (for example, betting, poker, lotteries). The fact that they are played over the Internet makes them more dangerous.[353]

The Court of Justice started relatively late to address Internet-specific issues in its case law. The Italian cases *Zenatti*, *Gambelli and Placanica* only related in the broad sense to remote betting because the Italian 'information centres' served as

---

[349] GamblingCompliance, "Loto-Quebec To Pay $50 m To Addicted Players".

[350] Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

[351] For a general overview of legal issues regarding cross-border gambling services, cf. *Cross-Border Gambling on the Internet – Challenging National and International Law*, Publications of the Swiss Institute of Comparative Law, vol. 47, Swiss Institute of Comparative Law (Ed.), Zurich: Schulthess, 2004; Rose, N., and Owens, M., *Internet Gaming Law*, 2nd ed., New Rochelle, NY: Mary Ann Liebert Inc. Publishers, 2009. Cf. also the first edition with significantly different contents: Rose, N., and Owens, M., *Internet Gaming Law*, 1st ed., Larchmont, NY: Mary Ann Liebert Inc. Publishers, 2005.

[352] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 103.

[353] The term 'online gambling' is regularly used as a synonym for 'Internet gambling'. By contrast, the term 'remote gambling' is broader and includes all forms of gambling in which players participate by the use of any kind of remote communication, including the Internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication. Cf. e.g. the definition in the UK Gambling Act.

agencies that collected bets and transferred them to the UK operator. The topic of Internet gambling was not expressly dealt with until *Liga Portuguesa*.[354] In that case, the Court of Justice held that games of chance accessible via the Internet involved different and more substantial risks of fraud.[355] The Court of Justice reaffirmed that statement in *Sporting Exchange*.[356] It also applied a very lenient proportionality review in relation to questions concerning the Internet. In *Markus Stoss*, the Court added that difficulties in ensuring compliance with the strict limitations of a monopoly due to the transnational nature of the Internet could not as such call into question the conformity of measures with EU law.[357]

The statement that online gambling involves different and more substantial risks of fraud does not necessarily lead to the conclusion that this is also the case for risks of gambling disorder. It was in *Carmen Media* that the Court of Justice extended its critical opinion about the medium Internet also to health risks:

> the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.[358]

Before the Court of Justice's decision in *Carmen Media*, the EFTA Court had expressed concerns in relation to online gambling in its judgment in *EFTA-Ladbrokes*. It had held that channelling measures could be suitable if they were envisaged to draw players away from addictive games via the Internet or other hard to suppress channels.[359]

---

[354] Dissenting: Koenig, C. (2007b). "Der EuGH als Glücksspielmonopolverderber", *Europäisches Wirtschafts- und Steuerrecht, 18*(4), 1.

[355] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 70.

[356] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, para. 34.

[357] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 86.

[358] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 103.

[359] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 54.

The Court of Justice left a very wide margin of appreciation to national authorities in relation to online games and did *de facto* not review the proportionality of the measures in this regard. The German ban on online gambling, even though with certain temporary exceptions, was found suitable to pursue the objective of combating gambling addiction and in particular of protecting young persons.[360] Notably, the Court of Justice has not altered its view on Internet gambling in recent judgments.[361]

Finally, it should be noted that the ECtHR adopted the Court of Justice's critical stance on Internet gambling. The ECtHR quoted from the case law regarding the compatibility of the State Treaty of the German Länder with EU law. After a lengthy quote from the *Carmen Media* judgment, the ECtHR almost literally adopted the wording in relation to the 'different and more substantial' dangers of Internet gambling.[362]

9.2.7.2 Epidemiology of Gambling Disorder

In many parts of the world, land-based forms of gambling have been around for decades and centuries. Internet gambling is a *recent phenomenon*, with the biggest growth only taking place in the last decade.[363] In the early days of online gambling, most websites based their operations in Caribbean and Central American jurisdictions. Certain *autonomous tribal jurisdictions* became key players in the online gambling business: in 2007 for instance, the Kahnawake Mohawk Territory in Quebec hosted the highest number of online gambling websites (377 websites).[364]

This new phenomenon has raised significant concerns that Internet gambling will lead to sharply increased levels of gambling disorder. The fears are not surprising as a couple of factors explain their presence. First, games of chance over the Internet have only been professionally commercialised for slightly more than a *decade*. Empirical research is much younger than on land-based gambling, and their impact on the prevalence of disordered gambling still needs to be followed up in long-term studies. Second, though the online share of the gambling industry is still clearly smaller, it is *rapidly growing* and at much higher rates than land-based gambling. Third, online gambling aliments concerns in a double

[360] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 105.

[361] C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 79–80; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 96–99.

[362] The applicant had argued *inter alia* a violation of Art. 14 ECHR (discrimination) due to the fact that the State Treaty treated online operators differently than operators of other forms of games: TIPP 24 AG v Germany, Application no 21252/09 [2012], para. 44.

[363] The first online casino supposedly opened in 1995: Liddell Jr, P., Watson, S., Eshee Jr, W.D. et al. (2003). "Internet Gambling: On a Roll?", *Seton Hall Legislative Journal, 28*(2), 101–141, at 315.

[364] Williams, R.J., and Wood, R.T., *Internet Gambling: A Comprehensive Review and Synthesis of the Literature*, Report Prepared for the Ontario Problem Gambling Research Centre 2007, at 6–8.

manner: the services not only relate to gambling but *in addition to the medium Internet*. The latter in itself aliments disputes over the opportunities and risks of this new technology, in particular for youth.[365] Popular media may report about 'Internet addicts' who spend several days in front of the Internet. The combination of those factors unsurprisingly nourishes fears about an uncontrollable spread of gambling addiction.

The Internet has not only brought new forms of gambling. Due to its cross-border nature and the ease of access, it has generally *increased the overall exposure of people to games of chance*. According to the earlier described exposure model, increased exposure to gambling offers should result in increased levels of disordered gambling. Until recently, there were no empirical results available from studies comparing the effectiveness of different regulatory approaches towards online gambling.[366] Most recently, a study could not find statistically significant differences of prevalence rates between prohibitive and permissive regulatory approaches towards online gambling.[367]

In the absence of further studies that analyse the comparative effectiveness of regulatory approaches, a series of national prevalence rates from one country can also offer helpful indications. In the UK, the 2005 Gambling Act introduced an *open licensing system for online operators*. The Act also allows under certain conditions foreign operators to operate gambling offers to UK residents. While the effective exposure to online games has not been measured, many authors argued that exposure to games of chance increased in the UK with the liberalisation of the gambling market and predicted significantly increased levels of gambling disorder.[368] Recent epidemiological research from the UK does not support such significant increase.[369] In fact, the three prevalence studies from the UK[370] show *quite stable prevalence rates of gambling disorder* over several years.

Sparrow analysed the situation of online gambling in the US where online games of chance were *prohibited in all States* at that time. In spite of this prohibition, it is

---

[365] For a more optimistic view, cf. Palfrey, J., and Gasser, U. (2011). "Reclaiming and Awkward Term: What We Might Learn From "Digital Natives"", *I/S: A Journal of Law and Policy for the Information Society, 7*(1), 33–55.

[366] Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

[367] Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe". Regarding some limitations of the study, see also Sect. 9.2.2.2 *i.f.*

[368] Light, "Gambling Act 2005: Regulatory Containment and Market Control"; Orford, "Disabling the Public Interest: Gambling Strategies and Policies for Britain".

[369] Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

[370] Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*: The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % DSM-IV). Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*: The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV). Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

estimated that the global market share of US residents was one quarter to one third in 2008, corresponding to about $5–6 billion. Moreover, the US is home to more online gambling websites than any other country. Only the domain ownership is American while the servers are generally located off-shore.[371] Sparrow even argued that the addition of US licensed operators would hardly alter the already present ubiquity of online games of chance and that regulation would bring clear advantages such as increased control.[372] In a survey conducted by the American Gaming Association, only 19 % indicated that they were aware that online gambling was currently illegal in the US.[373]

Even before the new millennium, it was predicted that Internet gambling would be impossible to stop by regulation.[374] Upon analysing various regulatory approaches, other authors also concluded that regulating online gambling might be a more effective way than a prohibitionist approach.[375] The *widespread popularity of online gambling in the US has not translated into an increase of rates of gambling disorder*. The development of the prevalence of gambling disorder in the US was described in Sect. 9.2.5.2. The most recent nation-wide epidemiological studies found decreasing levels of gambling disorder. Petry et al. found life-time gambling disorder at a rate of 0.4%[376] and Kessler et al. at a level of 0.6 %.[377] This was at a time when online gambling services had been available already for several years and the volume of offers rapidly growing.[378]

---

[371] Wilson, M. (2003). "Chips, Bits, and the Law: An Economic Geography of Internet Gambling", *Environment and Planning A, 35*(7), 1245–1260, at 1250 and 1254. Choosing off-shore servers allows to circumvent legal requirements: Cabot, A.N., and Balestra, M., *Internet Gambling Report VIII: An Evolving Conflict between Technology & Law*, Missouri: River City Group, 2005.

[372] Sparrow, M., *Can the Internet Be Effectively Regulated? Managing the Risks*, 2009, available at http://financialservices.house.gov/media/file/hearings/111/sparrow.pdf, concurring: Andrle, J.D. (2006). "A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States", *UNLV Gaming Research & Review Journal, 10*(1), 59–93.

[373] *2006 State of the States: The AGA Survey of Casino Entertainment*, 2006, at 26; cf. also the brief comment in 'Editors' (2006), "Internet Gambling Increases Dramatically", *The Computer & Internet Lawyer, 23*(7), p. 22, at 22. For an account of online gambling regulation in the US, cf. Bernhard, B.J., and Montgomery, A., "The Only Thing Certain is Uncertainty? Internet Gambling in the United States, 1961–2011" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, Robert T., Parke, Jonathan (Eds.), London/New York: Routledge, 2012, 300–315.

[374] Bell, T.W. (1998). "Internet Gambling: Impossible to Stop, Wrong to Outlaw", *Regulation, 21*(1), 16–17.

[375] Wiebe, J., and Lipton, M., *An Overview of Internet Gambling Regulations*, Submitted to the Ontario Problem Gambling Research Centre 2008.

[376] Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

[377] Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

[378] The first online casino supposedly opened in 1995: Liddell Jr, Watson, Eshee Jr et al., "Internet Gambling: On a Roll?", at 315.

9.2.7.3 Internet Addiction

Fears of increased gambling addiction due to Internet gambling offers also relate to concerns about the Internet itself. The Internet has indeed brought an incredible increase of accessible information. Palfrey and Gasser noted that in the year 2007 alone, 161 billion gigabytes of digital information were created, stored and replicated, which corresponded to three million times the information of all books ever written.[379] It is impossible to deal with such a *galactic amount of information*. Search engines take a key role in making the information overload somehow manageable. The regulation of search engines brings a series of challenges for policy-makers such as the need to synchronise legal evolution with technological innovation and the tension between the global scope (business activities) and the local scope (laws seeking to regulate the activity).[380] Unsurprisingly, some people cope with the enormous information overload better than others.

The most severe form of disordered Internet behaviour is regularly described as *'internet addiction'* or excessive Internet use or pathological internet use. *Caution* is needed. Popular media often refer to the term 'addiction' in relation to the Internet rather easily; anecdotal reports may leave the layperson with the impression that Internet addiction is a mass phenomenon. There have been efforts to define diagnostic criteria for Internet addiction.[381] Young suggested an eight-item screen whose diagnostic criteria were adapted from those of gambling disorder; Young sees gambling disorder as most akin to the pathological nature of Internet use.[382]

Popular media sometimes report figures on the prevalence of Internet and similar 'addictions'.[383] In the *absence of commonly accepted diagnostic criteria* these figures need to be dealt with very carefully. It is not surprising that many reports do not appear in peer-reviewed journals. *Different reports may measure different things*

[379] Palfrey, J., and Gasser, U., *Born Digital: Understanding The First Generation of Digital Natives*, Basic Books, 2008, at 185.

[380] Gasser, U. (2006a). "Regulating Search Engines: Taking Stock and Looking Ahead", *Yale Journal of Law & Technology, 9*, 201–234.

[381] Beard, K.W., and Wolf, E.M. (2001). "Modification in the Proposed Diagnostic Criteria for Internet Addiction", CyberPsychology & Behavior, *4*(3), 377–383; Block, J.J. (2008). "Issues for DSM-V: Internet Addiction", American Journal of Psychiatry, *165*(3), 306–307; Young, K.S. (1998). "Internet Addiction: The Emergence of a New Clinical Disorder", CyberPsychology & Behavior, *1*(3), 237–244.

[382] Young, "Internet Addiction: The Emergence of a New Clinical Disorder", at 237.

[383] Faiola, A., "*When Escape Seems Just a Mouse-Click Away*", The Washington Post, 27 May 2006, citing a survey funded by the South Korean government.

with some reports looking into addiction to computers,[384] the Internet,[385] video games[386] or online games.[387] What is more, certain publications simply include under the term Internet addiction online and offline computer usage.[388] The term is unclear as it may refer to being addicted to the medium as such (generalised addictive use) or to certain content like pornography or gambling (specific addictive use).[389] Other publications suggest a three-fold distinction into gaming, sexual preoccupations and e-mail/text messaging.[390] Upon a review of the available literature, scholars have identified significant methodological deficits in many studies that intended to provide evidence for the harmfulness of the Internet. The deficits include for instance inconsistent criteria or inadequate recruiting methods of participants.[391]

---

[384] Cf. hereto e.g. suggested criteria that simply merge 'computer and Internet addiction' into one category:

"- Increasing amounts of time spent on computer and internet activities
- Failed attempts to control behavior
- Heightened sense of euphoria while involved in computer and internet activities
- Craving more time on the computer and internet
- Neglecting friends and family
- Feeling restless when not engaged in the activity
- Being dishonest with others
- Computer use interfering with job/school performance
- Feeling guilty, ashamed, anxious, or depressed as a result of behavior
- Changes in sleep patterns
- Physical changes such as weight gain or loss, backaches, headaches, carple tunnel syndrome
- Withdrawing from other pleasurable activities".

ICA Services, "Signs & Symptoms of Computer & Internet Addiction", available at http://www.icaservices.com/signs_symptoms.htm (accessed 1 June 2012).

[385] Cao, F., Su, L., Liu, T.Q. et al. (2007). "The Relationship between Impulsivity and Internet Addiction in a Sample of Chinese Adolescents", *European Psychiatry, 27*(7), 466–471; Sun, D.L., Chen, Z.J., Ma, N. et al. (2009). "Decision-Making and Prepotent Response Inhibition Functions in Excessive Internet Users", CNS Spectrums, *14*(2), 75–81.

[386] Grüsser, S.M., Thalemann, R., and Griffiths, M.D. (2006). "Excessive Computer Game Playing: Evidence for Addiction and Aggression?", *CyberPsychology & Behavior, 10*(2), 290–292; Harris Interactive, "Video Game Addiction: Is it Real?", 2007, available at http://www.harrisinteractive.com/news/allnewsbydate.asp?newsid=1196.

[387] Faiola, "*When Escape Seems Just a Mouse-Click Away*".

[388] Block, "Issues for DSM-V: Internet Addiction", at 306; Services, "Signs & Symptoms of Computer & Internet Addiction".

[389] Palfrey, and Gasser, *Born Digital: Understanding The First Generation of Digital Natives*, at 188. For an overview of the different forms of 'internet addiction', cf. Young, K.S., and Nabuco de Abreu, C., *Internet Addiction: A Handbook and Guide to Evaluation and Treatment*, Hoboken, NJ: John Wiley & Sons, 2011.

[390] Block, "Issues for DSM-V: Internet Addiction", at 306.

[391] Byun S., Ruffini C., Mills J.E., Douglas A.C., Niang M., Stepchenkova S., Lee S.K., Loutfi J., Lee J.K., Atallah M., Blanton M. (2009). "Internet Addiction: Metasynthesis of 1996–2006 Quantitative Research", *CyberPsychology and Behavior, 12*(2), 203–207; Linden, *The Compass of Pleasure: How Our Brains Make Fatty Foods, Orgasm, Exercise, Marijuana, Generosity, Vodka, Learning, and Gambling Feel So Good*.

Petry correctly observed that one must be cautious of where to draw the line between *mere excessive behavioural patterns* (described for instance for television, computer, gaming, internet, work, exercise, chocolate, shopping, sex) and a true psychiatric disorder. The fact that over two-thirds of Americans are overweight cannot lead to the conclusion that they are addicted to food.[392] Nevertheless, Petry and colleagues concluded that an addiction model of overeating could at least effectively inform prevention and treatment of obesity.[393]

At present, the sole behavioural addiction recognised in DSM-5 is gambling disorder. According to the work group on substance-related disorders, other behavioural forms of addiction will be considered for *integration in the DSM as research data accumulate*;[394] the evidence is currently not considered solid enough.[395] The DSM-5 task force decided, however, to include 'Internet gaming disorder' in the separate Section III among 'conditions for further studies'. These conditions are not recognised mental health disorders and the provisionally suggested diagnostic criteria are not intended for clinical use. The purpose is to encourage further research and to provide a common language for researchers and clinicians.[396] Unsurprisingly, the proposed diagnostic criteria for Internet gaming disorder are similar to the criteria of gambling disorder and substance use disorders:

> Persistent and recurrent use of the Internet to engage in games, often with other players, leading to clinically significant impairment or distress as indicated by five (or more) of the following in a 12-month period:
>
> 1. Preoccupation with Internet games. (The individual thinks about previous gaming activity or anticipates playing the next game; Internet gaming becomes the dominant activity in daily life).
>
> **Note**: This disorder is distinct from Internet gambling, which is included under gambling disorder.
>
> 2. Withdrawal symptoms when Internet is taken away. (These symptoms are typically described as irritability, anxiety, or sadness, but there are no physical signs of pharmacological withdrawal.)
> 3. Tolerance – the need to spend increasing amounts of time engaged in Internet games.
> 4. Unsuccessful attempts to control the participation in Internet games.
> 5. Loss of interests in previous hobbies and entertainment as a result of, and with the exception of, Internet games.
> 6. Continued excessive use of Internet games despite knowledge of psychosocial problems.

---

[392] Petry, N.M. (2010). "Should the Scope of Addictive Behaviors Be Broadened to Include Pathological Gambling?", *Addiction, 101*(Supplement 1), 152–160, at 157.

[393] Barry, D., Clarke, M., and Petry, N.M. (2009). "Obesity and Its Relationship to Addictions: Is Overeating a Form of Addictive Behavior?", *The American Journal on Addictions, 18*(6), 439–451. The concept of 'food addiction' as yet another behavioural expression of addiction is gaining ground. For a recent publication see Food and Addiction: A Comprehensive Handbook, K. Brownell and M. Gold (Eds.), Oxford/New York: Oxford University Press (2012).

[394] Explanations of the Substance-Related Disorders Work Group of DSM-5: Association, "DSM-5 Development – Substance-Related Disorders".

[395] Professor Charles O'Brian, Chairman of the Substance-Related Disorders Work Group, at the annual NCRG conference in Las Vegas in November 2010, as well as ibid.

[396] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 783.

7. Has deceived family members, therapists, or others regarding the amount of Internet gaming.
8. Use of the Internet games to escape or relieve a negative mood (e.g., feelings of helplessness, guilt, anxiety).
9. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of participation in Internet games.[397]

For the moment, the proposed disorder is limited to Internet games since non-Internet computerised games have been less well researched. Other expressions of excessive Internet use, such as relating to sex websites, are not included either. The proposed disorder typically involves individuals who devote eight to ten hours or more per day to Internet gaming and often go for long periods without food or sleep. Contrary to Internet gambling, no money is being wagered in relation to Internet gaming.[398]

In the absence of solid evidence on Internet-related disorders and the proposed Internet gaming disorder only being of provisional nature, it is advisable to resort to the *general knowledge that the scientific literature has gathered on addiction*. Section 9.1.5 showed that an extent review of the literature led scientists to describe addiction as a syndrome with some object-specific expressions, various shared manifestations and common aetiology. Studies regarding the behaviour of disordered Internet users seem to confirm shared manifestations. Sun et al. found that their ability of decision-making was diminished; the subjects experienced difficulties in balancing immediate rewards versus long-term detrimental consequences.[399] This is reminiscent of pathological gamblers[400] and people engaging in substance use disorders.[401] Research generally shows that the preference for a smaller-sooner over a larger-later reward is an important component of impulsivity. This phenomenon is called 'discounting': the value of the larger-later reward is subjectively discounted because there is a delay until its delivery.[402]

According to the syndrome model, disordered Internet use may be yet another expression of the same underlying pathological condition. However, the evidence base first needs to become more solid. Not every excessive Internet use should immediately be labelled 'addiction'.

---

[397] Ibid., at 795. Bold emphasis in original.

[398] Ibid., at 796–797.

[399] Sun, Chen, Ma et al., "Decision-Making and Prepotent Response Inhibition Functions in Excessive Internet Users".

[400] Cavedini, P., Riboldi, G., Keller, R. et al. (2002). "Frontal Lobe Dysfunction in Pathological Gambling Patients", *Biological Psychiatry, 51*(4), 334–341; Goudriaan, A.E., Oosterlaan, J., De Beurs, E. et al. (2006). "Neurocognitive Functions in Pathological Gambling: A Comparison with Alcohol Dependence, Tourette Syndrome and Normal Controls", *Addiction, 101*(4), 534–547.

[401] Bechara, A., Dolan, S., and Hindes, A. (2002). "Decision-Making and Addiction (Part II): Myopia for the Future or Hypersensitivity to Reward?", *Neuropsychologia, 40*(10), 1690–1705; Bechara, A., and Damasio, H. (2002). "Decision-Making and Addiction (Part I): Impaired Activation of Somatic States in Substance Dependent Individuals when Pondering Decisions with Negative Future Consequences", *Neuropsychologia, 40*(10), 1675–1689.

[402] Petry, and Madden, "Discounting and Pathological Gambling".

9.2.7.4 Actual Online Gambling Behaviour

Following these considerations on 'Internet addiction', the focus of the inquiry can come back to online gambling and the risks of gambling disorder that it involves. The impact of online gambling can be studied in different approaches. One way is to analyse the *development of prevalence rates of disordered gambling*. The examples of the UK and the US were briefly discussed as both these countries offer a series of epidemiological studies. Another way is to study *actual online gambling behaviour of players*. It was argued in the literature that certain factors associated with online gambling would lead to a greater risk of developing gambling addiction: permanent and convenient ease of access, the interactivity of the game or the asocial component of online gambling, that is, the anonymity and isolation of the player.[403]

While the field of study of online gambling is still young, several publications have analysed actual gambling behaviour of consumers playing on online gambling websites. Cunningham et al. correctly noted that it was a challenge but also a necessity to determine the demographic characteristics of online gamblers without invading their privacy.[404] Researchers at the Division on Addiction have studied large data samples of ten thousands of online players while respecting their privacy.[405] These studies are a shift of paradigm in that analysis has moved from self-reporting to observing *actual gambling behaviour*.[406] However, self-reporting may still be needed to establish the actual existence and extent of disordered gambling.[407]

According to these publications, the large majority of the studied online gamblers *played very moderately*, both in terms of wagered money and time spent gambling. A prospective longitudinal study of sports betting during 8 months analysed the betting behaviour of around 25,000 live-action bettors and 40,000 fixed-odds bettors.[408] The median betting behaviour for the two types of betting was to place

---

[403] Griffiths, M.D., and Parke, J. (2002). "The Social Impact of Internet Gambling", *Social Science Computer Review, 20*(3), 312–320; Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 25.

[404] Cunningham-Williams, Cottler, and Womack, "Epidemiology", at 31.

[405] The research samples allow to identify age, gender, country of residence and preferred language (to choose among 20 languages). Privacy is not breached as researchers cannot identify specific individuals via the aforementioned information: LaBrie, R.A., LaPlante, D.A., Nelson, S.E. et al. (2007). "Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior", *Journal of Gambling Studies, 23*(3), 347–362.

[406] Shaffer, H.J., Peller, A.J., LaPlante, D.A. et al. (2010). "Toward a Paradigm Shift in Internet Gambling Research: From Opinion and Self-Report to Actual Behavior", *Addiction Research & Theory, 18*(3), 270–283.

[407] Wood, R., T., Williams, R., J., and Parke, J., "The Relationship between Internet Gambling and Problem Gambling" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 200–211, at 204.

[408] Average age of cohort was 31 years and players were from 85 countries, mostly from Germany. The large majority were men. Interestingly, the gambling behaviour of women was very similar to that of men, but women tended to play during a shorter period of time but compensated by betting on more days during that time and by placing larger bets: LaBrie, LaPlante, Nelson et al., "Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior", at 351–352.

2.5 bets (fixed-odds) and 2.8 bets respectively (life-action) of 4 Euros every fourth day.[409] The authors concluded that the empirical data from this study did not support the speculation that gambling over the Internet had an inherent propensity to encourage excessive gambling.[410]

The large sample further showed that only a small percentage demonstrated discontinuously high values regarding several measures. This was the case for *around 1 % of the players* in relation to the following measures: number of bets, bets per day, Euros per bet, total wagered and net loss. Interestingly, the top 1 % heavily involved of one measure were not necessarily among the top 1 % of another measure. In other words, somebody who may be among the top 1 % in terms of Euros per bet was not necessarily among the top 1 % of number of bets. This means that even among the heavily involved, players found strategies to moderate their behaviour.[411]

Subsequent studies on other types of games confirmed that even among the most heavily involved players, many moderated their gambling behaviour over time. For Internet poker, the heavily involved sub-group was 5 %. After a while, both the most involved and the rest of the sample reduced Euros per poker session as well as Euros wagered in total as losses increased.[412] These facts show that even among the top 5 % poker players, moderation strategies were applied. Another study with sports bettors found a lesser developed capacity to moderate behaviour among the heavily involved bettors, in particular in relation to live-action bets.[413]

While potential *online-specific risks* need to be addressed, the medium Internet can also be used to offer *safeguards*, which land-based gambling cannot provide to the same extent. As any new technology, the Internet brings both *challenges and opportunities*.[414] It is fairly normal that fears over challenges and risks are first being voiced before opportunities and safeguards are discovered. If the opportunities of the Internet are adequately implemented, they hold the potential to lead to true shifts

[409] Ibid.

[410] Ibid., at 358.

[411] Ibid., at 355, 356, 359.

[412] LaPlante, D.A., Kleschinsky, J.H., LaBrie, R.A. et al. (2009). "At the Virtual Poker Table: A Prospective Epidemiological Study of Actual Internet Poker Gambling Behavior", *Computers in Human Behavior, 25*(3), 711–717, at 715.

[413] LaPlante, D.A., Schumann, A., LaBrie, R.A. et al. (2008). "Population Trends in Internet Sports Gambling", *Computers in Human Behavior, 24*(5), 2399–2414.

[414] Cf. the recent publication, Cabot, A., and Pindell, N., *Regulating Internet Gaming: Challenges and Opportunities*, Las Vegas: UNLV Gaming Press, 2013; cf. also GamblingCompliance, *ECJ Special Report: A Mandate For German Gambling Reform*, GamblingCompliance 2011, at 43. In the case *Dickinger & Ömer*, the parties and the (intervening) Maltese Government argued that gambling activities on the Internet could be tracked and consequently controlled more effectively, making it easy to detect problematic or suspicious operations: C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 92.

of paradigm, including in the legal field.[415] If regulators rely on sound research, additional safeguards may soon be available.[416] Deposit limits or temporary account closures could prove to be effective social responsibility instruments.[417] If, in the future, such tools are combined with *early identifying behavioural markers* for disordered gambling, they could prove to be more effective.[418] Recent publications have identified such early markers;[419] they hold the potential to indicate how *self-limitations or account closures*[420] may be most effectively used.[421]

Online gamblers need to be further studied. They may differ from land-based gamblers in relation to their *motivation* to gamble. Considering the advantages and disadvantages, which the Internet brings, it is hardly surprising that online and land-based gamblers can be motivated by different aspects of the game. They can also have different socioeconomic backgrounds. In an Australian study, land-based gamblers and online gamblers indicated overall different motivations for gambling. Land-based gamblers were more likely to gamble for charity, the atmosphere and excitement. They indicated that it was their favourite activity or simply saw it as a social activity. They also showed greater belief in luck. By contrast, online gamblers were more likely to see online gambling as more exciting and convenient than

[415] In the legal field for instance, online dispute resolution has significantly transformed alternative dispute resolution: Hörnle, *Cross-Border Internet Dispute Resolution*, at 74.

[416] Palfrey, and Gasser, "Reclaiming and Awkward Term: What We Might Learn From "Digital Natives"", at 34, in relation to the use of technology by youth in general.

[417] For studies on the effect of deposit-limits on the gambling behaviour, cf. Broda, A., LaPlante, D.A., Nelson, S.E. et al. (2008). "Virtual Harm Reduction Efforts for Internet Gambling: Effects of Deposit Limits on Actual Internet Sports Gambling Behavior", *Harm Reduction Journal, 5*(27); Nelson, S.E., LaPlante, D.A., Peller, A.J. et al. (2008). "Real Limits in the Virtual World: Self-Limiting Behavior of Internet Gamblers", *Journal of Gambling Studies, 24*(4), 463–477. For the evaluation of land-based self-limitation programmes, cf. Ladouceur, R., Sylvain, C., and Gosselin, P. (2007). "Self-Exclusion Program: A Longitudinal Evaluation Study", *Journal of Gambling Studies, 23*(1), 85–94; Tremblay, N., Boutin, C., and Ladouceur, R. (2008). "Improved Self-Exclusion Program: Preliminary Results", *Journal of Gambling Studies, 24*(4), 505–518.

[418] For an industry research collaborative aiming at identifying patterns of disordered gambling, cf. LaPlante, D.A., Nelson, S.E., LaBrie, R.A. et al., "The bwin.party Division on Addiction Research Collaborative: Challenges for the 'Normal Science' of Internet Gambling" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 29–45.

[419] For studies on behavioural markers, cf. LaBrie, R., and Shaffer, H.J. (2010). "Identifying Behavioral Markers of Disordered Internet Sports Gambling", *Addiction Research & Theory, 19*(1), 1–10; Braverman, J., and Shaffer, H.J. (2012). "How Do Gamblers Start Gambling: Identifying Behavioural Markers for High-Risk Internet Gambling", *The European Journal of Public Health, 22*(2), 273–278; Braverman, J., LaPlante, D.A., Nelson, S.E. et al. (2013), "Using Cross-Game Behavioral Markers for Early Identification of High-Risk Internet Gamblers", *Psychology of Addictive Behaviors*.

[420] For a study on account closure, cf. Xuan, Z., and Shaffer, H. (2009). "How Do Gamblers End Gambling: Longitudinal Analysis of Internet Gambling Behaviors prior to Account Closure Due to Gambling Related Problems", *Journal of Gambling Studies, 25*(2), 239–252.

[421] For some safety parameters, cf. Peller, A.J., LaPlante, D.A., and Shaffer, H.J. (2008). "Parameters for Safer Gambling Behavior: Examining the Empirical Research", *Journal of Gambling Studies, 24*(4), 519–534.

land-based gambling. It could be played anytime and in a private setting. They estimated the changes of winning to be better, saw it as less dangerous and could choose to stop gambling any time. Online gamblers saw greater benefits from gambling online than off-line.[422]

9.2.8 Mutual Recognition

The gambling sector has not been harmonised at the European level. The question arises to which extent there is an obligation for the host state to recognise regulatory standards of the home state. Alternatively, the question may also be to which extent authorities have to take into account controls that have already been exercised by other authorities. This question arose in *Placanica*. When assessing the necessity of the national restrictions, *Advocate General Colomer* advocated that the principles of mutual recognition should apply in the case. In his view, national authorities should recognise the requirements imposed and controlled by another Member State as sufficient. There was no reason to apply double checks.[423] The Court of Justice, however, did not follow his opinion.[424]

The question re-emerged in *Liga Portuguesa*, *Sporting Exchange* and *Markus Stoss*. In the former two cases, the Court of Justice made it clear that there was *no obligation to mutually recognise authorisations* in the area of gambling. The motivation was that games of chance via the Internet had not been harmonised in the Union and involved *different and more substantial risks* than land-based games of chance.[425] In relation to the land-based forms of games of chance, the Court's argumentation was similar. While it also noted the lack of harmonisation, it expressly referred to the margin of appreciation that Member States enjoyed in this area.[426] According to the Court, mutual recognition could only play a role in one situation:

---

[422] Lee, G., and McGuiggan, R. (2008). "Differences between Land-Based and Online Gamblers", *Journal of Academy of Business and Economics, 8*(1), 72–85, at 81.

[423] Opinion of Advocate General Colomer in C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891; cf. also opinion of Advocate General Alber in C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, and opinion of Advocate General Fennelly in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, paras 15 and 21.

[424] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

[425] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 69.

[426] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 112.

> only if the monopolies at issue in the main proceedings were held incompatible with Article [49 TFEU] or Article [56 TFEU] would the question as to the possible existence of such an obligation of mutual recognition of authorisations issued in other Member States be capable of having any relevance for the purposes of resolving the disputes in the main proceedings.[427]

Considering the wide margin of appreciation that the Court of Justice has applied in relation to gambling services, the *non-applicability* of the principle of mutual recognition is not surprising. Since the Court of Justice had conceded that it was up to each Member State to define the objectives of its gambling policy as well as the protection level, (unlimited) mutual recognition would indeed be a far-reaching step. There are benefits and costs to consider for governments.[428] Some Member States may primarily profit from the benefits of online gambling (tax revenues) while others may end up with the *social costs*, *namely gambling-related harm*. Eventually, this point will need to be discussed.[429]

Surprising was the rationale that the Court of Justice used to argue its conclusion. The Court chose in *Liga Portuguesa* an unconventional approach. The *Portuguese government argued that it did not have the same means of control* in relation to a foreign operator, such as Bwin, as it had in relation to its own operator Santa Casa.[430] From a Member State's perspective, this is a valid point to argue. The Court's reply to this concern was unexpected since it did not address the pleaded difficulties of the host state (Portugal) but the difficulties of the state of *establishment* (sic!) to control its licensees. According to the Court, the Portuguese government could take the view that the quality assessment by the authorities of another Member State did not sufficiently assure consumer protection

> in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators [such as Bwin].[431]

The unconventional phrasing of the Court's argument leaves two options: either it was a mistake or an *obiter dictum*. A mistake can be argued with a systematic reading of the decision. The Court's reply does not address the concerns that were argued by the Portuguese government. Indeed, the Court of Justice started its 'reply' to the argument of the Portuguese government with "*in that regard*, it should be noted that the sector involving games of chance offered via the internet has not been

---

[427] Ibid., para. 110.

[428] Walker, D.M., *The Economics of Casino Gambling*, Berlin/Heidelberg/New York: Springer Verlag 2007; Grinols, E.L., *Gambling in America: Costs and Benefits*, Cambridge: Cambridge University Press, 2004.

[429] For a discussion of pan-European tax issues, cf. van der Paardt, R.N.G. (2009), "Taxation of Internet Gaming and Gambling in the European Union", *ERA Forum, 10*(4), 525–531; for tax issues in the US, cf. Clotfelter, C.T., "Gambling Taxes" in *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving*, Cnossen, S. (Ed.), Oxford: Oxford University Press, 2005, pp. 84–119.

[430] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 68.

[431] Ibid., para. 69.

the subject of Community harmonisation."[432] Consequently, the question would logically be whether the Portuguese authorities could validly rely on the alleged difficulties of assessment *on the Portuguese side*.

The second option is that of an *obiter dictum*. In that case, the question pertains to the rationale behind the statement. The Court's remark is far-reaching as it alludes to severe difficulties that the authorities of the states of *establishment* face in assessing their licensees. Was the Court of Justice trying to tell national authorities (for example, in Malta and the UK) that they were facing almost insurmountable difficulties in assessing their licensees?[433] The Court of Justice has occasionally acted as 'national legislator' *in favour* of the Single Market.[434] The opposite is unheard of. An additional element to argue the *obiter dictum* alternative is the fact that the Court of Justice repeated the same statement in subsequent cases.[435]

The approach of the Court of Justice to mutual recognition in the gambling sector can be summarised as follows. If the national monopoly or licensing model is found to be compatible with EU law, there is *no space to apply the principle of mutual recognition*, both in relation to land-based and online games. In the negative case, this still does not automatically mean that national authorities could not require a foreign operator to seek a national licence nor does it mean that a Member State has to liberalise its gambling market. Due to the primacy of EU law, a transitional period cannot apply, but the Member State is free to reform its monopoly to make it compatible with EU law. The Court of Justice refrained from offering further indications for this latter situation.[436]

---

[432] Ibid., para. 69. Italic emphasis added.

[433] Ibid., para. 69.

[434] Using teleological and dynamic methods of interpretation as well as the 'effet utile' approach, the CJEU has on several occasions taken a role that is reminiscent of a national legislator *in favour* of the Single Market. An illustrative example was C-106/77 Amministrazione delle Finanze dello Stato Simmenthal SpA [1978] ECR 629, para 21 where the national judge was asked to set aside national law that conflicts with EU law: "It follows […] that every national court must […] set aside any provision of national law which may conflict with [Community law], whether prior or subsequent to the Community rule". For the former two paragraphs, cf. Planzer, "Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning".

[435] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, para. 33; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 96.

[436] Recently reconfirmed in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 46. Regarding the CJEU's case law on mutual recognition, cf. also Hatzopoulos, V. (2013). "The Court's Approach to Services (2006–2012): From Case Law to Case Load?", *Common Market Law Review, 50*(2), 459–501; Doukas, D. (2011). "In a Bet There Is a Fool and a State Monopoly: Are the Odds Stacked Against Cross-Border Gambling?", *European Law Review, 36*(2), 243–263; Anagnostaras, G. (2012). "Les jeux sont faits? Mutual Recognition and the Specificities of Online Gambling", *European Law Review, 37*(2), 191–203; Dawes, A., and Struckmann, K. (2010). "Rien ne va plus? Mutual Recognition and the Free Movement of Services in the Gambling Sector After the "Santa Casa" Judgment", *European Law Review, 35*(2), 236–262.

The EFTA Court took a different approach than the Court of Justice. It chose a more fundamental freedom friendly approach in its *EFTA-Ladbrokes* decision while opting for a more moderate solution than the one suggested by Advocate General Colomer in *Placanica*. The EFTA Court had to decide whether the Norwegian government could preclude gambling companies, which were licensed in another EEA Contracting State, from providing and marketing games in Norway. If the national court found the restrictions to be lawful, the host state had the right to preclude foreign operators. If by contrast the restrictions were not justified, "national authorities may still require foreign operators to seek a national licence under the same conditions that apply to domestic operators."[437] Due to the lack of harmonisation "different levels of protection may exist throughout the EEA. A licence permitting the offering of gaming services may be less strict in the home State of the gaming operator than in the host State."[438]

The EFTA Court added an important element that limited the discretion of Member States for future cases. National measures could *not be excessive* in relation to the objective pursued:

> This would be the case if the requirements to which the issue of a licence is subject coincided with the requirements in the home State. That means, firstly, that in considering applications for licences and in granting them, the Contracting Party in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of establishment and secondly, that it must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State.[439]

The stance on mutual recognition taken by the EFTA Court follows a similar pattern as the solution chosen by the Court of Justice in other non-harmonised areas[440] as well as the solution provided in the *Services Directive*.[441] By contrast, the Court of Justice recently held that Member States were not obliged to take into account licensing requirements already fulfilled in other Member States. The referring Austrian court seemed to suggest that the regulatory interests of the Austrian government were already sufficiently taken into account in the state of establishment

---

[437] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 84.

[438] Ibid., para. 85.

[439] Ibid., para. 86.

[440] Cf. e.g. C-382/08 Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen [2011] ECR I-139, paras 38–42. The case regarded the licensing of commercial balloon flights. It should be noted that the public interest objectives were arguably at least as serious as those in the gambling cases: protection of the life and health of persons and safety of air transport. Further case law quoted in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 94.

[441] Art. 10(3) provides that national measures must not duplicate "requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State." Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive').

of the online operator (Malta) and that in fact the Maltese provisions were more rigorous than those applicable in Austria.[442] *Dickinger & Ömer* was the first case in which a Member State intervened to support the private parties and not the government of another Member State. The Maltese government emphasised its pioneer role in ensuring controlling and monitoring mechanisms specifically designed for online games of chance. There were strict access controls, such as an examination of the operators' professional qualities and integrity. Operators remained subject to continued checks and monitoring by the competent Maltese regulatory authorities.[443] However, the Court of Justice held:

> It must be recalled in this respect that no duty of mutual recognition of authorisations […] can exist in the current state of European Union law […]. The various Member States do not necessarily have the same technical means available for controlling online games of chance, and do not necessarily make the same choices in this respect. […] the fact that a particular level of protection of consumers against fraud by an operator may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not permit of the conclusion that the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not grasp. Consequently, the case-law relied on by Mr Dickinger and Mr Ömer and the Maltese Government […] does not apply, in the present state of development of European Union law, in a field such as that of games of chance, which is not harmonised at European Union level, and in which the Member States have a wide discretion in relation to the objectives they wish to pursue and the level of protection they seek.[444]

In the light of the clear and repeated rejection of mutual recognition, it is no surprise that the Court of Justice was not willing to follow the far-reaching opinion of Advocate General Mazák in *HIT & HIT LARIX*.[445] The Court approved Austrian legislation under which operators licensed abroad, who wish to advertise their services in Austria, must demonstrate that the consumer protection provisions in their state of establishment correspond to the Austrian provisions. Therefore, the Court seemed to shift the burden of proof on the (foreign) operators. Yet, the Court also held that it would be disproportionate to require the rules of the other Member State to be 'identical' or to impose rules that are not directly related to consumer protection.[446]

---

[442] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 90.

[443] Ibid., paras 91–93.

[444] Ibid., paras 96–99.

[445] Opinion of Advocate General Mazák in C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr.

[446] Ibid., paras 28–32.

9.2.9 Illicit Penalties

It is commonplace for Member States, irrespective of the chosen regulatory model, to enforce their regulatory choices by criminal sanctions. In more liberal licensing models, there is also a rational of competition policy for the use of criminal law: licensed operators should not suffer from unfair competition by unlicensed operators. The enforcement of rules by means of sanctions (of criminal or other nature) is not questionable as such. Where national restrictions of fundamental freedoms are compatible with EU law, the national legislator can sanction violations of an exclusive right system by penalties.[447] Under EU law, the question may arise whether national sanctions appear to be disproportionate considering all legal and factual circumstances of a gambling regime.

In *Gambelli*, the Court of Justice raised doubts as to the suitability, namely the consistency of the Italian measures. In particular, the practice of encouraging participation in gambling while pleading the objective of limiting gambling opportunities appeared to be inconsistent. The Court asked the referring Italian court to consider these circumstances when deciding upon the necessity of the criminal penalties imposed on individuals choosing to gamble with unlicensed operators.[448] *Gambelli* also concerned criminal sanctions imposed on unlicensed agents serving as intermediaries for operators in other Member States. The Court raised the question whether such sanctions could still be seen as necessary considering that operators in other Member States were already under strict controls of the relevant surveillance authorities:

> The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State […] is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.[449]

In the *Sjöberg* case, the sanctions were imposed on publishers who had included adds in their newspapers for foreign (unlicensed) operators. Swedish law imposed criminal sanctions for promoting gambling offers organised abroad.[450] It appeared that the same offence in relation to unlicensed gambling offers by Swedish operators

---

[447] Recently confirmed in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 32 and 43, *e contrario*, and C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, para. 85, *e contrario*.

[448] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 72.

[449] Ibid., para. 73.

[450] For a comparative look at alcohol, cf. the judgment in the *Gourmet* case regarding the Swedish prohibition to advertise spirits in print magazines: C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) [2001] ECR I-1795.

was *only punishable by an administrative penalty*. It was for the referring court to examine whether the two situations were subject to non-discriminatory, equivalent treatment. In this context, not only the legislation mattered but also the effective enforcement in practice. Thus, the national court had to

> ascertain whether, on the facts, those infringements are prosecuted by the competent authorities with the same diligence and lead to the imposition of equivalent penalties by the competent courts.[451]

The Court of Justice reaffirmed in *Markus Stoss* that

> a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of EU law.[452]

The critical stance towards unjustified or excessive criminal sanctions was reconfirmed in *Dickinger & Ömer*, both by the Advocate General[453] and the Court.[454]

Recently, the Court of Justice also underlined the aspects of *foreseeability, legal certainty and non-arbitrariness* in relation to penalties. It was necessary for the circumstances in which those penalties will be applied to be set out in a "clear, precise and unequivocal manner." The relevant standard is whether "a reasonably informed tenderer exercising ordinary care could have understood the exact significance" of references to penalties. In relation to the Italian tendering procedure it held that the penalty of the withdrawal of the licence could only be regarded as proportionate if it was based on a judgment having the force of *res iudicata* and concerned a *sufficiently serious offence*. The Court of Justice extended by this judgment its critical stance from criminal penalties to (mere) *administrative* penalties.[455]

9.2.10 Licensing Tenders: Procedure and Requirements

It was established that the Court of Justice has generally applied a lenient proportionality review; in recent decisions, a somehow stricter review could be noted. By contrast, the Court of Justice has *strictly reviewed the necessity of (criminal or administrative) penalties*. As it will be shown, the Court of Justice

[451] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 55.

[452] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 115.

[453] Opinion of Advocate General Bot in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 37–50.

[454] Ibid., paras 32 and 43.

[455] C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, paras 78–79, 83.

has also applied a *stricter scrutiny in relation to requirements for (potential) licensees* and *imposed minimum standards for licensing tenders*.

In *Commission v Italy*, the Italian government increased the number of horse-race betting shops from 329 to 1,000. 671 new licences were awarded in a tendering procedure, but the 329 existing old licences were simply renewed. The Court found that the failure to invite competing bids infringed the *general principle of* transparency, in particular the *obligation to ensure a sufficient degree of advertising* towards potential tenderers. Since this case was a *direct action against an evident infringement*, the judgment did not reveil much about the Court's proportionality review practice. The measure was not even suitable: the Italian government could not explain how the simple renewal of the existing licences served the public interest objective of preventing clandestine betting activities.[456]

As noted earlier, the Court's remarks in the subsequent *Sporting Exchange* decision were highly ambiguous.[457] It was only in the later German and Austrian cases that the review practice became clearer. According to the facts in *Carmen Media*, the competent German authorities had discretion as to whether they would grant an administrative authorisation or not. Even though there was a *de facto* monopolistic system in place, the authorities enjoyed discretion to provide for additional authorisations. As a consequence, the Court held:

> if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.[458]

In the Austrian case *Engelmann*, the Court had to address the question whether it was compatible with EU law to oblige potential licensees to adopt the legal form of a public limited company and to have their company seat in Austria. In principle, the Court did not rule out this possibility as certain objectives might justify this requirement.

> The obligations binding public limited companies in regard, in particular, to their internal organisation, the keeping of their accounts, the scrutiny to which they may be subject and relations with third parties could justify such a requirement, having regard to the specific characteristics of the gaming sector and the dangers connected with it.[459]

It would be for the national court to verify whether these objectives were pursued and whether the measures respected the principle of proportionality. The Court of

---

[456] C-260/04 Commission v Italy [2007] ECR I-7083. The Court further held that "the need to ensure continuity, financial stability and a proper return on past investments for licence holders" could not serve as overriding reasons in the general interest (para. 35).

[457] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, paras 58–59; cf. comment in Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach".

[458] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 87.

[459] C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 30.

Justice however narrowed the margin of appreciation, adding that the requirement to have seat in Austria *could deter companies from participating in the tender*. If such restriction were found to be discriminatory, it could only be justified under an express Treaty derogation. The objective pleaded by the Austrian government was effective control over operators regarding criminal or fraudulent activities. The Court held:

> Without it being necessary to determine whether that objective can fall within the definition of public policy, it need merely be pointed out in this respect that the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime. There are indeed various measures available to monitor the activities and accounts of such operators […]. Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition, as the Advocate General has stated in point 60 of his Opinion, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers. […] there is nothing to prevent supervision being carried out on the premises of those establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.[460]

The Court of Justice was even stricter in *Dickinger & Ömer* with regard to the seat requirement. Austrian law required that the Austrian monopoly of operating lotteries needed to have its registered office within the national territory. Following the Advocate General's view, the Court found the requirement to be a *discriminatory* restriction, which could only be justified by an express *Treaty derogation*. It raised doubts that *public policy* could serve as justification ground since this concept needed to be narrowly construed and required a genuine and sufficiently serious threat to a fundamental interest of society. It asked the referring court to ascertain whether there were other *less restrictive means* to ensure the supervision of operators. The Court noted that national law, which awards concessions based on the *criterion of maximising public revenue*, systematically works to the disadvantage of foreign operators and could not be regarded as compatible with EU law. It also held that no public interest objective was pleaded to justify the requirement that the holder of the concession was not allowed to set up branches outside Austria.[461]

In relation to the mandatory *legal form of a capital company* the Court reconfirmed its position from the *Engelmann* judgment that such requirement could be justified by the objectives of preventing money laundering and fraud. In relation to the requirement of a *paid-up nominal or share capital* of EUR 109,000,000, the Court of Justice reminded that restrictions could not go beyond what was necessary for achieving the aim pursued. The referring court would have to ascertain whether other means were available to ensure that the claims of winning gamblers will be honoured by the operator.[462]

---

[460] Ibid., paras 37–39.

[461] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 78–88.

[462] Ibid., paras 76–77; cf. also C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 30.

A major aspect on which the Court of Justice has insisted in relation to licensing tenders is the *obligation of transparency*. In *Engelmann*, it stated that, in spite of the lack of applicable secondary law, the obligation of transparency fully applied in relation to gambling licenses or concessions:

> the public authorities which grant such concessions are none the less bound to comply with the fundamental rules of the Treaties, in particular Articles [49 TFEU] and [56 TFEU], and with the consequent obligation of transparency […]. Without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed […]. The grant of a concession, in the absence of any transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, who have no real possibility of manifesting their interest in obtaining the concession in question. Such a difference in treatment is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality, and constitutes indirect discrimination on grounds of nationality prohibited by Articles [49 TFEU] and [56 TFEU], unless it is justified by objective circumstances […]. The fact that the issue of licences to operate gaming establishments may not be the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article [56 TFEU], in particular the principle of equal treatment and the obligation of transparency […]. Indeed, the obligation of transparency amounts to a condition which must be met before a Member State can exercise its right to award licences to operate gaming establishments, irrespective of the method of selecting operators, because the effects of the award of such licences on undertakings which are established in other Member States and potentially interested in engaging in that activity are the same as those of a service concession contract.[463]

These statements clarified earlier remarks of the Court. In *Sporting Exchange*, it had first given the impression that these requirements would apply to any licensing procedure, because the detrimental nature of competition in the gambling market needed to be distinguished from the positive nature of a competitive call for tenders.[464] Despite this statement about the positive effects of a competitive tender procedure, the Court found in the next sentence that the requirements of equal treatment and transparency did not apply

> if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.[465]

This interpretation left the question unanswered whether the Dutch licensees satisfied those conditions. *It was left to the referring Raad van State* to decide upon

---

[463] C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, paras 49–53.

[464] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, paras 58–59; Cf. comment in Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach".

[465] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, para. 59.

this issue. That court subsequently found that the relationship between De Lotto (sports-betting licensee) and Scientific Games Racing (horseracing licensee) and the Dutch state did not meet the requirement of a relationship characterised by a sufficiently strict control. Therefore, the obligation of transparency had not been respected. The Raad van State found the relevant licensing procedure incompatible with EU law.[466]

The Services Directive does not apply to gambling services (see Sect. 4.2.9). Nonetheless, the Court of Justice has insisted in relation to licensing procedures on elements, namely transparency and non-discrimination, which can be found in the Services Directive. The Court derives those obligations from the fundamental Treaty rules. Similar to the Directive, which does not apply to exclusive right holders, the Court does not impose the aforementioned obligations on gambling (public or private) monopolies under direct state supervision or subject to strict control by the state.

The judgment in *Costa & Cifone* reconfirmed the aforementioned obligations imposed by the case law.[467] The case related to the re-distribution of betting licenses in Italy. The formerly applicable licensing system had been found in breach of EU law and had excluded a category of operators from the award of licences. The Italian government sought to remedy that breach by putting out to tender a significant number of new licences. Meanwhile, it protected the market positions acquired by the existing operators, as it required new licensees to observe a minimum distance to establishments of existing operators. Restating its case law, the Court reminded the *principles of equivalence, effectiveness, equal treatment, non-discrimination* and the *obligation of transparency*. In the cases at hand, the principle of equal treatment required

> that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. This is especially the case in a situation such as that in the cases before the referring court, in which a breach of EU law on the part of the licensing authority concerned has already resulted in unequal treatment for some operators.[468]

In fact, the existing operators had already been able to establish themselves on the market with a certain reputation and a measure of customer loyalty. Imposing a minimum distance on new licensees would offer existing operators an even greater competitive advantage. This would result in a new breach of EU law, namely of the principle of effectiveness and the principle of non-discrimination.[469]

In sum, the Court of Justice has distinguished in its case law two situations between which the standard of review differs. First, the state provides one operator with the *exclusive right* to provide (certain types of) gambling services and *exercises*

---

[466] Betfair v the Minister of Justice, case no 200700622/1/H3-A, judgment of 23 March 2011.

[467] Picod, F. (2012). "Encadrement strict d'un appel d'offres de jeux de hasard", *La Semaine Juridique Edition Générale*, 13.

[468] C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, paras 50–51, 54–57.

[469] Ibid., paras 53 and 58.

strict control on this single (state or private) operator. In such situation, the usual requirements of non-discrimination and transparency, as laid down in the case law on services concessions, do not apply and the Court hardly practises a proportionality review. Second, *the aforementioned conditions are not fulfilled*, that is, the law allows for several licensees or the control over the exclusive right holder is not sufficiently strict. In this latter case, *the procedural requirements of non-discrimination and transparency apply* and the Court of Justice is inclined to closely review the proportionality of the national gambling regime. The requirements applying in the two distinct situations must not be confused.[470]

9.2.11 Results

Section 9.2 discussed the proportionality review in the case law on gambling through the prism of empirical evidence. It was compared to which extent the Court of Justice's views on gambling addiction find support in current empirical research. It was inquired whether the wide margin of appreciation was counterbalanced by a *meaningful proportionality review*. It was found that *different standards of review applied to different categories* and these categories were accordingly studied one after the other.

The first categories included the *definition of the level of consumer protection*, *the choice of the regulatory model (exclusive right holder* versus *licensing system)* and the arguments of *'channelling'* as well as of the *'detrimental nature' of competition*. Until recently, the first two aspects were not reviewed by the Court of Justice as the Court left it to the Member States to define the protection level, which they pursue and to choose the regulatory model, which they find appropriate. By contrast, the EFTA Court found it important to review how high the protection level was *in practice*; restrictions on the exclusive right holder like opening hours, number of outlets, advertising and development of new games needed to be considered. *The EFTA Court reviewed the necessity of monopolies and expressly applied the less restrictive test* in both its gambling cases. It denied their necessity in relation to crime concerns but accepted it in relation to gambling addiction.

In relation to exclusive right systems (private or public monopolies), the reference of the Court of Justice to the principle of proportionality remained, until recently, *rhetoric*. The Court of Justice found monopolies "certainly more effective" in addressing gambling-related risks, such as gambling addiction. However, hardly any empirical research has directly addressed this question. An extent *literature review in 2011 did not find direct empirical evidence* regarding the comparative effectiveness

[470] Concurring: Hecker, M. (2007). "Italien und das Glücksspiel – Zenatti, Gambelli, Placanica und kein Ende?", *European Law Reporter, 10*, 357–360. However, in *Garkalns*, the CJEU seemed to water down this distinction. On the one hand, it required the national court to review whether the state strictly supervised the gambling activities, even though a licensing system with several operators was concerned. On the other hand, the CJEU discussed in less detail the requirements stemming from the principle of equal treatment and the obligation of transparency. C-470/11 Garkalns SIA v Rigas dome [2012] nyr, in particular para. 47.

of different regulatory approaches to gambling but solely varying opinions expressed by scholars. A subsequent pan-European study could not identify statistically relevant differences with regard to prevalence rates of disordered gambling associated with licensees on the one hand and public monopolies on the other. In recent judgments, the Court of Justice adjusted its approach and *started to (leniently) review the protection level and exclusive right holders*. It found that a monopoly could only be installed to ensure a particularly high level of consumer protection in practice.

The Court of Justice approved the so-called *'channelling' argument* since *Läärä*. That argument has taken various forms such as the need to channel the 'desire to gamble' or to channel gambling offers through single right holders. It was noted that there was no general, uncontrollable desire to gamble. Section 9.1 found that only about 0.5 to 2 % of the population experience life-time gambling disorder. Second, it must be considered that *channelling is not a scientific term* but an empty shell that is *used differently by different bodies*: the EFTA Court used it, for instance, in relation to licensing systems. In Swiss law, it refers to the policy of chanelling gambling services through casino venues run by competing licensees.

Advocate General Bot, followed by the Court of Justice, held in *Sporting Exchange* that competition in the field of gambling services had *detrimental effects*, resulting in an increase in gambling addiction. The aforementioned literature review could *not identify published empirical evidence* on this point. Some of the few jurisdictions, for which a series of reliable prevalence rates are available, include the US and the UK. These jurisdictions do not show higher rates of gambling disorder than the rough global average, in spite of a market with competing licensees.

Another category involved the criterion of a 'consistent and systematic' gambling policy, in particular *'controlled expansion' and 'advertising'*. While the Court of Justice started to review the proportionality in *Gambelli*, the standard of review remained lenient. In *Placanica*, the Court approved the concept that a single right holder may engage in controlled expansion of games and advertising, and confirmed this approach expressly in relation to gambling addiction concerns in *Ladbrokes*. Such expansion may not necessarily be inconsistent and may be needed to draw players away from the blackmarket. *The EFTA Court showed a stricter review practice*: a monopoly operator had to limit its gambling offers and abstain from extensive marketing practices. It was for the Member State to demonstrate the consistency of its policy. More recently, the Court of Justice's review practice also became stricter and its conclusions in *Markus Stoss* and *Carmen Media* seemed to be influenced by the approach of the EFTA Court.

The empirical evidence shows some support for the stance of the Court of Justice. The so-called *exposure model* did not find support in long-term epidemiological data. While rates of gambling disorder first increased in the US, the *most recent rates are at similar levels as in the late 1970s* – in spite of much greater exposure to games of chance. In the UK, the rates remained stable in spite of a significant liberalisation of land-based and online gambling by the 2005 Gambling Act. Research also found that *people who had recently moved to Nevada showed higher rates of disordered gambling* than people who had been residing in Nevada for 10 years or more.

Scientists have argued that the exposure model needed to be combined with the *adaptation model*: populations may first experience an increase in disordered gambling before adapting to the new environmental exposure. There is empirical support for responsible 'controlled expansion' policies. However, the Court of Justice limited this argument to single right holders. There are no indications in the literature to suggest that social adaptation processes relate to a *specific* regulatory model only. In fact, the afore-described effects were particularly shown in the UK and the US, therefore relating to systems where the majority of games are run by competing licensees.

With regard to advertising, the Court of Justice showed in its earlier case law a lenient proportionality review. It argued *inter alia* that exclusive right holders might need to advertise their offers in order to draw players away from the blackmarket. They could not excessively incite and encourage consumers. The EFTA Court reviewed advertising practices more strictly, taking in particular a critical stance towards extensive marketing practices. More recently, the Court of Justice adjusted its approach and reviewed the consistency of measures more closely as well. Exclusive right holders could not trivialise gambling problems and present gambling in a mere positive way. In *Dickinger & Ömer*, the Court further considered the young age of consumers targeted by the advertising and distinguished between (restrained) informative versus (expensionist) encouraging advertising practices.

An extent literature review showed that there was no direct empirical evidence as to the impact of advertising on the prevalence of gambling disorder. It was convincingly argued in the literature that the effects on the general population were likely to be overestimated, especially in mature markets. Nonetheless, studies show that advertising may have negative effects on vulnerable groups such as *adolescents* and *disordered gamblers*. Some disordered gamblers experience problems resisting the trigger in the form of advertising. Adolescents were found to be particularly receptive of (gambling) advertising and counter-advertising, which shaped their views on the positive and negative sides of gambling. There is similar empirical evidence from other fields like tobacco and alcohol advertising. What seems to matter is that consumers receive a balanced picture of the chances and risks of gambling. In particular *vulnerable groups* must be protected from the harmful effects of disordered gambling. Empirical evidence supports the practice of the Internal Market Courts of taking a critical stance towards certain advertising practices.

Other categories involved the proportionality *review of games that show a higher dangerousness* according to the courts. This is the case for slot machines and gambling on the Internet. More dangerous games may justify stricter limitations of fundamental freedoms. On the other hand, substantial expansion may question the consistency of a monopolist system. There are studies showing that EGM's are amongst the preferred gambling activities of pathological gamblers. But high rates were in particular found with *EGM's being located in bars*, underlining the importance of environmental factors. The available evidence is limited. In particular, it is unclear whether EGM's contribute to the development and maintenance of disordered gambling.

The other category of games that is seen as dangerous in the case law are games *over the Internet*. The Court of Justice stated in *Carmen Media* that they combined many factors that were likely to foster the development of gambling addiction – without distinguishing between different types of online games. The Court of Justice hardly reviewed the proportionality in relation to online games. Empirical evidence does not support the view that online gambling leads to sharply increased levels of gambling disorder. In spite of the significant increase of gambling services on the Internet, prevalence rates of gambling disorder have remained stable. *In line with the adaptation model*, the rates in the UK remained stable in spite of a liberalisation of the online gambling sector. *In the US, whose residents' share in the global gambling market is one quarter to one third (despite the prohibition in place)*, recent prevalence rates are as low as in the 1970s.

The question remains if there was empirical evidence for 'Internet addiction' as such. The only behavioural addiction recognised in the DSM is gambling disorder, but DSM-5 suggests to further study 'Internet gaming disorder'. Researchers have studied actual online gambling behaviour of players. These studies show that the large majority of the online gamblers play very moderately with regard to money and time commitment. It was noted that the Court's lenient proportionality review exclusively focused on potential threats without considering potential benefits of the Internet in view of responsible gambling policies.

In a next step, the Court's approach to *mutual recognition* and the necessity for additional controls was assessed. If the national licensing system is found to be compatible with EU law, there is no space to apply the principle of mutual recognition. In the negative case, national authorities can still require that foreign operators need to seek a national licence. While the Court's result was hardly surprising, its argumentation in relation to online operators was. It argued in *Liga Portuguesa* that authorities of the state of establishment did not have sufficient means to control their own licensees. *The EFTA Court took a more mutual recognition-friendly approach*. If restrictions to fundamental freedoms of foreign operators were found to be unlawful, national authorities could still require a national licence. However, they needed to take into account those requirements that were already fulfilled in the home state.

The strictest proportionality review was noted in relation to penalties and procedural requirements in licensing tenders. Criminal penalties were found to be disproportionate in several cases. They could not be imposed for failure to complete an administrative formality where the latter was rendered impossible in infringement of EU law. In *Costa & Cifone*, the Court of Justice disapproved even administrative(!) penalties. The authorities' decision to grant a licence needed to be based on objective, non-discriminatory and non-arbitrary criteria and operators had a right to effective judicial remedy. The Court of Justice even alluded to the principle of the least restrictive measure in *Engelmann*. Excessive seat requirements for operators were found disproportionate in relation to crime concerns. The principles of transparency and equal treatment fully apply when allocating gambling licenses.

9.3 The Peculiar Approach in the Review Practice of the Court of Justice of the EU

The Court of Justice and the EU legislator have repeatedly referred to a peculiar nature of gambling, namely based on gambling addiction concerns. Section 9.1 illustrated that gambling disorder does not show a peculiar nature. On the contrary, it shares manifold commonalities with other expressions of addiction. With regard to public morality concerns, it was concluded that they are secondary as they relate to undesired side effects of gambling and not to the activity as such. Gambling is not a core case of public morality. With regard to crime as justification ground, it will be for other authors to verify whether fraud, embezzlement and money laundering in relation to gambling activities are somehow peculiar.[471] The approach of the EFTA Court did at least not seem to support such view.[472]

The idea of gambling or gambling addiction being of peculiar nature has been refuted. The detailed empirical views on the case law showed that gambling addiction is not of peculiar nature. The wide margin of appreciation and the lenient proportionality review practised by the Court of Justice are special. The analysis showed that the Court's review practice deviated from the general criteria of the doctrine on the margin of appreciation. Its early case law also significantly differed from that of the EFTA Court, but the Court of Justice has adjusted its approach in recent decisions. The lenient review of the Court of Justice prompted Lein to rhetorically ask whether the Court's review in the field of gambling constituted a gamble.[473] Other scholars concluded that the Court of Justice's use of the margin of appreciation and its review practice led to a virtual dismantling of the Internal Market requirements in the field of gambling.[474]

This section compares the approach chosen by the Court of Justice in the gambling cases with closely related fields (Sect. 9.3.1). It discusses cases that involved concerns in relation to *addiction* and to the *Internet* since the Court has applied a particularly lenient proportionality review in relation to these two dimensions of gambling. If this analysis confirms the special approach chosen in relation to gambling, a subsequent analysis needs to inquire the reasons for such approach (Sect. 9.3.2). Finally, Sect. 9.3.3 discusses the *consequences* of the chosen approach.

---

[471] For a contribution challenging the view that online gambling constitutes a major threat regarding money laundering, cf. Levi, M. (2009). "E-Gaming and Money Laundering Risks: A European Overview", *ERA Forum, 10*(4), 533–546; cf. also Skala, J., "Money Laundering and Internet Gambling: A Suspicious Affinity?" in *Cross-Border Gambling on the Internet – Challenging National and International Law*, Swiss Institute of Comparative Law (Ed.), Publications of the Swiss Institute of Comparative Law, vol. 47, Zurich: Schulthess, 2004, pp. 305–348.

[472] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 50.

[473] Lein, E. (2007). "Quo vadis Luxemburg? Die europäische Rechtsprechung zum Glücksspielrecht", *ERA Forum, 8*(3), 373–403, at 375.

[474] Van Den Bogaert, S., and Cuyvers, A. (2011). ""Money for Nothing": The Case Law of the EU Court of Justice on the Regulation of Gambling", *Common Market Law Review, 48*(4), 1175–1213, at 1208.

9.3.1 Cases with Similar Consumer Protection Concerns

9.3.1.1 Concerns Relating to Addiction and Adolescents

Sections 9.1.3, 9.1.4 and 9.1.5 established the close relationship between gambling disorder and other forms of addiction. DSM-5 reclassified gambling disorder together with substance use disorders under 'substance-related and addictive disorders'. From a scientific point of view, addiction to games of chance is not peculiar. Its mechanisms and nature are *inter alia closely related to alcohol-use disorder* (see Sect. 9.1.3.3).

Governments around the world have tried to protect consumers from the abuse of and the addiction to substances such as alcohol. Similarly, authorities have attempted to protect consumers from harmful behaviour relating to gambling. Policies aiming at protecting people from substance- or behaviour-related risks may result in restrictions of fundamental freedoms. The Court of Justice has dealt with restrictions that are based on policies aiming at preventing addiction. The fight against alcohol addiction was at the heart of several cases. The Swedish case *Rosengren* is used here to illustrate the Court's approach. This case is particularly suitable for comparative purposes since it involved concerns in relation to *adolescents*. As it was shown, this population group has a higher vulnerability to addictive disorders. The case regarded 'Systembolaget', the Swedish alcohol retailing system. In Sweden, the law ('alkohollagen') confers a state monopoly over retail sales of wine, strong beer and spirits to a company constituted for that purpose.[475]

The appellants in the main proceedings had ordered cases of Spanish wine by way of correspondence. The cases were confiscated by the Swedish customs as the alcohol order should have been processed through Systembolaget. After several appeals against the confiscation, the Swedish Supreme Court ('Högsta domstolen') referred questions to the Court of Justice as to the compatibility of the prohibition to directly import alcoholic beverages into Sweden without at the same time taking care of the transport.

The restrictions in *Rosengren* were not argued by 'consumer protection' as an overriding reason of public interest but under the express Treaty exception of the *protection of the health and life of humans* under Article 36 TFEU. This is relevant since the Court in *Commission* versus *Spain* noted that the restrictions to gambling could not be argued on public health grounds as the government had failed to show that gambling addiction had reached a *dimension*, which could justify relying on public health grounds.[476] According to the Court, the latter ground therefore relates to health concerns of bigger dimension than gambling disorder.

---

[475] Former Advocate General Alber used this case for a comparative analysis of the gambling case law of the CJEU, even though from another angle (justifiability of monopolies): Alber, S. (2007). "Freier Dienstleistungsverkehr auch für Glücksspiele? Zur Rechtsprechung des EuGH zum Glücksspielbereich", *ERA Forum, 8*(3), 321–355, at 342.

[476] C-153/08 Commission v Spain [2009] ECR I-9735, para. 40. For a comment, cf. Picod, F. (2009). "Condamnation d'une législation fiscale relative aux jeux de hasard", *La Semaine Juridique Edition Générale*, 43.

Prior to the *Rosengren* decision, the Court had already held that Member States could themselves decide what degree of protection they wished to ensure within the limits of the Treaties,[477] and recognised that legislation aiming to control the consumption of alcohol in order to prevent detrimental effects reflected health and public policy concerns in Article 36 TFEU.[478]

Similar to the gambling case law, the Court referred to the national restrictions as 'channelling' measures. The Swedish government justified them with the general need to limit the consumption of alcohol. This argument is reminiscent of the gambling jurisprudence.

In relation to the health concerns linked to alcohol addiction, the Court of Justice expressly applied the *principle of less restrictive measures* within the proportionality review. If the health and life of humans could be protected just as effectively by measures that were less restrictive of intra-Union trade, the national measures could not profit from the Treaty exception.[479] By contrast, the Court of Justice has in general refrained from referring to this principle and leniently reviewed the necessity of gambling-related restrictions aimed at controlling gambling addiction.

The Court of Justice closely reviewed the Swedish legislation and the actual application of it *in practice*, underlining the *burden of proof* on the state. Systembolaget had the legal possibility to refuse the processing of a purchase order. Yet, it did not follow from the information available to the Court that Systembolaget did in practice refuse to make such supply. The measures were held unsuitable to generally limit the consumption of alcohol because of the rather marginal nature of their effects.

On a second ground, the Swedish government argued that the channelling measures, which directed the demand through Systembolaget, pursued the objective of protecting specifically *younger persons* from the detrimental effects of alcohol consumption. People placing orders through Systembolaget had to be at least 20 years of age. Under this age, alcohol could also not be imported by individuals. The protection of the health of adolescents constitutes a particularly legitimate argument and finds support in empirical evidence. It was shown that this age group features increased vulnerability to gambling disorder and substance use disorders (see Sect. 9.1.3.5).[480]

The Court approved the aim of preventing younger persons from purchasing alcohol; this aim ultimately served to reduce the health risk in relation to alcohol consumption. Nevertheless, the Court reminded that it was for the state to show that

[477] C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval [2003] ECR I-14887, para. 103.

[478] C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171, para. 28.

[479] C-170/04 Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren [2007] ECR I-4071, para. 43.

[480] The need to protect young persons in particular was discussed for instance in C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 103, 105, 111; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 60.

the measures were proportionate. This would not be the case if the objective could be achieved by less restrictive measures. The general Swedish prohibition to import alcohol by way of correspondence, irrespective of the age of the purchaser, went beyond what was necessary to achieve the objective.

The Court also closely scrutinised the *consistency* of the Swedish alcohol regime. It noted that beside the generally applicable monopoly of *Systembolaget* in distributing alcohol and checking the age of purchasers, there were also some methods of distribution that conferred the responsibility for age checks on third parties, such as in food shops or service stations. The Court went as far as to openly doubt that age checks were performed in situations where *Systembolaget* supplied customers in stations or coach stops. Due to these likely inconsistencies in practice, the Court found that the objective could only be met partly.

The intensity of the proportionality review of the Court went even further in that it inquired itself into less restrictive but equally effective measures in view of the objective of the protection of the health of adolescents. It referred to the Commission's suggestion: the purchaser could declare on a form accompanying the alcoholic beverages that he is more than 20 years of age. Remarkable about this solution is not only that *the Court of Justice itself argued an alternative, less restrictive measure* but also the high *burden of proof* that it imposed on the government.

> The information before the Court does not, on its own, permit the view to be taken that such a method, which attracts appropriate criminal penalties in the event of non-compliance, would necessarily be less effective than that implemented by Systembolaget.[481]

The standard of review applied in *Rosengren* contrasts strongly with that in the case law on gambling.[482] The decision cannot be explained as a kind of accident of a small bench, given it was handed down with the Court of Justice sitting as *Grand Chamber*. The Court had found measures to be disproportionate already in earlier cases relating to alcohol and health.[483] Considering the Court's approach with regard to gambling addiction, *the difference in dealing with measures relating to alcohol addiction* is remarkable. In *Rosengren*, the Court applied a fully fletched proportionality test regarding the Swedish restrictions, including the search for alternative, less restrictive measures.[484] Each objective was assessed separately and thoroughly.

---

[481] C-170/04 Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren [2007] ECR I-4071, para. 56.

[482] Concurring: Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 163.

[483] Cf. *ex multis* C-189/95 Criminal proceedings against Harry Franzén [1997] ECR I-5909; C-178/84 Commission v Germany [1987] ECR 1227. Similarly, the EFTA Court found measures related to alcohol and public health disproportionate, cf. *ex multis* E-1/94 Ravintoloitsijain Liiton Kustannus Oy Restamark [1994–1995] EFTA Court Report 15; E-6/96 Tore Wilhelmsen AS v Oslo kommune [1997] EFTA Court Report 53; E-1/97 Fridtjof Frank Gundersen v Oslo kommune, supported by the Government of the Kingdom of Norway [1997] EFTA Court Report 108. For a comparison of these alcohol cases, cf. Baudenbacher, C. (1998). "Vier Jahre EFTA-Gerichtshof" *Europäische Zeitschrift für Wirtschaftsrecht, 9*(13), 391–397.

[484] C-170/04 Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren [2007] ECR I-4071, paras 44–57.

The striking difference regarding the choice of language and the clarity of the findings compared to the judgments in the gambling cases was also noted by other authors.[485] In the gambling cases, the Court's proportionality review of measures relating to gambling addiction has generally been limited to a (lenient) suitability test. There has also been a tendency to assess the objectives 'together' or 'as a whole'. More recently, however, the Court of Justice has started to intensify the proportionality review.

9.3.1.2 Concerns Relating to the Internet

The *Rosengren* case was chosen because of its close relationship regarding health concerns of addiction. The following cases were also chosen because of their relation to the gambling cases. They show a close parallel due to the object of attention: the Internet. The decisions deal with the Internet and the risks it involves as a new service channel for consumers. In the gambling cases, the Court of Justice showed a very sceptical stance towards the Internet as it involved different and more substantial risks in the view of the judiciary.[486]

The two cases that are used for comparison are *DocMorris*[487] and *Ker-Optika*.[488] Both relate to the service of *offering products* via *the Internet*, the first of medicine and the latter of contact lenses.[489] The competent Hungarian health authority ('ÀNTSZ') prohibited Ker-Optika's activity of selling contact lenses via its website as this service could only be provided in a shop specialising in the sale of medical devices or by home delivery of such shop to the final customer.[490] Upon several appeals, the Court of Justice was asked whether the restrictions to the free movement of goods could be justified. The Court recognised the requirement that qualified staff should initially counsel the customers on the questions whether and how they should use lenses. The Court found it, however, unnecessary that customers had to be advised at every occasion of purchasing contact lenses.

> However, customers can be advised, in the same way, before the supply of contact lenses, as part of the process of selling the lenses via the Internet, by means of the interactive features on the Internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses.[491]

---

[485] Lein, "Quo vadis Luxemburg? Die europäische Rechtsprechung zum Glücksspielrecht", at 401.

[486] C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 102.

[487] C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval [2003] ECR I-14887.

[488] C-108/09 Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete [2010] ECR I-12213.

[489] For a more detailed analysis comparing *Ker-Optika* and *DocMorris* with the reasoning in the case law on online gambling, cf. Littler, A. (2011). "Internet-Based Trade and the Court of Justice: Different Sector, Different Attitude", *European Journal of Risk Regulation, 2*(1), 78–84.

[490] Picod, F. (2010). "La vente des lentilles de contact ne peut pas être réservée à des magasins spécialisés", *La Semaine Juridique Edition Générale*, 50.

[491] C-108/09 Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete [2010] ECR I-12213, para. 69.

The Court further recognised that Member States could require that qualified staff verified the positioning of the lenses on the customer's eyes and advised the customer on the correct use and care of the lenses. However, those services were required only at the moment of first supply.[492]

> [W]hile the extended use of contact lenses must be accompanied by supplementary information and advice, those can be given to the customer by means of the interactive features to be found on the supplier's Internet site.
>
> Moreover, the Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the customer, at a distance, individualised information and advice on the use and care of the contact lenses. The provision of such information and advice at a distance may, moreover, offer advantages, since the lens user is enabled to submit questions which are well thought out and pertinent, and without the need to go out.[493]

The Court of Justice concluded that there were *less restrictive means available* to ensure the protection of the health of consumers of contact lenses and the Hungarian legislation was thus found to be disproportionate.[494]

Seven years prior to *Ker-Optika*, the Court handed down its ruling in *DocMorris*.[495] The German association of pharmacists was challenging the Internet sale of medicine by a Dutch pharmacy, which delivered its medicinal products by international mail order. The restrictions were based on *public health* grounds, namely that medicine may be incorrectly used and services of online pharmacies abused. In *Ker-Optika*, the Court of Justice referred on several occasions to its *DocMorris* decision and confirmed the approach chosen in the earlier case. The Court distinguished between two kinds of medicine: the first requiring prescription and the second not requiring prescription. It held that an absolute, undifferentiated prohibition of this distribution channel, that is, mail order via the Internet, could not be justified. The need to *advise customers could also be satisfied via the Internet*. In fact,

> internet buying may have certain advantages, such as the ability to place the order from home or the office, without the need to go out, and to have time to think about the questions to ask the pharmacists, and these advantages must be taken into account.[496]

Besides expressly underlining these advantages of the medium, the Court of Justice also addressed the risks by which the restrictions had been justified, namely that medicine could be incorrectly used and that medicine could be abused.

> As regards incorrect use of the medicine, the risk thereof can be reduced through an increase in the number of on-line interactive features, which the customer must use before being able

---

[492] Ibid., paras 70–71.

[493] Ibid., paras 72–73.

[494] The CJEU's stricter proportionality review cannot be explained with a fully harmonised sector of law. Only part of the facts fell within the scope of Directive 2000/31. The conditions under which contact lenses sold via the Internet could be supplied within a Member State fell outside the scope of this Directive. Cf. ibid., paras 30 and 77.

[495] C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval [2003] ECR I-14887.

[496] Ibid., para. 113.

> to proceed to a purchase. As regards possible abuse, it is not apparent that for persons who wish to acquire non-prescription medicines unlawfully, purchase in a traditional pharmacy is more difficult than an internet purchase.[497]

The approach of the Court towards the Internet as a new service channel in *Ker-Optika* and *DocMorris* is noteworthy for several reasons. First, the justification ground relevant in these cases was *'public health'*.[498] The Court qualified this ground as more severe than consumer protection.[499] Nevertheless, the Court's review practice was in these cases stricter than in the gambling case law.

Second, as many new technologies, the medium *Internet brings simultaneously both risks and opportunities*. The Court of Justice solely underlined the risks in relation to online gambling. With regard to online sales of goods, it underlined the opportunities that the new medium brings for consumers and rebuted the risks.[500]

As a consequence, the Court's proportionality review in relation to services via the Internet was much stricter in the aforementioned cases than in the case law on gambling. A broader perspective on the Court of Justice's general practice of proportionality review seems to confirm the divergence of the approach chosen in relation to gambling services. While it tends to review EU acts and decisions only leniently,[501] the Court engages in a fairly intensive review where national measures restrict rights protected by EU law, namely fundamental freedoms.[502] Compared to the gambling case law, the Court reviewed even certain core cases of morality more strictly.[503]

9.3.2 Causes: Political Considerations and Moral Views on Gambling

The analysis of the Court of Justice's jurisprudence showed a use of the margin of appreciation that significantly differs in the area of gambling services. It was further

---

[497] Ibid., para. 114.

[498] More precisely, "the health and life of humans" as it is referred to in the provisions relating to the free movement of goods.

[499] C-153/08 Commission v Spain [2009] ECR I-9735, para. 40.

[500] Concurring: Littler, "Internet-Based Trade and the Court of Justice: Different Sector, Different Attitude", at 83–84.

[501] The Court of Justice grants for instance wide discretion to the Commission in relation to anti-dumping measures (*ex multis*, cf. Van Bael, I., "Lessons for the EEC: More Transperancy, Less Discretion, and, at Last, a Debate?" in *Anti-Dumpting Law and Practice: A Comparative Study*, Jackson, J.H., and Vermulst, E. (Eds.), London: Harvester Wheatsheaf, 1990).

[502] *Ex multis*, Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 21.

[503] *Ex multis*, C-121/85 Conegate Limited v HM Customs & Excise [1986] ECR 1007.

demonstrated that neither the general case law nor empirical evidence on gambling addiction could explain the different approach. The question remains *why* the Court of Justice chose to apply a very wide margin of appreciation and a lenient proportionality review in the field of games of chance. The following analysis *tries to identify the extra-legal factors* that impacted the judges at the Court of Justice in their decision-making. The analysis first inquires the broader *historical-political setting* and subsequently the *moral statements* made by the Court of Justice.

9.3.2.1 German Reunification, Treaty of Maastricht and Principle of Subsidiarity

There is a bigger setting to the gambling cases that is not to be neglected: the political discussions regarding the *principle of subsidiarity* that were dominant in the early 1990s. As this section shall show, they had an impact on the use of the margin of appreciation in the early gambling case law. The early case law in turn served *as decisive precedent* for the subsequent decisions.

The first request for a preliminary ruling in the area of gambling services was received at the Court of Justice on 18 June 1992. The judgment was handed down on 24 March 1994.[504] At that time, the political leaders of the EU were keen to emphasise *national sovereignty and the principle of subsidiarity*. By contrast, up until 1992, the political discourse had been different and dominated by the *broadening and deepening of European integration*. What led the political discourse to take such a significant turn?

The initial event – a moment of historic dimension indeed – was the fall of the Berlin Wall on 9 November 1989. Records from the Kremlin, which were only recently released, destroyed the belief that the Western Allies unconditionally supported Western Germany's aspiration for reunification. France and the UK opposed a reunification of Germany.[505] UK Prime Minister Thatcher and French President Mitterrand feared that the already thriving German economic engine would become even more powerful, combined with a bigger land mass and population. Germany as the political and economic hegemon was not an appealing thought to London and Paris. The ultimate fear was that an even more powerful Germany might start to reconsider its commitment to European integration and opt for a 'Sonderweg'.

The challenge was to make Germany's European commitment irreversible, and the French government came up with the solution: Germany had to give up its strong currency ('Deutsche Mark'), the financial backbone of its economic might, and commit to the European Economic and Monetary Union with its common currency, the Euro.[506]

---

[504] The next gambling case C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067 was received at the CJEU on 25 March 1997.

[505] "*Thatcher Told Gorbachev Britain Did Not Want German Reunification*", The Times, 11 September 2009.

[506] Eckert, D., *Weltkrieg der Währungen: Wie Euro, Gold und Yuan um das Erbe des Dollar kämpfen – und was das für unser Geld bedeutet*, Munich: Finanz Buch Verlag, 2010; "*Germany's*

In parallel, the combination of the collapse of communist regimes in Central Eastern Europe and the prospect of a German reunification led to the commitment to reinforce the international position of the European Economic Community.[507] In addition to a common currency, a common foreign and security policy as well as cooperation in internal affairs and justice came on the table of negotiations: factors that were supposed to reinforce the international position of Europe. These ambitious efforts culminated in the signing of the Maastricht Treaty on 7 February 1992.[508]

The population in certain Member States was not necessarily supportive of such big steps. The drafters of the Maastricht Treaty included elements aimed at increasing the popularity of the move. '*Subsidiarity*' *as a general principle of Union law* with general applicability was introduced.[509] 'European citizenship' served also as a promotional tool since it constituted a rather easy and non-consequential conglomerate of new rights.[510] Despite these goodies, the referendum on the Maastricht Treaty in the founding Member State France passed by mere luck with a 51 % approval rate, and few months later Denmark rejected the Treaty.[511] These results came as a wakeup call for many European political leaders.

It was in the aftermath of this *alarming lack of popular support* for a continued deepening and broadening of European integration that EU leaders felt the necessity to underline more prominently national sovereignty. A thorough review of the conclusions of the presidencies of the European Council[512] shows that the *political*

Neighbors Try to Redeem Their 1989 Negativity", Deutsche Welle, 8 September 2009. In return, Germany insisted on a strong independent European Central Bank. After this political deal was struck between Chancellor Kohl and President Mitterrand, the Treaty on the Final Settlement with Respect to Germany, also referred to as the Two Plus Four Agreement, was signed on 12 September 1990; cf. "Treaty on the Final Settlement with Respect to Germany", available at http://usa.usembassy.de/etexts/2plusfour8994e.htm.

[507] "Birth of the Treaty of Maastricht on European Union", available at http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm.

[508] Ibid.

[509] Article G of the Maastricht Treaty states: "The following Article shall be inserted: Article 3b'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'"

[510] Weiler, J.H.H. (1997). "The Selling of Europe: The Discourse of European Citizenship in the IGC 1996", *Jean Monnet Working Paper*, no 3/97 available at http://centers.law.nyu.edu/jeanmonnet/papers/96/9603.html.

[511] For a discussion, cf. Svensson, P. (1994). "*The Danish Yes to Maastricht and Edinburgh. The EC Referendum of May 1993*", *Scandinavian Political Studies, 17*(1), 69–82. A renegotiated version of the Treaty, offering Denmark several special terms, passed in a second referendum in June 1993 with 57 %. The third referendum on the Treaty, in Ireland, passed in June 1992 with 69 %. People in Ireland were aware of the fact that their country had substantially profited from European structural aid.

[512] Art. 15(1–2) TEU: "1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

discourse changed significantly during that period of time. The principle of subsidiarity became suddenly the central topic of discussion of the European Council while it had been largely marginalised before.

Following the Danish 'nej' on 2 June 1992, the European Council met at the end of June 1992 in Lisbon. In the conclusions of the presidency, the European Council elaborated on "a Union close to its citizens." It was "convinced that harmonious development of the Union […] depends […] on the strict application […] of the principle of subsidiarity by all the institutions."[513] This would "ensure a direction […] in conformity with the common wish of Member States and of their citizens."[514] The Commission and the Council of Ministers were invited to "undertake urgent work on the procedural and practical steps to implement the principle and to report to the European Council in Edinburgh."[515]

The tone was further intensified following a second shock, the near-failure in the French referendum on 20 September 1992. In a three page declaration entitled 'A Community close to its Citizens',[516] the conclusions of the presidency discussed the question of how to bring the Community closer to its citizens and the importance of the principle of subsidiarity. "Making the principle of subsidiarity work should be a priority for all the Community institutions."[517] Moreover, the report of the Commission, requested by the European Council in Birmingham,[518] stated that the Commission "following consultations with interested parties, […] intends to abandon certain initiatives that had been planned." This included *inter alia* proposals on the harmonisation of the regulation of gambling.[519]

The next summit of the European Council took place in *Edinburgh* in December 1992, when the Swiss voters had just rejected the ratification of the EEA Agreement.[520] Referring to the conclusions of the presidency, the outcomes of the summit were

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work." As opposed to the aforementioned post-Lisbon version, in the 1990s, the European Council was not led by its President but by a rotating presidency among Member States that changed every half a year. Its political purpose, however, was similar.

[513] Conclusions of the Presidency at the Lisbon European Council, at 9.

[514] Ibid., at 9.

[515] Ibid., at 9.

[516] It should also be noted that between the two summits the wording of the title changed from a 'Union' to a 'Community' close to its citizens, thus *returning* to the pre-Maastricht language.

[517] Conclusions of the Presidency at the Birmingham European Council, Annex 1, at 6.

[518] Ibid., at 1.

[519] Conclusions of the Presidency at the Edinburgh European Council, Annex 2 to Part A, at 3.

[520] Agreement on the European Economic Area, OJ L 001, 03.01.1994. *Nach dem schweizerischen Nein und dem liechtensteinischen Ja zum EWR*, Baudenbacher, C., and Brauchlin, E. (Eds.), St.Gallen: Wissenschaftlicher Verlag, 1993.

supposed to "pave the way for a return to confidence by its citizens in European construction."[521] An annex outlined in detail how the principle of subsidiarity was to be implemented: "This principle contributes to the respect for the national identities of Member States and safeguards their powers. It aims at decisions within the European Union being taken as closely as possible to the citizen."[522]

A close analysis of the conclusions of the presidencies makes it clear that the *aforementioned rhetoric merely served to accommodate political concerns*. The principle of subsidiarity had historical antecedents in the Treaties and the case law; it was not a new invention.[523] It was even expressly held that "[t]he application of the principle shall respect […] the maintaining in full of the acquis communautaire."[524] Also, the principle of subsidiarity should not have direct effect.[525]

The political discourse prior to the referenda on the Maastricht Treaty illustrates the *significant shift of language*. At the time when Germany's reunification was successfully negotiated,[526] the European Council discussed the "extension and strengthening of Community action" in December 1990. It noted "a wide recognition of the need to extend or redefine the Community's competence in specific areas […] inter alia […] *the health sector and in particular the combating of major diseases*."[527]

In this context, it is almost impossible not to contemplate the possibility that *gambling addiction and other related disorders* could be part of a holistic EU public health policy today if the discourse had not significantly changed at that time. It is not insensible to consider that gambling addiction could have been much earlier on the table of DG Internal Market or DG SANCO – arguably not to the detriment of the health of consumers.

Prior to the referenda, the principle of subsidiarity had played only *a minor role in the political discussions*. The relevant conclusions had only mentioned it in one paragraph. However, they did expressly hold under the heading '[e]ffectiveness and efficiency of the Union' that the extension of the competences of the Union "must be accompanied by a strengthening of the Commission's role and in particular of its implementing powers so that it may, like the other institutions, help to make Community action more effective."[528] There can be no doubt that this language is significantly different to that in the conclusions of the summits posterior to the Danish and French referenda.

The Court of Justice received the first gambling case at a time when the political discourse had completely changed from integration-oriented towards

---

[521] Conclusions of the Presidency at the Edinburgh European Council, Part A, at 3.

[522] Ibid., Annex 1 to Part A, at 14.

[523] Ibid., Annex 1 to Part A, at 15.

[524] Ibid., Annex 1 to Part A, at 17. Italic emphasis added.

[525] Ibid., Annex 1 to Part A, at 17.

[526] Around the same time, the Treaty on the Final Settlement with Respect to Germany was signed on 12 September 1990. It paved the way for the reunification of Germany. Text of the Treaty available at "Treaty on the Final Settlement with Respect to Germany", available at http://usa.usembassy.de/etexts/2plusfour8994e.htm.

[527] Conclusions of the Presidency at the Rome 2 European Council Part 1, at 7–8. Italic emphasis added.

[528] Ibid., Part 1, at 9.

subsidiarity-concerned. The principle of subsidiarity was the dominant political topic at that time. Contrary to the changed political discourse, *the legal framework remained essentially unchanged*, including the Court's power to review national measures on their compatibility with EU law. As the Edinburgh summit concluded, "[t]he application of the principle shall respect […] the maintaining in full of the acquis communautaire" and the principle should not have direct effect.[529]

9.3.2.2 Early Case Law

A significant change in the political discourse from a broadening and deepening of integration towards an emphasis on subsidiarity took place in the early 1990s. A political change does not necessarily mean that this shift also impacted the Court of Justice's work. It must be inquired whether there are indications in opinions and judgments that the new emphasis on the principle of subsidiarity had an influence on the decision-making of the Court. It is also examined whether a moral perspective on games of chance affected the decision-making of the judges.

The Opinion of Advocate General Gulmann

Judgments of the Court of Justice are regularly rather short,[530] as opposed to the decisions of the General Court, and the choices can often only be fully understood by a reading of the opinions of the Advocates General.[531] *Schindler* is an illustrative example. Though the Advocate General's reasoned submissions have no binding effect upon the Court,[532] it should be considered that the judges sitting in *Schindler* were for the first time confronted with a question regarding the gambling sector. This fact added substantial weight to the Advocate General's opinion. As this retrospective of the gambling case law shall show, Advocate General Gulmann introduced considerations that were key for the approach chosen by the judges. An indicator for the vital importance of this case for the Member States can furthermore be seen in the fact that all but one intervened.[533]

---

[529] Conclusions of the Presidency at the Edinburgh European Council, Annex 1 to Part A, at 17.

[530] The style of the reasoning of the Court of Justice strongly contrasts with for instance that of the German Constitutional Court. The latter regularly outlines in detail the various points of consideration. Cf. e.g. Kischel, U. (2000). "Die Kontrolle der Verhältnismässigkeit durch den europäischen Gerichtshof" *Europarecht, 35*(3), 380–402, at 396.

[531] Maduro, M.P., "The European Court of Justice" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008, pp. 207–226, at 226.

[532] Art. 252 TFEU.

[533] According to Article 40 of the Statute of the Court of Justice, Member States can intervene in cases before the Court. Interveners however have to bear their own costs, which prevents Member States from intervening too easily. In C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, all Member States, except for Italy, intervened in favour of the UK government. Even though the case concerned the lottery sector only, the

Advocate General Gulmann's opinion gave *significant weight to political considerations*. This can already be seen by the structure of the opinion. The Advocate General did not immediately proceed to a legal assessment. His opinion starts off with *general political considerations*, outlining the then dominant state of regulation in the European gambling markets. From the outset, his remarks appeared to approve the necessity of a general prohibition of gambling services.

> In the legal systems of all the Member States there is a fundamental prohibition on lotteries and other forms of games of chance. The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons, should not be permitted.[534]

In several passages, he made the Court aware of the "*considerable practical and fundamental interest*" of the case.[535] Gambling was an important source of revenue for the Member States with a total turnover of over ECU 45,000 million. Member States regulated "this sector in an intensive and fairly restrictive manner."[536] Overall, the regulation aimed at restricting the supply of gambling offers to protect consumers from "*gambling fever*."[537]

The Advocate General took express reference to the *political discourse at the Edinburgh summit* and reminded that the Commission had "informed the European Council that in view of the principle of subsidiarity […], it has decided not to submit proposals for Community rules in [the] field [of gambling]."[538] He then noted a lack of relevant secondary law and, combined with the principle of subsidiarity, concluded that it could be "presumed" that Member States can "require revenue to be used solely for public or public-interest purposes; and restrict the supply of lotteries."[539]

The Advocate General also discussed a point that would be reactivated later by Advocate General Bot: the *detrimental nature of competition* in the gambling sector. According to Gulmann, the supply of lottery offers needed to be limited; otherwise, the different national lotteries would unduly compete with each other. Large lotteries would have significant competitive advantages compared to smaller lotteries[540] because they could offer the biggest prizes, with consumers being attracted by big prizes. He further combined this point with the importance of the revenues for the public purse. A different outcome was not wishful in the eyes of the Advocate General as it would result in competition "between public funds and public-interest purposes in the various Member States."[541]

Court's assessment was likely to cause implications for the gambling sector as a whole.

[534] Opinion of Advocate General Gulmann in ibid., para. 1. The wording in French is just as categorical as that in English: "il s' agit d' une activité qu' on ne saurait admettre pour des raisons éthiques et sociales."

[535] Opinion of Advocate General Gulmann in ibid., para. 3.

[536] Opinion of Advocate General Gulmann in ibid., paras 5–10 and 31.

[537] Opinion of Advocate General Gulmann in ibid., para. 37.

[538] Opinion of Advocate General Gulmann in ibid., para. 30.

[539] Opinion of Advocate General Gulmann in ibid., para. 38.

[540] Opinion of Advocate General Gulmann in ibid., para. 112 fn 40.

[541] Opinion of Advocate General Gulmann in ibid., para. 49.

It was only after these broad political considerations, which contrasted wishful with non-wishful political outcomes, that the Advocate General approached the legal assessment of the case. He identified three grounds that could each justify the limitations: the fight against crime (fraud, money laundering), the limitation of the supply of lottery services to protect consumers from detrimental social and health consequences, and the allocation of the revenues for public interest purposes with the latter being emphasised throughout the opinion.[542] In this context, he suggested a further approach that was also adopted by the Court of Justice. According to some of the pleadings, he suggested that the aforementioned justifications "cannot be taken in isolation one from another." The second part of the paragraph shows the ambiguity of this peculiar approach.

> While it is necessary to consider each factor separately, that does not, however, rule out the possibility that the factors taken together may justify the restrictions even if, considered separately, they cannot do so.[543]

This 'overall assessment' proved to significantly impact the review practice of the Court in numerous cases. Measures only partly justified by one ground and only partly by another could amount to a *full justification* if taken together. The Court's very reluctant proportionality review, especially in the early case law, illustrates this approach.

Another dominant political component in the opinion was that the Advocate General repeatedly argued with the regulatory *status quo* in the Member States. He noted that there was a "consensus of the Member States that there is a real need to limit the supply of gambling and that such limitation […] must necessarily be undertaken by each Member State separately."[544] He also reminded that an opposite ruling would lead to detrimental competition between public interest purposes of Member States,[545] and the regulations of all the Member States showed that the market mechanisms could and should not apply.[546] It is, however, not immediately clear why the *status quo* of national law should be decisive for the interpretation of Union law.

Advocate General Gulmann's opinion was strongly driven by *political and moral considerations*, and it took express reference to the then recent *discussion of the principle of subsidiarity* in the European Council. The principle of subsidiarity, the Member States' regulatory *status quo* and the financial interests of Member States played a central role in its argumentation. The opinion also pointed out several times at the "*special nature*" of lotteries, due to which the market mechanisms could not apply.[547] He also assumed that Member States needed to limit the supply of gambling to prevent "gambling fever." Consequently, the margin of appreciation granted in the opinion was virtually unlimited.

---

[542] Opinion of Advocate General Gulmann in ibid., para. 88.

[543] Opinion of Advocate General Gulmann in ibid., para. 91.

[544] Opinion of Advocate General Gulmann in ibid., para. 101.

[545] Opinion of Advocate General Gulmann in ibid., paras 113–114.

[546] Opinion of Advocate General Gulmann in ibid., para. 120.

[547] Opinion of Advocate General Gulmann in ibid., paras 20–21 and 120.

The Role of Precedent

The next issue is whether these political and moral considerations affected the judgment of the Court of Justice. As the review of the early case law showed, several of the Court's key remarks on gambling are reminiscent of Advocate General Gulmann's considerations. The first two decisions, namely *Schindler*[548] and *Läärä*,[549] formed decisive precedent in that they defined the margin of appreciation that should generally apply to games of chance. The Court *largely followed* the views put forward by Advocate General Gulmann. In particular, it held:[550]

> [I]t is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit.[551]

Similar to the Advocate General, the Court of Justice further emphasised a "peculiar nature of lotteries,"[552] and found "the morality of lotteries […] at least questionable."[553] The sole notable divergence between judgment and opinion was that the Court did not agree that the public interest proceeds formed an independent justification ground. It was nevertheless "not without relevance […] that lotteries may make a significant contribution to the financing of benevolent or public interest activities."[554]

The Court of Justice also followed its Advocate General in that the objectives needed to be "*taken together*." This resulted in the Court of Justice not assessing the different justification grounds separately but limiting itself to an overall approach. Concepts like 'peculiar nature' or considerations 'taken together' resulted in the early case law, namely *Schindler*, *Läärä* and *Anomar*, in an *unlimited margin of appreciation*.

---

[548] Ibid.

[549] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067.

[550] The opinion of Advocate General Gulmann had particular importance since it was the first time that the Court of Justice decided in a gambling-related matter. Advocate General Gulmann, who subsequently became judge at the Court of Justice, sat as judge in the second gambling case *Läärä*.

[551] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[552] Ibid., para. 59.

[553] Ibid., para. 32. The Court had used the same wording already in the prominent *Grogan* case regarding the Irish prohibition to inform on clinics that perform abortion services abroad: cf. C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et alii [1991] ECR I-4685, para. 20. For other examples of delicate and politically sensitive areas, cf. C-196/87 Udo Steymann v Staatssecretaris van Justitie [1988] ECR 6159 concerning the application of the Treaty rules to the economic activities of religious organisations, and C-186/87 Ian William Cowan v Trésor public [1989] ECR 195 concerning the application of the Treaty to national rules on compensation for victims of acts of violence.

[554] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

The Court of Justice also expressed moral views on gambling services as it had already noted that it was "not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling."[555] In its early case law, it adopted moral concepts such as "squandering money on gambling" or that private profit could be seen as morally doubtful.[556] The channelling argument that was adopted in *Läärä* also served in the Court's view to use the gambling revenues for public interest purposes.[557] The idea of a kind of 'moral equilibrium' or 'venial sin' was subsequently rejected both by the EFTA Court and Advocates General.[558] The Court also adhered to the view that there was a general desire to gamble or even a "human passion for gambling."[559] These moral views on gambling contrast strongly with empirical views on the regulation of gambling and gambling addiction.

In sum, *political considerations and a moral perspective on games of chance were dominant in the early case law*. This conditioned the development of the case law since the Court of Justice generally relies on precedent, even though there is no obligation of *stare decisis*.[560] Certainly, the Court of Justice added new criteria to its jurisprudence, such as the requirement of a 'consistent and systematic' policy in *Gambelli*.[561] Nonetheless, the Court's formula from the early case law still re-emerged even in recent decisions, thus affecting the standard of review.[562] In *Sjöberg*, the Court of Justice linked several of the aforementioned moral statements in one paragraph.

---

[555] Ibid., para. 60.

[556] Ibid., paras 57 and 60.

[557] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 37.

[558] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 48; opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 35, cf. also paras 11 *i.f.* and 12.

[559] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 32; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 75.

[560] For a detailed discussion of the practice of precedent at various courts, cf. *The Role of Precedent*, International Dispute Resolution Conference, vol. 3, Baudenbacher, C., and Planzer, S. (Eds.), Stuttgart: German Law Publishers, 2011.

[561] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67.

[562] Cf. e.g. regarding 'squandering money', C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, paras 23 and 29.

> Considerations of a cultural, moral or religious nature can justify restrictions on the freedom of gambling operators to provide services, in particular in so far as it might be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune. According to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of gambling by entrusting it to public or charitable bodies.[563]

9.3.3 Consequences: Lack of Science-Informed Approach and Judicial Vacuum

9.3.3.1 Cultural Relativism

The political and moral considerations significantly affected the early gambling case law and initially resulted in an unlimited margin of appreciation. The Court of Justice did not engage in any proportionality review in *Schindler* and *Läärä*, and the subsequent decisions in *Zenatti*[564] and *Anomar*[565] did not alter this picture. The Court's reference to the principle of proportionality remained rhetoric until the *Gambelli*[566] decision.

The Court kept repeating the formula that "it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling."[567] The peculiar nature of gambling was substantially argued by "moral, cultural and religious factors."[568] Chapter 7 concluded that gambling-related risks, in particular gambling disorder, were not primarily an issue for public morality but should be made subject of a scientific perspective. According to the argued two-category model, moral concerns fall in core cases of morality and non-core cases (see Sect. 7.3). In the first category, the behaviour as such is seen as morally reprehensible as was seen for instance in *Omega*.[569] In the second category, the moral disapproval is not aimed at the behaviour as such but at potentially detrimental consequences of that behaviour. Society wishes to minimise risks associated with the behaviour. Gambling activities fall in this latter category. Gambling-related risks, namely gambling disorder, are about risk assessment and the discussion about how to minimise gambling-related

[563] C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43.

[564] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289.

[565] C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621.

[566] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[567] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[568] Ibid., para. 60.

[569] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

harm can be objectivised. Risks can be described in epidemiological studies and addressed with policies informed by empirical evidence.[570]

The Court of Justice dealt with gambling as an issue of public morality and not of risk assessment, science and empirical evidence. Therefore, it granted a very wide margin of appreciation *without substantially reviewing the proportionality* of the measures. On the axis of the *universality-diversity dichotomy*, the Court chose to accommodate alleged moral concerns even though the issue could be *predominantly assessed on other justification grounds*. In gambling issues, these are consumer protection (addiction and fraud) as well as public order (other forms of crime).

The moral perspective on games of chance and gambling addiction led the Court of Justice to a self-imposed self-restraint. The argument of 'cultural differences' reinforced this stance. Due to the precedence established in the early case law the Court must have found it hard to significantly alter its perspective in later cases. The criteria for alternative approaches would have been available from the EFTA Court and the ECtHR.[571]

9.3.3.2 Lack of Science-Informed Approach

At first impression, one may think that a moral perspective on games of chance is not such big problem and that a wide margin of appreciation for national authorities is not *per se* a bad thing. Yet, there is a problem to the moral perspective that goes beyond a mere incoherence in legal doctrine. By approving and supporting this perspective, the Court of Justice *did not objectivise the discussion* on gambling-related risks. The political and judicial discussion of gambling issues is still strongly informed by assumptions rather than a focus on empirical evidence.

As Collins noted, moral and ideological agendas regularly corrupt addiction policies. A value-loaded discussion makes it extremely hard to achieve a *rational and humane discussion on addiction policy*.[572] Addiction problems, such as gambling disorder, are dramatised and reduced to an easily identifiable cause. This in turn lays the ground for the call of a restrictive public policy that is aimed at protecting citizens from the 'social evil'.[573]

A scientific perspective on gambling disorder is far less dramatic and offers a more complex picture of causality as it was described in Sects. 9.1 and 9.2. Ross

[570] Regarding the problem of causality of information, cf. Gasser, *Kausalität und Zurechnung von Information als Rechtsproblem*.

[571] Handyside v the UK, Application no 5493/72 [1976], para. 49; E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 55.

[572] Collins, "Defining Addiction and Identifying the Public Interest in Liberal Democracies", at 411.

[573] Cf. wording of the CJEU in C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921.

and Kinbaid noted correctly that scientific knowledge tended to undermine dramatic purity.[574]

By relying on a moral perspective, the Court of Justice did not steer the discussion towards the necessity of informing gambling policies by scientific research. Neither did the Court of Justice itself engage in such discussion nor did it ask national courts to assess the risks from this angle. Similarly, the constructive role that international best practice could play was neglected.[575]

There were opportunities where the Court of Justice made allusions that it may wish to rely on empirical evidence in future cases.[576] In *Gambelli*, the Court initiated its demand for a "consistent and systematic" policy for national measures to qualify as suitable.[577] One week later, the Court noted in an *obiter dictum* in *Lindman* that the case file disclosed no "statistical or other evidence" that would enable conclusions as regards the gravity of the risks of games of chance.[578] The fact that the Court handed down these criteria within one week raised expectations that the scientific perspective on gambling would gain importance in future cases. While the decisions in *Gambelli* and *Lindman* could have served as a basis on which to build a science-informed case law, the Court of Justice pursued its moral views on games of chance from the *early case law*.[579]

An element from more recent case law may illustrate the minimal role that actual empirical evidence plays. The Portuguese government argued in *Liga Portuguesa* that the existence of the national state monopolist Santa Casa over more than five centuries was evidence of its reliability.[580] The Court's conclusions suggest that it was persuaded by this argument. It seems daring to argue the

---

[574] Ross, and Kincaid, "Introduction: What Is Addiction?", at vii.

[575] Best practices have been established or at least suggested for phenomena that are clearly more recent than gambling-related risks. Cf. e.g. Gasser, U. (2006b). "Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model", *Fordham Intellectual Property, Media & Entertainment Law Journal, 17*, 39–113.

[576] For the following paragraphs, cf. Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach", at 293.

[577] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67: "[R]estrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner."

[578] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, paras 25–26.

[579] An exception may be seen in the *Ladbrokes* case where the CJEU asked the referring court to verify whether illegal gambling activities did in reality constitute a problem in the Netherlands and whether channelling measures would be apt to resolve this problem. The scale of the unlawful activities needed to be significant. Cf. C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30; confirmed in the opinion of Advocate General Mazák in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 57.

[580] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 65.

reliability and thus quality of an institution by its long existence. If this were a sufficient criterion, the presence of monopolies that existed for many decades, for instance in the energy sector, would have also been evidence of their reliability and quality.[581]

Likewise, the Court of Justice did not underline the role of science in subsequent cases. In *Markus Stoss*, the referring court had asked whether the absence of any study on the proportionality of public monopolies before establishing such regime was compatible with EU law and referred to the criterion raised in *Lindman* regarding evidence. Yet, the Court found that the requirement to base that decision on evidence relied on a misreading of its case law.[582]

In more recent decisions, however, the Court of Justice occasionally emphasised the burden of proof of Member States. It needed to be shown whether the risks that are claimed did in fact exist in the market at the material time and whether the expensionist gambling policy could have solved the problem. The Court recalled this element in *Dickinger & Ömer* that it had originally introduced in *Ladbrokes*.[583]

It must be noted that a scientific perspective does not necessarily mean that the Court of Justice itself would need to get involved in the assessment and weighing of empirical evidence on gambling addiction. The ECtHR gives in this context helpful guidance. A certain margin of appreciation can be granted to national authorities as so-called 'medical discretion'. When a *difficult weighing of complex medical or scientific data* is at hand, specialised staff and local authorities are in a better position to accomplish that task. Judges cannot be expected to possess or acquire specialised medical expertise. The Court of Justice and the national courts could focus in their reviews on a limited number of issues. Have the domestic authorities relied on *best international science and empirical evidence*? Have they shown *professionalism* and pursued standards of *best practice* in implementing the gambling policy?

9.3.3.3 Malfunctioning Judicial Dialogue Between the Court of Justice of the EU and National Courts

Legal Uncertainty and a Reluctant Court of Justice

Following the *Placanica* decision, the Court of Justice remained, until recently, reluctant in reviewing the proportionality of gambling measures. This proved to be

[581] Planzer, "Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning".

[582] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 72.

[583] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 56–57 and 66–67.

particularly true when health concerns were pleaded. The Court did not substantially elaborate on the criterion of a 'consistent and systematic' policy. It would not appear that this reluctance was coincidental; several decisions were taken with the Court sitting as Grand Chamber. There is also another indicator: Contrary to some Advocates General,[584] the Court of Justice did not refer to the gambling judgments handed down by the EFTA Court in *ESA* versus *Norway* and *EFTA-Ladbrokes*.[585] The EFTA Court had applied a *stricter standard of review* and had given more substantial guidance regarding the meaning of 'consistent and systematic'.[586] Baudenbacher observed that the Court of Justice seems to be reluctant to enter a debate where it disagrees with the reasoning of its sister court.[587] The Court of Justice, at that time, chose to go a different way in its gambling jurisprudence. However, its significantly stricter review in the cases *Markus Stoss* and *Zeturf* indicates an adjustment of the Court's practice and thus an implicit reference to its sister court.[588]

---

[584] Opinions of Advocate General Bot in C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, at fn 15; C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, at fn 56; C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, at fn 56; and C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 313; opinion of Advocate General Mengozzi in C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 60; opinion of Advocate General Trstenjak in C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH [2010] ECR I-217, fn 68. Yet, it is noteworthy that the Advocates General chose to cite the EFTA Court only in relation to points that offered wide discretion to Member States. They did not cite those aspects in relation to which the EFTA Court had applied a stricter review. For the judicial dialoge between the CJEU and the EFTA Court and the role of the Advocate Generals therein, cf. Baudenbacher, "The EFTA Court, the ECJ, and the Latter's Advocates General – A Tale of Judicial Dialogue".

[585] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8; E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86.

[586] Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach", at 293.

[587] Baudenbacher, C. (2005). "The EFTA Court: An Actor in the European Judicial Dialogue", *Fordham International Law Journal, 28*(2), 353–391, at 390.

[588] As opposed to its usual approach, the CJEU reviewed the necessity of the regulatory model of an exclusive right holder in these cases. While not explicitly referring to the case law of the EFTA Court, it adhered in *Zeturf* to the latter's reasoning: "a measure as restrictive as a monopoly can be justified only in order to ensure a particularly high level of protection with regard to those objectives" (para. 46); cf. already *Markus Stoss*, para. 83. Passages in which the CJEU silently integrates wording or rationale from judgments of its sister court have been described as 'implicit references' (Johansson, M., "The Two EEA Courts – Sisters in Arms" in *Judicial Protection in the European Economic Area*, EFTA Court (Ed.), Stuttgart: German Law Publishers, 2012, 212–217, at 214).

The Commission's Green Paper on online gambling lists the interests that stakeholders have in the gambling sector. Legal security takes the central role.[589] The lack of legal security is evident in the gambling sector. Arguably, this is due to a combination of the lack of EU secondary law and the reluctance of the Court of Justice to offer substantial guidance to national courts. The legal insecurity can be identified in the *abundance of proceedings before national courts* that concern the compatibility of national gambling laws with EU law. According to a pan-European report composed by the Swiss Institute of Comparative Law, the number of proceedings amounted already in early 2006 to almost 600 cases.[590] The number was particularly high in Germany where differences in outcomes have often been quite substantial between different courts. As a result, national courts kept referring preliminary questions to the Court of Justice – an unsatisfactory situation that was also noted by Advocate General Colomer.[591] Some authors referred to a chaotic state of gambling law that public and private operators experienced.[592]

Eventually, it seemed to be clear that the Court of Justice did not wish to change its approach and offer substantial guidance.[593] In its post-*Placanica* decisions, it did not refer to the more detailed rulings of the EFTA Court. Several judgments showed that the Court of Justice wishes a more active role of the national courts, because it repeatedly emphasised their role in the review process. The decisions in *Sporting Exchange* and *Ladbrokes* (and subsequent judgments) made this quite clear. The Court kept emphasising the *role of national courts in reviewing* the objective and the proportionality of national measures.[594]

This path is not unproblematic. First, the *rationale of the preliminary ruling procedure* needs to be considered. Under the preliminary ruling procedure of Article 267 TFEU, the Court is required to offer guidance to the referring court. Advocate

[589] Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 3–6.

[590] Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, cited in Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 6 fn 6.

[591] Advocate General Colomer correctly noted in an opinion *not* related to gambling issues that the CJEU should not hesitate to offer a 'complete solution' in its judgment – including a discussion of the proportionality of the measures – "which [.] avoids subsequent referrals" "[a]s has happened with internet gambling." C-11/06 and C-12/06 (Joined cases) Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06) [2007] ECR I-9161, para. 112 and fn 70.

[592] Mertens, K. (2006). ""Bet and Lose" oder doch "betandwin"? – Zum anhaltenden Chaos im Recht der Sportwetten", *Deutsches Verwaltungsblatt, 121*(24), 1564–1570.

[593] However, the CJEU seemed to recognise this problem in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 50.

[594] Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach", at 293. Cf. also C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 62, 69–70; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 50.

General Colomer provided a witty formula to describe this requirement.[595] And Advocate General La Pergola concisely noted in *Läärä* that the Court is required

> to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible.[596]

In related fields, the Court of Justice showed the willingness to offer useful guidance that informs the proportionality review of the referring court.[597] There is also a *frustrating time factor* for national courts. In spite of significant improvements, a reference to the Court of Justice still results in a delay of the procedure of a couple of years. If referring judges did not expect substantial guidance from the Court of Justice, they would hardly opt for a reference.

Judicial Vacuum

It may be argued that the reluctance of the Court of Justice can be counterbalanced by an *effective judicial control by national courts*. As the Court of Justice leaves a wide margin of appreciation to national authorities, it is for the national courts to use this space of manoeuvre.[598] For the following considerations, it is necessary to distinguish direct actions from preliminary rulings. In the former procedure,[599] if discretion is granted to national authorities, it is granted to the sole national power involved – the executive power. By contrast, the preliminary ruling procedure[600] constitutes an institutionalised judicial dialogue between the national courts and the Court of Justice. The equivalent procedure before the EFTA Court is the advisory opinion procedure. The margin of appreciation granted by the Court of Justice in preliminary rulings is to be *shared between the national judicial branch and the executive branch*. The Court of Justice sends the case back to the national court, which has to decide on the merits of the case. Therefore, it is ultimately left to the national court to which extent it passes the granted margin of appreciation on to the

---

[595] "The foregoing observations [in the Opinion] provide the ingredients with which to compose a recipe which will furnish the referring court with the seasoning it needs to offer the parties in the main proceedings a meal which is to their taste and which reconciles their different aspirations." Opinion of Advocate General Colomer in C-374/05 Gintec International Import Export GmbH v Verband Sozialer Wettbewerb eV [2007] ECR I-9517, para. 80.

[596] Opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 23.

[597] Cf. e.g. C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171, para. 39. The case regarded public health concerns in relation to alcohol.

[598] In relation to alcohol and public health concerns, the CJEU occasionally left it to the referring court to review the proportionality of the measures while nevertheless guiding the national court's review by offering clear criteria: ibid., para. 39.

[599] Art. 258 TFEU.

[600] Art. 267 TFEU.

executive branch. This does not exempt national courts from reviewing the proportionality of the measures.

The Study of Gambling Services in the Internal Market of the European Union by the Swiss Institute of Comparative Law looked *inter alia* into the review practice of courts in the Member States. It assessed in particular *whether and to which extent national courts were scrutinising the proportionality* when deciding upon the compatibility of national gambling laws with EU law.

The study found that even in cases where justification grounds were given, both national legislatures and the jurisprudence did regularly not refer to precise criteria to evaluate the proportionality of national measures. In any case, if at all, proportionality tests were mainly conducted by courts but not legislatures.[601] Especially in cases where measures were held to be justified, the tendency of the courts was to simply refer to the *notion of 'proportionality' in very broad terms*. Courts may thus limit their review to the mere statement that a "measure is proportionate" or that it is "in accordance with the criteria set out in the Gambelli judgment."[602] Even though a slightly increased attention to the proportionality review could be noted since the *Gambelli* decision, the report concluded that the review remained rather superficial in most cases.[603]

> National courts, however, mostly refer rather globally to the principle of proportionality, simply stating that a measure is "proportionate" or "proportionate in the light of EC law" or of "the Gambelli criteria", without engaging in any detailed analysis.[604]

In a situation where the guidance by the Court of Justice is limited to very broadly phrased criteria, national courts may find it difficult to proceed to a meaningful proportionality review. The consequence of such joint lenient review practice is a *'judicial vacuum': an area of law empty of meaningful judicial scrutiny*.[605] Gambling laws and administrative decisions are hardly scrutinised. The functioning of the judicial dialogue between interpreting court (Court of Justice) and applying courts (national courts) is weakened. The outcome is that the Court of Justice is reluctant in giving meaningful, substantial guidance because it wants the national courts to solve the issues while the latter limit their scrutiny to an exercise restricted to *referring to the recurring formula of the Court of Justice*. Hence, no court applies a meaningful scrutiny, resulting in a judicial vacuum.

---

[601] Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 984 and 986.

[602] Ibid., Chap. 2, at 984.

[603] Ibid., Chap. 2, at 986–987.

[604] Ibid., Chap. 2, at 990.

[605] Planzer, S., *Assessing the Impact of Regulation* (paper presented at Responsible Gaming Day, Brussels, 13 October 2010).

Cultural Differences in Review Practice

The extent to which national courts review legal acts and government decisions is subject to the powers that these courts are granted by national law. Yet, it is also subject to different *judicial cultures*, which may strongly vary from country to country. The self-perception of judges, that is, the interpretation of their role in the bigger societal system, may differ from one Member State to another. It can also vary individually from judge to judge. The Study of Gambling Services supports this view. Among those countries that were identified as jurisdictions where a number of courts *only made a global reference* to the principle of proportionality were inter alia *Denmark, Finland and Sweden*. By contrast, there were also a few jurisdictions in which a number of courts referred to concrete criteria in their proportionality analysis: Austria, Belgium, Germany, Italy, Luxembourg and the Netherlands.[606] In particular, *only Austrian and German courts found it important to inquire into alternative measures* that would be less restrictive to intra-Union trade while still being equally effective.[607] Not least because of their historical experience with totalitarian regimes, the German and Austrian legal systems provide for courts that are expected to closely review government decisions. The central role attributed to courts also affects the self-perception of judges to ensure the rule of law. It can hardly be disputed that German courts are generally not hesitant in reviewing laws and acts.[608] The German Constitutional Court demonstrated the willingness to closely review the proportionality of restrictive gambling measures in its well-known judgment regarding the *gambling monopoly in Bavaria*.[609] Ennuschat observed that this court applied a stricter review than the Court of Justice.[610]

[606] The study found court decisions from Germany, Italy and the Netherlands with *both* strict and lenient review practices. The study does not attempt to deliver an explanation for this fact. In Germany, the mixed constellation is very likely to come from the fact that this country has had more gambling cases than any other Member State. They are likely to go into the hundreds. It is thus quite normal to find diverging approaches. With regard to Italy, the Study may have been under the impression of the *Gesualdi* judgment by the Corte suprema di cassazione (Supreme Court of Cassation): Cass. SU Sent. 111/04 of 26 April 2004, Mario Gesualdi et alii, available at http://www.ictlex.net/?p=382. At the time when the study was drafted, this judgment received wide attention. Despite the critical stance of the CJEU in *Gambelli*, the Italian Supreme Court found in *Gesualdi* that the Italian betting and gaming legislation was compatible with EU law. Cf. C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 15. The Supreme Court's decision in *Gesualdi* was seen as 'side-stepping' the clear doubts regarding consistency in *Gambelli*: Cuyvers, A. (2008). "C-338/04, C-359/04 and C-360/04 (Joined Cases) Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891", *Common Market Law Review, 45*(2), 515–536, at 526.

[607] Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 987.

[608] *Ex multis* Schwarze, J., *Europäisches Verwaltungsrecht*, 2nd edition, Baden-Baden: Nomos Verlagsgesellschaft, 2005.

[609] BVerfG, 1 BvR 1054/01, Verfassungsmässigkeit des deutschen Sportwetten-Monopols.

[610] Ennuschat, "Aktuelle Entwicklungen in der Rechtsprechung von EuGH und BVerfG", at 74.

This is substantially different in other countries. The significant difference of the proportionality review practice in Scandinavia relates to differences in judicial culture. While the scope of this book does not permit an account of these factors in great detail, a brief overview of some aspects is given in the following.

The Danish situation may serve to illustrate some broad considerations of judicial culture. Courts in that country assumed the power to review laws from 'Folketinget' (the Danish parliament) as well as acts of the government. However, there is *strong reluctance to review laws*, not to mention to overturn them. This includes the 'Højesteret' (the Danish Supreme Court). The reluctance is more a phenomenon of *judicial culture* rather than one of judicial powers. By law, any Danish court can review laws on their constitutionality. Yet, only one real case is known in which Højesteret found a law unconstitutional, that is, not simply for formal reasons.[611]

Beside these broad considerations, a concrete difference in *legal instruments* should also be considered.[612] As noted earlier, when reviewing administrative measures, Scandinavian courts were *traditionally* not familiar with the principle of proportionality but rather limited their review to a mere *reasonableness* test (see Sects. 3.4.1 and 9.3.3.3 *i.f.*). Based on considerations relating to the *supremacy* of EU law and the *principle of homogeneity* in EEA law, it can be argued that the EU/EEA principle of proportionality must also be applied by the EU/EEA national courts – *within the sphere of EU/EEA law*.[613]

One cannot help to be reminded in this context of the well-known *Factortame* case. According to the doctrine of sovereignty of Parliament, UK courts could traditionally not disapply acts of Parliament by a temporary injunction. Notwithstanding this considerable difference in legal traditions, the Court of Justice held that UK courts must set aside such national rule and grant *interim relief* to market actors in a situation such as in *Factortame*.[614] Similar to UK

The German Constitutional Court assessed, however, the constitutionality of the monopoly and not the conformity with EU law.

[611] *Tvind [1999] Ugeskrift for Retsvæsen 1999*, 841 *et seq*.

[612] Yet another difference of judicial culture relates to methodology. Scandinavian courts traditionally attach great importance to the historical will of the (national) legislator and accordingly to the travaux préparatoires (Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at. 6). By strong contrast, the Internal Market Courts tend to rely on a combination of teleological, dynamic and effet utile interpretation, in particular in the absence of secondary law.

[613] Lilli concludes that the principle of proportionality *became part of Norwegian law* (ibid., at 44). Such conclusion ultimately accepts the reasoning in *Van Gend en Loos* as *directly* applicable for Norway. Considering that Scandinavian countries follow a *dualist conception*, separating the sphere of national law from the sphere of international law, such far-reaching conclusion may be contested by other Scandinavian scholars. The combined doctrine of *supremacy* and the principle of *homogeneity* provide, however, safe grounds to argue that Scandinavian courts *have to apply* the principle of proportionally *within the sphere of EU/EEA law*. Cf. for a similar argumentation in relation to direct effect of EEA law, Baudenbacher, "The EFTA Court – An Example of the Judicialisation of International Economic Law", at 893.

[614] C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd et alii [1990] ECR I-2433, paras 20–23.

courts that are bound to apply a legal instrument traditionally alien to their legal heritage, Scandinavian courts – as other EU/EEA national courts – are bound to review the proportionality of national measures at the level required by the European case law. It was suggested in the literature that Norwegian courts proceed to a proportionality review when dealing with EEA law (and ECHR law) but may often incorrectly apply the proportionality test, that is, not in line with the review criteria of the European High Courts.[615] The earlier mentioned empirical study seems to support the view of a very lenient judicial review.[616] It was further argued that UK courts effectively apply a proportionality review on substance – in spite of also using language reminiscent of common law, particularly relating to the *Wednesbury* test.[617] However, final conclusions on this topic would require a close analysis of a significant number of cases from these jurisdictions.

A more lenient proportionality review by Scandinavian courts may not be specific to the gambling cases. However, another aspect must be considered in this context too. It was previously noted that the Court of Justice generally leaves it to the referring court to assess the proportionality *stricto sensu* of a measure (see Sect. 3.3 *i.f.*). Due to the aforementioned factors, the third subtest of proportionality may rarely be judicially reviewed. Yet, the leniency of proportionality review in the area of gambling goes far beyond that situation. It was shown that the gambling jurisprudence of the Court of Justice additionally left large aspects relating to the subtests of *suitability* and *necessity* to the discretion of the referring courts (see Sect. 9.2). If national courts refrain from meaningfully assessing not only the *proportionality stricto sensu* but also the suitability and necessity of national restrictions, there is little judicial review of proportionality left.

The case law shows that even the more substantial proportionality review of the EFTA Court did not trigger a full scrutiny of the proportionality of the measures by the Norwegian courts. A Norwegian scholar noted that the Oslo District Court[618] assessed the suitability of the measures, but that court's discussion of necessity was more formal rather than on substance. The necessity review was largely limited to references to the EFTA Court's criteria in the advisory opinion, without effectively applying the criteria to the concrete facts of the case or inquiring into less restrictive

[615] Harbo, *The Function of Proportionality Analysis in European Law*, 235.

[616] Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*.

[617] Craig, P., "Unreasonableness and Proportionality in UK Law" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 85–106, at 105; Harbo, *The Function of Proportionality Analysis in European Law*, at 173. Contrary to Lord Hoffmann, Green predicted a significant impact of the principle of proportionality also for cases with no link to EU law or the ECHR (Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law"; Green, N., "Proportionality and the Supremacy of Parliament in the UK" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publisher, 1999, pp. 145–164).

[618] Oslo Tingrett Ladbrokes Ltd. mot Kultur og Kirkedepartmentet, judgment of 3 October 2008.

measures.[619] It was suggested that a misconception on the part of the Oslo District Court led to the lenient review: the discretion granted by the EFTA Court in the advisory opinion was seen as automatically justifying an essentially unlimited margin of appreciation for the Norwegian government as regards the necessity of the measures.[620] This was arguably not what the EFTA Court's decision implied.[621] In the gaming machines case, the Norwegian Supreme Court expressly relied on the aforementioned logic. It argued that the EFTA Court had interpreted leniently the necessity criterion in *ESA v Norway* and that this approach harmonised well with the Norwegian tradition of judicial review of *distinctly political measures*.[622] As a consequence, it largely refrained from reviewing the measures as to their necessity.[623]

9.3.3.4 Varying Intensity of Review by the Court of Justice of the EU

Role of Composition of Bench

The intensity of the judicial review by national courts depends on varying judicial cultures as well as individual differences among judges. These differences can also play a role at the Court of Justice, the EFTA Court and the ECtHR. For procedural reasons, it is hard to identify individual differences. Only judges at the ECtHR are permitted to draft *dissenting or concurring opinions*. Judges at the Court of Justice and the EFTA Court are bound by the secrecy of deliberations and are not allowed to unveil the individual voting behaviour. Their opinions could be deducted from speeches and publications, but judges generally refrain from being too outspoken to avoid recusal in future cases. Different of course is the situation of *Advocates General*. Their view on the case is known in detail as opinions are associated with specific Advocates General. In addition, opinions tend to be much more detailed than judgments, at least in the case of the Court of Justice.[624]

Nonetheless, it may be interesting to assess whether certain patterns can be identified in the gambling cases. In the case of the EFTA Court, the exercise is

---

[619] Harbo, *The Function of Proportionality Analysis in European Law*, at 179–184.

[620] Ibid., at 183.

[621] "Even though the Contracting Parties do have discretion in setting the level of protection in the field of gambling, this does not mean that the measures are sheltered from judicial review as to their necessity" (E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 55).

[622] Rt. 2007: 1003 (Spilleautomat), para. 104–106, quoted in Harbo, *The Function of Proportionality Analysis in European Law*, at 94.

[623] However, it must also be noted that the Supreme Court's judgment was not handed down subsequent to an advisory opinion. The EFTA Court's decision was taken in a direct action procedure, and the Norwegian Supreme Court had stayed proceedings to await the ruling of the EFTA Court.

[624] Maduro, "The European Court of Justice", at 226.

superfluous from the outset since this court generally sits in the identical composition of the three judges composing the EFTA Court. This was not different in the two gambling cases, because no *ad hoc* judge was sitting in those cases.

In the case of the Court of Justice, it is at least possible to see who sat as *Advocate General* and *judge* in a given case. The *'juge rapporteur'* may have a substantial influence, because in this function a judge needs to look more closely at the case and the issues it involves. It was mentioned that the early case law showed an essentially unlimited margin of appreciation. A significant change came with *Gambelli*, *Lindman* and *Placanica*. This was followed by a series of decisions that left a mixed picture regarding judicial review.

In the early period, some key persons can be identified. *Advocate General Gulmann* drafted the opinion in the very first gambling case. Many of the considerations in this opinion were instrumental to the development of the case law (see Sect. 9.3.2.2). Gulmann also *became judge* at the Court of Justice and sat in the second gambling case *Läärä*. His influence in *Läärä* was likely to be significant, considering his experience as Advocate General in *Schindler* and the fact that the bench in *Schindler* had followed his opinion. With regard to the influential function of *'juge rapporteur'*, Judge Puissochet served this function in the cases *Läärä*, *Zenatti* and *Anomar*.

The significant change in *Gambelli*, *Lindman* and *Placanica* was also associated to a certain composition. *Judge Edward* served as '*juge rapporteur*' in *Gambelli* and *Lindman*. The Advocates General in *Gambelli* and *Placanica* asked for a much stricter review than previously applied: *Alber* in *Gambelli* and *Colomer* in *Placanica*.

The following judgments are difficult to associate to specific jurists. Some decisions were stricter, others more lenient. Clearly identifiable is only the role of *Advocate General Bot* in *Liga Portuguesa*, *Sporting Exchange*, *Ladbrokes*, *Sjöberg*, *Winner Wetten* and *Dickinger & Ömer*, especially when contrasted with the opinions of *Advocate General Mengozzi* in *Markus Stoss* and *Carmen Media* or *Advocate General Mazák* in *HIT & HIT LARIX* and in the Greek case *'OPAP'*. The latter Advocates General suggested a stricter review than Bot.[625] Unclear is the influence of Judge Schiemann who served as *'juge rapporteur'* on almost all cases from *Placanica* until *Costa & Cifone*.[626] An additional difficulty lies in the fact that several of these decisions were decided with the Court of Justice sitting as *Grand Chamber*.

In sum, a look at the composition of the bench cannot fully clarify the varying use of the margin of appreciation in the post-*Anomar* case law.

---

[625] By way of exception, the Court of Justice decided in C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633 to proceed to judgment without an opinion of Advocate General Jääskinen.

[626] Considering the cases from *Placanica* to *Costa & Cifone*: Judge Schiemann was judge rapporteur in all but two cases: Judge Cunha Rodrigues served as '*juge rapporteur*' in C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, and the related C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757. Judge Schiemann did not sit in these two related cases.

Role of Referring Court and Case File

Apart from the judges sitting in the case, the referring courts have played a major role for the use of the proportionality review of the Court of Justice. Varying judicial cultures influenced the review process in national proceedings, with Scandinavian courts being rather reluctant to review laws and government practice. Austrian, German and Italian courts were more inclined to review the proportionality of measures.[627]

There is another aspect underlining the central role of national courts. It was partly the *referring courts that were guiding the Court of Justice.* There is a recognisable pattern: Where the Court of Justice chose to review national measures more strictly, the respective referring court *had pointed at the facts of the case in quite critical language*. This was the case for references from Austria, Germany and Italy. It may be more than a coincidence that those countries are also among those that host courts, which show a higher willingness to review national laws on their conformity with constitutional and EU law. These courts influenced the Court of Justice by phrasing their references in critical terms. In particular, *they emphasised inconsistencies* in the national gambling regime and often suggested themselves that the pleaded objectives were not coherently pursued. After such a reference, it was hard for the judges at the Court of Justice to ignore the highlighted inconsistencies. The Court of Justice made it clear that the suitability of the measures presupposed that they were coherent and consistent.[628] A few examples shall illustrate this point.

In *Gambelli*, it was the referring Italian court that drew the attention of the Court of Justice to some striking inconsistencies of the Italian gambling policy. It made the Court aware of Italy's policy of the expansion of gambling offers. The Court of Justice expressly quoted the referring court and the inconsistencies that court had noted.

> The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.[629]

More recent references from Germany and Austria confirm this point, namely in the decisions *Markus Stoss*, *Carmen Media*, *Engelmann* and *Dickinger & Ömer*.[630]

---

[627] Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 987.

[628] Mathisen, G. (2010). "Consistency and Coherence as Conditions for Justifications of Member State Measures Restricting Free Movement", *Common Market Law Review, 47(*4), 1021–1048, at 1037–1038.

[629] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 22.

[630] Another factor was arguably of significance too: except for *Dickinger & Ömer*, the opinions were delivered by Advocates General Mengozzi and Mazák. For Advocate General Mazák, cf. also his far-reaching opinion in *HIT & HIT LARIX*.

In *Markus Stoss*, the pattern became clear in several paragraphs.

> The said court [Verwaltungsgericht Giessen] doubts whether the restrictions on the freedom of establishment and the freedom to provide services arising from that situation may be justified by objectives in the public interest […] because of failure by the monopoly at issue in the main proceedings to satisfy the requirements of the principle of proportionality. […] The doubts which that court has as to the conformity of the monopoly at issue in the main proceedings with European Union law ('EU law') are of three types. […] In the view of the referring court, the Land Hessen has no consistent and systematic policy for restricting gambling.[631]
>
> The doubts of that court [Verwaltungsgericht Stuttgart] largely echo those expressed by the Verwaltungsgericht Gießen. […] A consistent and systematic policy is also lacking, in the national court's view, having regard to the aggressive promotional activity of the holder of the public monopoly.[632]

The Court of Justice followed the pattern of *referring to the national courts' doubts* throughout its ruling; relevant passages can be found in paragraphs 89 to 90,[633] 100[634] as well as 105.[635] A similar pattern can be identified in the Austrian case *Engelmann*. It even seemed that the referring judges had largely reached a conclusion and appeared to merely seek support by the Court of Justice.

> That court [Landesgericht Linz] had doubts as to the compatibility of [Austrian law] with European Union law […]. Those doubts are founded first of all on the fact that, to the best of the national court's knowledge, the adoption of the applicable provisions of the [Austrian Gambling Law] was not preceded by an analysis of the dangers of gambling addiction or of the possibilities of preventing it either de jure or de facto. […] According to the Landesgericht Linz, those provisions run counter to the Court's case-law […]. Secondly, the Landesgericht Linz harbours doubts as to whether Austrian policy in the sector of games of chance allowed under concessions is consistent and systematic. In its view there can be a consistent and systematic restriction on activity related to games of chance and wagers only where the legislature appraises all areas and sectors of games of chance and then intervenes according to the potential level of risk or dependency for each type of game. It states that this is not

---

[631] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, paras 20–26.

[632] Ibid., paras 34–41.

[633] "[…] the referring courts have doubts as to the scope of that latter requirement [limit betting activities in a consistent and systematic manner]."

[634] "the referring courts have also noted, first, that the holder of the public monopoly on bets on sporting competitions is engaging […] in intensive advertising campaigns emphasising the need to finance social, cultural or sporting activities to which the profits derived are allocated, thereby making it appear that maximisation of the profits destined for such activities is becoming an end in itself of the restrictive measures concerned. Those courts have also noted, secondly, […] that […] the public authorities are developing or tolerating policies of expanding supply."

[635] "the Verwaltungsgericht Stuttgart has also indicated that […] the surplus revenue is paid into the public purse, and in so far as it is not possible to exclude the possibility that the financial support given to bodies recognised as being in the public interest permits the latter to develop activities in the public interest which the State might normally be called upon to undertake, thereby leading to a reduction in the State's expenses."

> the case in Austria. […] Fourthly, the Landesgericht Linz refers to the active pursuit, by the national authorities, of tax revenue from the sums paid by the gaming establishments.[636]

The conclusion to be drawn from these cases is that the *role of the reference has been significant* for the review process of the Court of Justice. The latter applied a stricter review in cases where the referring courts had expressly emphasised inconsistencies in the national gambling regime. This was the case in the Italian cases of *Gambelli* and *Placanica*, the German cases of *Markus Stoss*, *Carmen Media*, and the Austrian cases of *Engelmann* and *Dickinger & Ömer*.

A further aspect underlining the importance of the reference is that *Gambelli* was assessed more critically than the previous case *Zenatti*. As the Commission correctly observed in *Gambelli*, the applicable Italian gambling regulation in *Gambelli* was largely similar to that in *Zenatti*.[637] The difference indeed was that in *Gambelli*, the national court had repeatedly pointed at substantial inconsistencies in the Italian gambling regulation. The referring court's critical remarks were noted by *Advocate General Alber* who held:

> Against that background, there can no longer be any talk of a coherent policy to limit gambling opportunities.[638]

The aforementioned cases also coincided with Advocates General who were favourable to a stricter review practice: Alber in *Gambelli*, Colomer in *Placanica* and Mengozzi in *Markus Stoss* and *Carmen Media*.

It is sensible to consider that the *Gambelli* ruling might well have looked significantly different if *only the applicants* had pointed at inconsistencies (and not the referring court) and if *another Advocate General* had delivered the opinion. In other cases that involved disputed facts, the Court of Justice showed a tendency to rely on the pleadings of counsels for government. This could be observed in *Liga Portuguesa* where, even according to intervening governments, some of the facts were not sufficiently clear. Nevertheless, the Court of Justice interpreted the unclear factual situation in favour of the Portuguese government.[639] Similarly, the doubts raised by the applicant in *Läärä* where not discussed by the Court of Justice but only by Advocate General La Pergola.[640]

According to the underlying purpose of the preliminary ruling procedure, the Court of Justice does not decide on the merits of the case but is only asked to offer an interpretation of EU law. However, it would be artificial to conclude that the facts of the case will not impact the Court's interpretation of EU law. The referring court, more

---

[636] C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, paras 19–23.

[637] "The Commission submits that the issue in this case was disposed of by the judgment in *Zenatti*. In its view, the legislative amendments introduced in 2000 merely supplement the existing prohibition without introducing new grounds for criminal prosecution." Opinion of Advocate General Alber in C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[638] Opinion of Advocate General Alber in ibid., para. 122.

[639] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, paras 39–43, 62–66.

[640] Opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 37–41.

precisely the description of the facts in the case file, holds the power to influence the Court of Justice's findings as regards the compatibility of the national provisions with EU law.

9.3.4 Results

Prior to Sect. 9.3 it was already established that the Court of Justice applied a review practice in the gambling cases that was characterised by a wide margin of appreciation and – in relation to many aspects – a lenient proportionality test. The Court's approach *deviated in important points from the approach of the EFTA Court and the criteria established by the ECtHR* in relation to the doctrine of the margin of appreciation. Section 9.3.1 double-checked those findings by contrasting them with cases from related fields: first from *alcohol addiction*, followed by risks and opportunities relating to the Internet.

It was shown that the Court applied in the Swedish case *Rosengren* a much stricter proportionality test, even though that case was argued on grounds of the protection of the health and life of humans under Article 36 TFEU. The Court of Justice adhered to the *principle of less restrictive measures* and reviewed closely the alcohol policy *in practice*. The Court itself *argued alternatives* that were less restrictive to intra-Union trade.

The Court of Justice's views on the Internet were then inquired. It underlined in *Ker-Optika the advantages that the medium Internet offered*. Customers could also be informed via the interactive features on the internet before purchasing contact lenses, not just in the shop, and the measures were found disproportionate. In *DocMorris*, the Court found that an absolute, undifferentiated prohibition on the distribution of medicinal products via the Internet was not justifiable, underlining several features, which land-bases sales could not provide. While the Court of Justice in the gambling cases only noted the risks of the medium Internet, it emphasised its advantages in *Ker-Optika* and *DocMorris* in relation to pharmaceutical/medical products.

All three aforementioned cases were argued on the *Treaty exception of public health*. In *Commission* versus *Spain*, the Court of Justice noted that the restrictions to gambling could not be argued on public health grounds as gambling addiction had not reached such a *level of seriousness*. Nevertheless, the proportionality review in the three cases was clearly stricter than in the case law on gambling.

Section 9.3 then inquired the reasons for and consequences of the Court's special approach to gambling. The *historical-political setting* was analysed, which surrounded the early case law of the Court. The first gambling case *Schindler*, was lodged at a time when *political discussions* about national sovereignty and the principle of subsidiarity were at a peak. An analysis of the conclusions of the presidencies of the European Council showed that the *political discourse significantly changed* in the aftermath of the almost-failure of the Maastricht Treaty. The principle of subsidiarity suddenly became the central topic of the European Council.

The Commission was asked to consider abandoning certain legislative initiatives, which ultimately also led to the abandoning of the regulation of the gambling sector. Notably, these political considerations left the *acquis communautaire* and the Court of Justice's powers to review national measures untouched.

It was then demonstrated that the *opinion of Advocate General Gulmann* in *Schindler* expressly referred to the *political considerations* of the European Council and heavily emphasised the *financial interests* of Member States. It also underlined *moral aspects* and the *special nature of gambling* and applied a virtually unlimited margin of appreciation. These perspectives were proven to have impacted the choices of the Court of Justice in its early case law, with the Court expressly referring to the "moral, religious or cultural aspects" as well as the "peculiar nature" of gambling. As the Court does not like to depart from its precedent, *formula from the early case law kept re-emerging* in subsequent decisions.

Section 9.3 then discussed the consequences of the Court of Justice's approach. It was found that the Court dealt with gambling issues as a matter for public morality rather than for scientific risk regulation. The moral perspective led to a lack of a science-informed approach towards games of chance and gambling addiction. Some of the Court of Justice's remarks in *Gambelli* and *Lindman* could have served as a basis for *developing a science-oriented jurisprudence* but remained rather isolated statements as further case law showed.

Another consequence was noted in a *malfunctioning judicial dialogue between the Court of Justice and national courts*. Underlining the wide margin of appreciation, the Court of Justice demonstrated reluctance in offering substantial guidance to national courts and *emphasised the role of national courts* in the judicial review of national gambling policies. A study had found that national courts often did not review the proportionality of restrictive measures in gambling, *regularly limiting their 'assessment' to a mere reference to formula of the Court of Justice*. The outcome can be referred to as a *'judicial vacuum': an area of law empty of a meaningful judicial scrutiny*.

It was demonstrated that there were *significant differences of judicial cultures* between Member States. While numerous courts in Austria and Germany assessed measures that would be less restrictive to intra-Union trade, courts in Scandinavian countries regularly made simply a global reference to the principle of proportionality or formula of the Court of Justice. As illustrated along the examples of Denmark and Norway, the reluctance may often not be due to a lack of judicial powers but rather due to judicial traditions. It was for instance shown that the Danish Supreme Court ('Højesteret') hardly ever struck down a national law based on unconstitutionality and that the Norwegian courts traditionally only applied a reasonableness test rather than a proportionality test.

It was then assessed whether the varying intensity of judicial review at the Court of Justice could be associated with the changing composition of the bench. Since the EFTA Court sat in identical composition in the two gambling cases, it was superfluous to do such an assessment. At the Court of Justice, certain cautiously suggested patterns of decision-makers were identified. A practice of lenient review was associated with Advocates General Gulmann and Bot as well as *'juge*

rapporteur' Puissochet. By contrast, a stricter review was associated with Advocates General Alber, Colomer, Mazák and Mengozzi as well as *'juge rapporteur'* Edward.

The central role of referring courts was demonstrated. In cases where the Court of Justice chose to review national gambling policies more strictly, the referring Austrian, German and Italian courts had pointed to inconsistencies. The pattern could be well observed in *Gambelli*, *Placanica*, *Markus Stoss*, *Carmen Media*, *Engelmann* and *Dickinger & Ömer* in which the Court of Justice expressly referred to the critical remarks by the referring courts.

Chapter 10
Excursus: Precautionary Principle in EU Gambling Law

Gambling activities involve risks relating to crime and addiction. Governments may wish to prevent the occurrence of those risks: preventing harm is a more effective approach than remedying harm. A prominent legal instrument in the context of taking a preventive approach towards risks is the precautionary principle.[1] Counsels voiced that the European courts should apply this principle in their gambling case law.[2]

It would go beyond the scope of this book to inquire all issues raised by the controversial precautionary principle. This chapter provides a brief *excursus* on the *potential applicability of the precautionary principle in European gambling law*. The notion, genesis and scope of the precautionary principle in European law must be presented (Sect. 10.1). It is then examined whether the precautionary principle is suitable to be applied in the gambling jurisprudence according to the principle's criteria and rationale (Sect. 10.2). Finally, a brief account of the gambling case law is given that is informed by elements of the precautionary principle (Sect. 10.3).

10.1 Notion, Genesis and Scope of Application

10.1.1 Notion

Public authorities need to be able to act quickly and effectively when confronted with the risk of a serious threat to human health or related public goods. The precautionary principle is the legal instrument enabling governments, under certain

[1] For the distinction of preventive approaches more generally and the precautionary principle specifically, cf. de Sadeleer, N., *Environmental Principles: From Political Slogans to Legal Rules*, Oxford: Oxford University Press, 2005.

[2] Vlaemminck, and Hubert, *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at Gambling Conference), at 11.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_10,

conditions, to take protective measures when confronted with scientific uncertainty regarding the existence or extent of a risk.[3] The precautionary principle is not defined in EU primary law but has been largely shaped by the case law of the Court of Justice, the General Court and the EFTA Court. In a landmark decision, the EFTA Court also defined its criteria of application.[4]

The constituent elements of the principle are a risk to human health (or related goods) and scientific uncertainty with regard to the existence and extent of the risk. The principle applies where "there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community."[5]

10.1.2 Genesis

The precautionary principle is a legal instrument largely defined and shaped by *European case law*. It was only introduced into EU primary law by the Maastricht Treaty in 1992 in relation to environmental policy. The limited mentioning in the Treaties has remained in place even under the consolidated Article 191(2) TFEU.[6] The principle was further codified in EU secondary (soft) law by the Commission Communication on the precautionary principle. The Communication aimed "to inform all interested parties […] of the manner in which the Commission applies or intends to apply the precautionary principle when faced with taking decisions relating to the containment of risk."[7]

The first manifestations of the principle in EU law occurred far prior to its integration by the Maastricht Treaty. Alemanno mentioned an *obiter dictum* in the 1983 judgment *Sandoz* as the first judicial recognition at EU level.[8] Advocate General Mischo saw *Sandoz* as "an application of the precautionary principle before the fact."[9] The wide margin of appreciation granted in *Sandoz* and the wording

[3] Roots of the principle can be found in German democratic socialism and German administrative law; cf. Baudenbacher, C., "The Definition of the Precautionary Principle in European Law: A Product of Judicial Dialogue" in *European Integration Through Interaction of Legal Regimes*, Baudenbacher, C., and Bull, H. (Eds.), Oslo: Universitetsforlaget, 2007a, pp. 1–31, at 2.

[4] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, 73.

[5] Communication from the Commission on the Precautionary Principle, COM (2000) 1, at 3.

[6] Art. 191(2) TFEU: "[Union policy on the environment] shall be based on the precautionary principle."

[7] Communication from the Commission on the Precautionary Principle, COM(2000) 1, at 9.

[8] Alemanno, A. (2001) "Le principe de précaution en droit communautaire: stratégie de gestion des risques ou risque d'atteinte au marché intérieur?", *Revue du droit de l'Union européenne, 4*, 917–953, at 917.

[9] Opinion of Advocate General Mischo in C-174/82 Criminal Proceedings against Sandoz BV [1983] ECR 2445, para. 83, cf. further para. 50.

chosen in that judgment are reminiscent of the case law on gambling where Member States are also free to choose their protection level:

> in so far as there are uncertainties at the present state of scientific research it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure.[10]

Alemanno found the *BSE judgments*[11] essential, even though the Court of Justice did not expressly refer to the precautionary principle in these cases. They paved the way for the development of the principle in EU law and extended the principle beyond environmental law.[12] One of those judgments emphasised two aspects that justify a wide margin of appreciation and which were discussed in this book: *seriousness of the risk and urgency of the situation*.[13] It was not before 2000 that the Court of Justice expressly mentioned the principle in *Bergaderm*. In the same case, the General Court had essentially referred to the principle without however mentioning its name.[14]

The conditions under which a Member State could rely on the precautionary principle remained unexplored. It was the EFTA Court that defined those conditions in its landmark *Kellogg's* judgment.[15] Similar to the *Sandoz* case of the Court of Justice, the *Kellogg's* case involved the fortification of food with vitamins. In contrast to its sister court, the EFTA Court however chose a stricter review of the national measures. The Court of Justice only asked Member States to authorise products "when the addition of vitamins to foodstuffs meets a real need."[16] The EFTA Court however underlined the role of science and of a comprehensive risk assessment.

---

[10] Ibid., para. 16.

[11] Bovine spongiform encephalopathy ('BSE'); cf. C-157/96 The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd. [1998] ECR I-2211; C-180/96 UK v Commission [1998] ECR I-2265.

[12] Alemanno, A., "The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty" in Valori costituzionali e nuove politiche del diritto, Cuocolo, L., and Luparia, L. (Eds.), Halley, 2007, pp. 11–24, at 4–5.

[13] C-180/96 UK v Commission [1998] ECR I-2265, para. 110. The ECtHR grants wide discretion to national authorities in relation to crime concerns (in the wide sense) only if they include the aspects of *seriousness* and *urgency*: see Sect. 8.3.1.

[14] Alemanno, "The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty", at 6. C-352/98 P. Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission [2000] ECR I-5291, paras 32 and 52; T-199/96 Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission [1998] ECR II-2805, para. 66: "Furthermore, where there is uncertainty as to the existence or extent of risks to the health of consumers, the institutions may take protective measures without having to wait until the reality and the seriousness of those risks become fully apparent."

[15] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, cf. in particular paras 25–43.

[16] C-174/82 Criminal Proceedings against Sandoz BV [1983] ECR 2445.

> The mere finding by a national authority of the absence of a nutritional need will not justify an import ban, a most restrictive measure, on a product which is freely traded in other EEA States.[17]

The General Court and the Court of Justice integrated elements from the Kellogg's ruling in their case law. Referring to the *Kellogg's* judgment, the General Court and the Court of Justice highlighted that preventive measures could not be based on a "purely hypothetical approach" and thus underlined the role of science in verifying suppositions.[18] Most importantly, the Court of Justice overruled its earlier *Sandoz* approach in the case *Commission v Denmark*, which again involved fortified foodstuffs.[19] In a classic example of judicial dialogue, the Court of Justice integrated the *criteria* that the EFTA Court had applied in *Kellogg's*.[20] These judicial criteria will be used below to assess the potential role of the precautionary principle in the case law on gambling.[21]

---

[17] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, para. 28 *i.f.*

[18] T-13/99 Pfizer Animal Health SA v Council [2002] ECR II-3305, para. 143; T-70/99 Alpharma Inc. v Council [2002] ECR II-3495, para. 156; C-236/01 Monsanto Agricoltura Italia SpA et alii v Presidenza del Consiglio dei Ministri et alii [2003] ECR I-8105, at 106.

[19] C-192/01 Commission v Denmark [2003] ECR I-9693.

[20] For the judicial dialogue between the CJEU and the EFTA Court specifically in relation to the precautionary principle, cf. Baudenbacher, "The Definition of the Precautionary Principle in European Law: A Product of Judicial Dialogue"; Bronckers, M., "Exceptions to Liberal Trade in Foodstuffs: The Precautionary Approach and Collective Preferences" in *The EFTA Court Ten Years On*, Baudenbacher, C., Tresselt, P., and Orlygsson, T. (Eds.), Oxford/Portland: Hart Publishing, 2005, pp. 105–114. For the judicial dialogue between the European High Courts more generally, cf. Baudenbacher, "The EFTA Court, the ECJ, and the Latter's Advocates General – A Tale of Judicial Dialogue"; Baudenbacher, C., "The EFTA Court Ten Years On" in *The EFTA Court Ten Years On*, Baudenbacher, C., Tresselt, P., and Orlygsson, T. (Eds.), Oxford/Portland: Hart Publishing, 2005, pp. 13–51; Baudenbacher, "The EFTA Court: An Actor in the European Judicial Dialogue"; Baudenbacher, C., "Some Considerations on the Dialogue between High Courts" in *Dispute Resolution*, Baudenbacher, C. (Ed.), Stuttgart: German Law Publishers, 2009, pp. 175–190; Skouris, V., "The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions" in *The EFTA Court Ten Years On*, Baudenbacher, C., Tresselt, P., and Orlygsson, T. (Eds.), Oxford/Portland: Hart Publishers, 2005, pp. 123–129. For the notion of 'implicit dialogue', cf. Johansson, "The Two EEA Courts – Sisters in Arms", at 214. For the early days of the genesis of the judicial dialogue between the CJEU, its Advocates General and the EFTA Court, cf. Baudenbacher, C., "Sven Norberg and the European Economic Area" in *Liber Amicorum in Honour of Sven Norberg – A European for all Seasons*, Johansson, M., Wahl, N., and Bernitz, U. (Eds.), Brussels: Bruylant, 2006, pp. 37–59, at 53–54.

[21] For the sake of completeness, it should be noted that the EFTA Court recently applied the precautionary principle in a novel way in its *Philip Morris* judgment. In that case, the uncertainty did not regard the underlying risk but solely the *effectiveness of the policy* taken in view of the risk (E-16/10 Philip Morris Norway AS v Norway EFTA Court Report [2011] EFTA Court Report 330). Yet, it remains to be seen how the Internal Market Courts will deal with similar constellations in future cases. This novel interpretation of the precautionary principle would result in a significant adjustment of the *burden of proof*. For a detailed analysis, cf. Alemanno, A. (2011b). "The Philip Morris Judgment: The EFTA Court Enters the Post-Keck Debate with a Precautionary Twist", *European Law Reporter, 9*, 246–253 as well as Alemanno, A. (2011a). "The Legality,

10.1.3 Scope of Application

The genesis of the precautionary principle shows that the traditional fields of application of this principle are *environment and foodstuffs*. The related public interest objectives are the protection of the environment and of the health of humans. The first codification in EU primary law occurred in relation to environmental policy,[22] and the first vague references by the Court of Justice were made within the area of public health (foodstuffs, protection of human health). There is no cogent reason to *a priori* exclude the application of this principle in other fields and to protect other public interest objectives. The Court of Justice has shown that it does not limit the principle to the scope granted in the EU Treaties but has expanded it to public health issues.[23] The Court of Justice has dealt with gambling addiction as a consumer protection issue (as opposed to a public health issue). While public health issues seem to be of a more severe nature in the view of the Court of Justice than consumer protection issues, it would be premature to automatically exclude an application of the precautionary principle. Ultimately, both justification grounds relate to the protection of health – one with an emphasis on the consumer, and the other with an emphasis on the human being.

10.2 Precautionary Principle in Gambling Law: Application, Rationale and Criteria

10.2.1 Current Application in Gambling Case Law

Vlaemminck demanded the recognition of the precautionary principle in the field of gambling.[24] Upon the delivery of the opinion in *Sporting Exchange/ Ladbrokes*, he noted that Advocate General Bot had now supported the application of the precautionary principle in the gambling sector. Member States did not have to wait until actual clandestine networks developed but could invoke crime concerns and take preventive measures.[25]

Rationale and Science of Tobacco Display Bans After the Philip Morris Judgment", *European Journal of Risk Regulation, 4*, 591–599.

[22] Art. 191(2) TFEU.

[23] Alemanno, "The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty", at 13.

[24] *Ex multis*, Vlaemminck, and Hubert, *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at Gambling Conference), at 11.

[25] Vlaemminck, P., "Is There a Future for a Comprehensive EU Gambling Services Policy?" in *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling*, Litter, A., Hoekx, N., Fijnaut, C., et al. (Eds.), Leiden/Boston: Martinus Nijhoff Publishers, 2011, 105–118, at 115 and fn 30; Vlaemminck, P., "Towards a Sustainable Policy for Gambling in the EU: Putting Our Common Principles of State Lotteries into Practice", *Magazine of the European*

A closer analysis of the Advocate General Bot's opinion shows a more ambiguous picture. The Commission had pointed to the burden of proof of the Member State and the relevant *obiter dictum* in *Lindman*. It had then noted that the order for reference contained no indications that clandestine gambling was indeed a serious problem in the Netherlands.[26] By contrast, Advocate General Bot found that whenever the protection of human health was at stake, governments could restrict fundamental freedoms without having to wait until the risk turned into reality. Without further argumentation, the Advocate General added, "[i]n my opinion, the same must apply in relation to the protection of society against the risk of a serious disruption of public order."[27] Beside the *abrupt switch from the preventive protection of human health to crime concerns*, it is noteworthy that *none of the two decisions quoted by the Advocate General* discussed the precautionary principle.[28] Advocate General Bot *alluded to the language* of the precautionary principle in *Sporting Exchange / Ladbrokes* while not referring to the principle. The choice of language suggests that the Advocate General wished to argue with the *consequences* of the precautionary principle (preventive restrictions and wide margin of appreciation), without wishing to *mention the principle or to deal with the principle's criteria of application*. Unlike the Advocate General, the Court of Justice did not enter this discussion and avoided language reminding of the precautionary principle.[29]

Neither the Court of Justice nor the Advocates General nor the EFTA Court referred to the precautionary principle to justify national restrictions of fundamental freedoms in the field of gambling. Only Advocate General Bot alluded to wording sometimes used in relation to the precautionary principle or, more broadly, *preventive approaches*. He used his words not in relation to gambling addiction concerns but crime concerns. Also, he did not discuss why the Court's earlier considerations, which were made in relation to health, should also apply in relation to crime.

Lotteries, News 33, April 2010, pp. 22–23; Vlaemminck, P., *The International Perspective Regarding the Framework of Gaming Operations from an EU Perspective to a Transatlantic Solution?* (paper presented at Conference on 'The Organization of the Greek Gaming Market', Athens, 31 May 2010).

[26] Commission cited in opinion of Advocate General Bot in C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, and C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 83–84; cf. also C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, paras 25–26.

[27] Opinion of Advocate General Bot in C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, and C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, para. 87.

[28] C-531/06 Commission v Italy [2009] ECR I-4103, para. 54; C-171/07 and C-172/07 (Joined Cases) Apothekerkammer des Saarlandes et alii (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales ECR I-4171, para. 30.

[29] C-203/08 Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, and C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757.

The discussion around the precautionary principle illustrates well the initially noted heated debate surrounding gambling issues. Claims from both sides can be noted that are not fully backed up by case law or empirical evidence. An industry representative pointed out that the precautionary principle could only apply where there was evidence of the risk of potential harm and that the Netherlands had not done that. But he clearly went too far by claiming that "no recent medical studies have shown that sports betting is prone to give rise to such harm" since the quoted study was not intended to nor could it offer such conclusive evidence.[30]

10.2.2 Criteria

The EFTA Court in its *Kellogg's* judgment defined the criteria that Member States needed to meet in order to rely on the precautionary principle.[31] The General Court as well as the Court of Justice integrated the EFTA Court's approach and the relevant criteria into EU law in *Pfizer* and *Commission v Denmark*.[32] Similar to the factual situation at stake in *Kellogg's*, gambling is not regulated at European level and the precautionary principle would apply to the gambling regulation adopted at national level. In the following analysis, the criteria established in *Kellogg's* are translated into the setting of national gambling regulation, including the requirements that Member States would have to comply with if the precautionary principle were to apply.[33] In this regard, the role of scientific research and empirical evidence is key.

For the purpose of the analysis, the criteria from the case law are grouped into three broad categories: (1) Scientific uncertainty regarding a risk to human health: identification of health consequences and comprehensive risk evaluation; (2) Address the issue of protecting human health and pass evidence-based measures; and (3) Proportionate, consistent, transparent, non-discriminatory measures.

10.2.2.1 Scientific Uncertainty: Identification of Health Consequences and Comprehensive Risk Evaluation

In the absence of harmonisation of rules, when there is uncertainty as to the current state of scientific research, it is for the Contracting Parties to decide what degree of protection of

[30] Lycka, M., "*What Future for Online Gambling Services in the EU?*", worldonlinegamblinglawreport, vol. 9, January 2010. The study that Lycka cited does not offer nor does it intend to offer evidence to such end: LaBrie, LaPlante, Nelson et al., "Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior".

[31] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73.

[32] T-13/99 Pfizer Animal Health SA v Council [2002] ECR II-3305; C-192/01 Commission v Denmark [2003] ECR I-9693.

[33] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, paras 25–43.

> *human health they intend to assure […]. It is within the discretion of the Contracting Party to make a policy decision as to what level of risk it considers appropriate.*[34]
>
> *A proper application of the precautionary principle presupposes, firstly, an identification of potentially negative health consequences […], and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information.*[35]
>
> *When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures.*[36]

This first group of criteria offers the opportunity to consider the very rationale of the precautionary principle. It is designed to offer Member States the possibility to act quickly and effectively; to protect their populations in situations where there are indications for a risk to public health. There is scientific uncertainty as to the *existence or extent of the risk*. The seriousness of the risk (potential severity of negative consequences or potential range of its spread) justifies taking precautionary measures, even if in the long-run, it should turn out that the risk does not materialise or only with less serious effects.

Scientific uncertainty, as to the existence or extent of the risk, is a key element of the precautionary principle. A typical application can concern food additives or other substances whose negative consequences are suspected but essentially unknown. The *existence* of the risk of gambling disorder has been demonstrated globally in countless epidemiological studies. Such studies are also available for European countries. *The detrimental consequences of excessive gambling have been known for centuries* and described in novels as shown in the introduction. While these consequences used to be historically attributed to moral failure, gambling disorder has been *recognised as a medical disorder since the publication of DSM-III in 1980*. Contrary to the typical situation under the precautionary principle, there is *scientific certainty as to the existence* of the risk to gambling addiction. Furthermore, the DSM provides diagnostic criteria that describe central negative consequences of gambling disorder. Scientific research has thus "identified the potentially negative health consequences."[37]

Epidemiological studies around the globe also show the *extent* of the risk of gambling disorder. Prevalence rates globally show that the past-year prevalence of gambling disorder ranges from about *0.25 to 1 % among the general population*. These rates *vary surprisingly little between various countries* in spite of very different regulatory approaches (see Sect. 9.1.2.2).

The case law further demands a "comprehensive evaluation of the risk to health based on the most recent scientific information."[38] It would need to be seen in relation to each gambling case to which extent a Member State did proceed to such

[34] Ibid., para. 25.

[35] Ibid., para. 30.

[36] Ibid., para. 31.

[37] Ibid., para. 30.

[38] Ibid., para. 30.

comprehensive risk evaluation and whether it based the evaluation on *most recent scientific findings*. If a government were to argue scientific uncertainty due to the lack of epidemiological studies from its jurisdiction, this may raise the question as to what 'scientific uncertainty' is supposed to mean normatively. Can a public policy be identified in the concerned Member State inquiring gambling-related harm? Are financial resources available for researchers to inquire about the extent of gambling addiction?

In *Kellogg's*, the Court found that the Norwegian government had not shown a comprehensive risk assessment. The assumption of the government was that it would need to approve all future applications if it permitted food enrichment in one area. The Court in contrast found that "authorities would at any subsequent time be in a position to assess new applications on their merits."[39]

10.2.2.2 Protecting Human Health and Adopting Evidence-Based Measures

> *The national authority must address the issue of the protection of health and life of humans. A purely hypothetical or academic consideration will not suffice. It is not only the specific effects of the marketing of a single product [… but] the aggregate effect [from other sources].*[40]
>
> *Measures taken by a Contracting Party must be based on scientific evidence.*[41]
>
> *Such restrictive measures must be non-discriminatory and objective, and must be applied within the framework of a policy based on the best available scientific knowledge at any given time. The precautionary principle can never justify the adoption of arbitrary decisions, and the pursuit of the objective of "zero risk" only in the most exceptional circumstances.*[42]

The first quote from *Kellogg's* shows that the objective of protecting human health must genuinely be addressed and the risk to health be put in a *bigger public health setting*. This book demonstrated that gambling addiction is not of a peculiar nature; it shares *manifold commonalities with other expressions of addiction*. The revised DSM-5 categorised it under 'substance-related and addictive disorders', together with substance-related forms of addiction (alcohol, opioid, etc.). Gambling addiction cannot be studied as an isolated phenomenon; a *holistic perspective on addiction* is needed. Where research gaps remain regarding gambling addiction, empirical evidence and best practice *from related disorders can inform public health policies* on gambling addiction.

The question therefore is whether a public policy can be identified that genuinely addresses addiction issues. Is a consistent and systematic policy practised? Are there public education (prevention) programmes in place? Is treatment available and affordable for those who need it?

---

[39] Ibid., paras 36–37.

[40] Ibid., para. 29.

[41] Ibid., para. 26.

[42] Ibid., para. 32.

The criteria also demand "*evidence-based measures*."[43] The whole policy framework, that is, the public health policy towards addiction issues, must be "based on the best available scientific knowledge at any given time."[44] Member States would first have to identify the health consequences of gambling and perform a comprehensive risk evaluation (see earlier under (1)) and subsequently pass measures that are based on empirical evidence. For that purpose, it would not be enough to rely on 'some' scientific literature. The use of the *"best available knowledge at any time"*[45] includes the reliance on the leading international scientific research and a continuous evaluation of the situation as empirical evidence evolves over time.

There is also a broader consideration as to the rationale of the precautionary principle. The *typical consequence* of the reliance on the precautionary principle is to *ban the import, production and offer* of a substance on the territory of the Member State. This was already the case in the early days of the principle when an increasing number of Member States invoked public health concerns in situations of alleged scientific uncertainty. The BSE cases served as illustrative examples. Specific substances contained in foodstuffs were banned on the national territory and stopped from importation.[46] The expected consequence of the reliance on gambling-related health risk would be the prohibition of (all or certain) games of chance and the consequent enforcement of that ban.[47] Some EU/EEA Member States have prohibitive regulatory approaches while others have single right holders or licensees in place.

In this context, it must be considered that the effects of games of chance seem to be more complex than those of a classic toxic substance. With the increase of the latter's dose, infection rates among the population will normally increase proportionately to the exposure (exposure-infection effects). In relation to exposure to games of chance, it was shown that *such proportionate infection reactions have not materialised.* The development of prevalence rates suggests *social adaptation* (see Sect. 9.2.5.2).

10.2.2.3 Proportionate, Consistent, Transparent and Non-Discriminatory Measures

> *However, under the requirement of proportionality, the need to safeguard public health must be balanced against the principle of the free movement of goods. The mere finding by a national authority of the absence of a nutritional need will not justify an import ban, a most restrictive measure, on a product which is freely traded in other EEA States.*[48]

---

[43] Ibid., para. 26.

[44] Ibid., para. 32.

[45] Ibid., para. 32.

[46] Alemanno, "The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty", at 2.

[47] For aspects of enforcement, cf. Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 94 *et seq.*

[48] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, para. 28.

> *[National measures] must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken.*[49]

The case law on the precautionary principle demands that measures are proportionate, consistent, transparent and non-discriminatory. In the gambling cases, the Court of Justice and EFTA Court have also demanded that measures are non-discriminatory and proportionate, that is, suitable and necessary. In particular, they demanded 'consistent and systematic' policies. This group of criteria from the precautionary principle is familiar to the gambling case law and does not require further elaboration.

10.3 Marginalisation of the Role of Empirical Evidence in the Gambling Case Law

The present analysis shows that the scope of the precautionary principle has been expanded by the case law far beyond environmental policy. In relation to the scope, one may not exclude from the outset the application of the precautionary principle in the area of gambling addiction. Upon an examination of the principle's rationale and its criteria of application, it can be concluded that the *principle is not well suited* to address the risks relating to gambling addiction. It can hardly be argued that there is 'scientific uncertainty' as to the existence and extent of gambling disorder. There is solid empirical evidence on the *existence, extent and the negative consequences of gambling addiction.*

This analysis has also shown an *irony* that accompanies the jurisprudence of the Court of Justice on gambling. The irony regards the role of scientific research and empirical evidence. Counsels of Member States have demanded that the precautionary principle should apply in the field of gambling.[50] That principle brings understandably a wide margin of appreciation for Member States. As seen above, *the criteria of this principle heavily emphasise the role of science.* National measures must be based on "scientific evidence,"[51] in fact, the "best available scientific knowledge at any given time."[52] A scientific approach is further demanded to identify the negative health consequences and to perform a comprehensive evaluation of the risk to health based on the most recent scientific information.[53]

---

[49] Ibid., para. 26.

[50] Vlaemminck, and Hubert, *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at Gambling Conference), at 11.

[51] E-3/00 EFTA Surveillance Authority v Norway ('Kellogg's') EFTA Court Report 2000–2001, 73, para. 26.

[52] Ibid., para. 32.

[53] Ibid., para. 30.

By contrast, the role of science and empirical evidence in relation to gambling addiction has been marginal in the case law of the Court of Justice. Although there is no genuine 'scientific uncertainty' as to the existence and extent of gambling addiction, the Court of Justice never required that gambling-related measures needed to be 'evidence-based'. Also, there has been no mention of a requirement similar to a 'comprehensive risk evaluation' in the gambling cases.

Certainly, in an *obiter dictum* in *Lindman*, the Court of Justice noted that the file referred to it did not contain any "statistical or other evidence."

> In the main proceedings, the file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, a fortiori, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.[54]

Furthermore, the Court of Justice demanded in *Gambelli* that Member States had to apply "consistent and systematic" policies.[55] From that basis, an evidence-oriented jurisprudence could have been developed. This has not been the case as the subsequent judgments of the Court of Justice showed. Apart from a couple of minor exceptions,[56] the *role of science and empirical evidence in relation to gambling addiction remained marginal*. There are risks inherent to such approach. Zander noted that the marginalisation of empirical evidence could result in approving irrational and untargeted restrictions.[57] The *interests of consumers*, who are supposed to be protected, may ultimately not be duly served. It is certainly understandable that the Court of Justice does not wish to discuss at length complex research on gambling disorder. Yet, there is nothing that would prevent it from requiring the referring courts to examine whether national gambling policies are based on scientific research and best practice.

In line with this general marginalisation of the role of science and empirical evidence the Court of Justice set aside doubts of the referring German courts in *Markus Stoss*. While the referring courts noted that the government had not proceeded to studies, the Court of Justice found that a Member State did not need to produce studies to justify the existence of a gambling monopoly. Such conclusion was based on a misreading of *Lindman*.[58] It thus turned out that Advocate General

---

[54] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, paras 25–26.

[55] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67.

[56] C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30; C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 70; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 66–67.

[57] Zander, J., *The Application of the Precautionary Principle in Practice – Comparative Dimensions*, Cambridge, MA: Cambridge University Press, 2010, at 129.

[58] C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07),

Mengozzi too had 'misread' *Lindman*.[59] Certainly, an emphasis on empirical evidence and best practice could have *objectivised the discussion* of the gambling-related risks. It is hard to achieve a rational and humane addiction policy when the setting is dominated by value-loaded claims rather than empirical evidence.[60]

One should stress that a more substantial role of scientific research, empirical evidence and best practice does not necessarily mean a narrowed margin of appreciation for Member States. The Court of Justice could simply scrutinise whether national policies were based on scientific findings rather than on other grounds. Nothing would prevent the Court to grant wide discretion under the label of '*medical discretion*'. The latter can be granted in situations *when complex scientific data must be weighed*. It is undisputed that domestic authorities are in a better position to proceed to a detailed weighing of different factors than the Court of Justice or national *courts.*

SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, paras 71–72.

[59] In his opinion in C-153/08 Commission v Spain [2009] ECR I-9735, Advocate General Mengozzi quoted the *Lindman* ruling and the therein mentioned essential role of empirical evidence. According to the Advocate General, "settled case-law [.] require[d] the submission of analyses capable of establishing the appropriateness and proportionality of the restrictive measure" (para. 86).

[60] Collins, "Defining Addiction and Identifying the Public Interest in Liberal Democracies", at 411.

Chapter 11
Excursus: EU Fundamental Rights in EU Gambling Law

According to the judgments of the Court of Justice and the EFTA Court as well as the opinions of the Advocates General, the violation of EU or EEA fundamental rights has so far not been pleaded in the gambling cases.[1] This is somehow surprising: the application of fundamental rights is not excluded from the outset and counsels have argued points that clearly had less chances of success in the gambling cases.[2] Chapter 11 discusses the potential role of EU fundamental rights in the gambling jurisprudence. The *development* of EU fundamental rights, mainly done by case law (Sect. 11.1), and the drafting of the *Charter of Fundamental Rights of the EU* are presented (Sect. 11.2). This lays the basis to analyse, *which* EU fundamental rights may apply to gambling services and to inquire the *level of protection and interpretation* under the Charter as well as their *relationship* to EU fundamental freedoms of the Single Market (Sect. 11.3). Finally, it is examined whether the legal situation changed with the *Lisbon Treaty* (Sect. 11.4).

11.1 Development of Fundamental Rights in Case Law

Fundamental rights are a category of law that the drafters of the Rome Treaties did not have in mind. The focus of the EEC Treaty was on the creation of a common market and the policies and supranational institutions that would be necessary to achieve it. The relation between the Court of Justice on the one side and national

[1] For the first time, EU fundamental rights were pleaded in the case C-390/12 Robert Pfleger et al. in the context of gambling law. At the time of writing, the judgment and the opinion of Advocate General Sharpston were not yet handed down. Therefore, by the time of publication of this book, some of the questions addressed in the present excursus may have arguably been dealt with in this judgment or this opinion.

[2] In relation to the latter point: some Member States pleaded in *Schindler* that games of chance did not constitute an economic activity: C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_11,

constitutional courts as well as the ECtHR on the other can be compared to the two-sword doctrine with the religious and the secular leader each holding their swords.[3] While the Court of Justice had the reign over European economic law, national constitutional courts – supervised by the ECtHR – held the reign over fundamental and human rights law.

The Court of Justice challenged the initial balance and separation of powers. Five years after the EEC Treaty entered into effect, the Court started to develop its constitutional reading of EEC law with *Van Gend en Loos* in 1963[4] and *Costa v ENEL* in 1964.[5] The direct effect and supremacy of EU law were a challenge to the constitutional doctrines of many Member States. According to the Court of Justice, direct effect and supremacy of EU law did not depend on approval by national constitutional doctrines. These principles were *inherent* to the EEC Treaty.

The constitutional reading, based on a predominantly *teleological* interpretation of Union law and the *central role granted to fundamental freedoms* raised concerns that Union law might marginalise national law. The case law on supremacy triggered two questions. First, would EU law be held supreme to *any* national law, including fundamental rights as protected by the constitutional laws of the Member States? Secondly, would EU law even prevail in a situation of conflict where the national legislation was passed *subsequent* to the relevant EU provision? Both questions were answered in the affirmative; the former in *Internationale Handelsgesellschaft*[6] and the latter in *Simmenthal*.[7]

This development of the doctrine of supremacy challenged the constitutional courts. Not only did the Court of Justice claim that its sword was superior to that of national courts (*Costa v ENEL*); it also seemed to question the very relevance of the sword of the constitutional courts. The Court held in *Internationale Handelsgesellschaft* that the validity of Union law could not be "overridden by rules of national law, however framed,"[8] meaning in the case at hand fundamental rights protected by national constitutional law.

In the aftermath of the atrocities committed during the Second World War, human rights had been attributed a central role in Western European legal orders. The Council of Europe was founded whose main role has been the promotion of human rights. The ECtHR was adopted to ensure an effective and independent protection of

[3] The two-sword doctrine (or theory) described the relationship between the power of the pope and that of the emperor. The two swords were the symbols of power of two, in principle, separate reigns.

[4] C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR English special edition 1.

[5] C-6/64 Flaminio Costa v E.N.E.L. ECR English special edition.

[6] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

[7] C-106/77 Amministrazione delle Finanze dello Stato Simmenthal SpA [1978] ECR 629.

[8] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 3.

those rights. National constitutions listed the recognised fundamental rights and empowered courts to protect those rights. The Court of Justice's development of the doctrine of supremacy questioned this central role of fundamental rights. Was the Internal Market a means or a goal in itself? The Court of Justice left the constitutional courts with the impression of ignoring that European economic integration was only a means to avoid a replication of the atrocities of two world wars.

This approach was unacceptable to a number of constitutional courts and later also to the ECtHR.[9] It was intolerable to them that the respect of fundamental rights was subject to the grace of the Court of Justice. In the aftermath of *Internationale Handelsgesellschaft*, several constitutional courts made clear that they were not ready to allow such encroachment on their reign, most prominently the German Bundesverfassungsgericht in its '*Solange I*' ruling.[10] While constitutional courts were ready to accept the idea of supremacy of EU law, they were not ready to sacrifice fundamental rights on the altar of supremacy.

This seemed to leave the Court of Justice with two options. First, EU law would continue to be of mere economic nature and, as such, would be subject to national fundamental rights as interpreted by constitutional courts. Second, the Court would recognise fundamental rights as forming part of EU law – and as interpreted by the Court of Justice. Wisely, the Court opted for the latter option, which the Bundesverfassungsgericht had indicated in the *Solange I* ruling. The Court of Justice realised that it could only sustain the doctrine of supremacy of EU law if it effectively protected fundamental rights.

While the Court of Justice had rebutted to discuss fundamental rights in earlier years,[11] it started in the 1970s to recognise a number of fundamental rights. Eventually, it also became clear that the protection of fundamental rights gave a level of legitimacy to the constitutional reading of Union law that mere market integration could not.[12]

When the Court of Justice first stated that it would protect fundamental rights under Union law, it did so in a quite unspectacular manner. In *Stauder*, the Court chose an interpretation of a provision that allowed it to accommodate the claims of the plaintiff that the provision at hand would otherwise violate his human right

[9] Matthew v the UK, Application no 24833/94 [1999]; Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland Application no 45036/98 [2005].

[10] Solange I BVerfGE 37, 271 *et seq.*

[11] C-40/64 Marcello Sgarlata et alii v Commission [1965] ECR English Special Edition 215. As this judgment showed, the CJEU maintained this position even after *Costa v ENEL* and was not willing to take fundamental rights considerations into account. Cf. judgment *i.f.* (no paragraphs indicated): "The applicants object that, if recourse to Article 173 were to be refused by reason of a restrictive interpretation of its wording, individuals would thus be deprived of all protection by the courts both under Community law and under national law, which would be contrary to the fundamental principles governing all the Member States. However these considerations, which will not be discussed here, cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court's task to apply".

[12] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 233.

to privacy. The Court simply stated without further elaboration at the end of the decision:

> Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.[13]

Certainly, the Court of Justice in *Internationale Handelsgesellschaft* repeated that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."[14] But the decision was overshadowed by the blunt statement that the validity of Union law could not be "overridden by rules of national law, however framed."[15] Furthermore, the Court found after a rather superficial analysis that the Union system at hand did "not violate any right of fundamental nature."[16] Fundamental freedoms took precedence over fundamental rights or were at least protected at a higher level than fundamental rights.[17]

In the following years, the Court continued to insist on the autonomous development of EU fundamental rights. Nevertheless, it *indicated certain authoritative sources for EU fundamental rights*. These rights were "inspired by the constitutional traditions common to the Member States"[18] and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines for these rights."[19] It became evident that particular attention would be given to the *ECHR*. The Court of Justice started to refer to it in *Rutili*,[20] and finally found that the ECHR had "special significance."[21] The Court of Justice has accepted a broad variety of fundamental rights that can be grouped into civil rights, economic rights, rights of defence and (other) general principles of law.[22] The two main sources of inspiration for the Court

[13] C-29/69 Erich Stauder v City of Ulm – Sozialamt [1969] ECR 419, para. 7. Earlier, in *Van Eick*, the Court had only referred to the need to "observe the fundamental principles of the law of procedure": C-35/67 August Josef Van Eick v Commission [1968] ECR 329, Heading A, p. 342 (no paragraphs indicated).

[14] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 4.

[15] Ibid., para. 3.

[16] Ibid., para. 20.

[17] Kombos, C. (2006). "Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity", *European Public Law, 12*(3), 433–460, at 435.

[18] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 13.

[19] C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 13.

[20] C-36/75 Roland Rutili v Ministre de l'Intérieur [1975] ECR 1219, para. 32.

[21] C-299/95 Friedrich Kremzow v Republik Österreich [1997] ECR I-2629, para. 14.

[22] For a list of these rights, cf. Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 235–236.

of Justice in defining these rights have been the *constitutional traditions common to the Member States and the ECHR*, including the case law of the ECtHR.[23]

While this *excursus* focuses on EU fundamental rights, it should be noted that the *EFTA Court* too has accepted *fundamental rights as general principles of EEA law*.[24] The first such recognition occurred in the case *TV 1000*,[25] which regarded a Norwegian ban on the transmission of pornographic films from Sweden to Norway. The EFTA Court found that this prohibition was a restriction of the freedom of expression, however, justified by public morality concerns. The EFTA Court referred to the case law of the ECtHR, namely the latter's well known *Handyside* judgment.[26] It held, in very similar terms as the ECtHR, that there was no uniform conception of morals in the domestic laws of the Contracting States.[27] The EFTA Court recognised further EEA fundamental rights in subsequent decisions. In *Bellona*, it held that access to justice constituted an essential element of the EEA legal framework and that the idea of human rights reinforced calls for widening the avenues of access to justice in the EEA.[28] In relation to the right to a fair and public hearing within a reasonable time, it noted that the ECHR and the case law of the ECtHR were important sources for determining the scope of EEA fundamental rights.[29] Recently, it held that effective judicial protection, including the right to a fair trial, constituted a general principle of EEA law. It was in this light that the EFTA Court assessed the burden of proof and the legality of a fine imposed during a competition law procedure.[30] Finally, it should be noted that the EFTA Court has repeatedly referred to the Charter of Fundamental Rights of the EU.[31]

---

[23] For a comparison of the protection of human rights in the two legal frameworks, cf. Gebauer, K., Parallele Grund- und Menschenrechtsschutzsysteme in Europa? Ein Vergleich der Europäischen Menschenrechtskonvention und des Strassburger Gerichtshofs mit dem Grundrechtsschutz in der Europäischen Gemeinschaft und dem Luxemburger Gerichtshof, Hamburger Studien zum Europäischen und Internationalen Recht, vol. 45, Berlin: Duncker & Humblot, 2007.

[24] Baudenbacher, C., *EFTA Court – Legal Framework and Case Law*, 3rd ed., Luxembourg: EFTA Court, 2008, at 25–26; Baudenbacher, C., "Fundamental Rights in EEA Law or: How far from Bosphorus is the European Economic Area Agreement?" in *Human Rights*, *Democracy and the Rule of Law*: *Liber amicorum Luzius Wildhaber*, Breitenmoser, S., Ehrenzeller, B., Sassòli, M., et al. (Eds.), Baden-Baden: Nomos Verlagsgesellschaft, 2007c, pp. 59–89.

[25] E-8/97 TV1000 Sverige AB v Norway [1998] EFTA Court Report 68.

[26] Handyside v the UK, Application no 5493/72 [1976].

[27] E-8/97 TV1000 Sverige AB v Norway [1998] EFTA Court Report 68, para. 48.

[28] E-2/02 Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA [2003] EFTA Court Report, 52, paras 36–37. In relation to access to justice, cf. further E-3/11 Pálmi Sigmarsson and the Central Bank of Iceland [2011] EFTA Court Report 430, para. 29; E-5/10 Dr Joachim Kottke and Präsidial Anstalt and Sweetyle Stiftung [2009–2010] EFTA Court Report 320, para. 26.

[29] E-2/03 Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson [2003] EFTA Court Report, 185, para. 23.

[30] E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] nyr.

[31] E-4/11 Arnulf Clauder [2011] EFTA Court Report 216, para. 49; E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] nyr, para. 86.

11.2 Drafting of the Charter of Fundamental Rights of the EU

After three decades during which the Court of Justice recognised a number of fundamental rights as general principles of EU law, many EU stakeholders felt that fundamental rights should receive a more prominent and visible place. In 1999, the European Council of Cologne decided that a charter of fundamental rights should be composed. That document should combine the rights of the ECHR, those of the common constitutional traditions, EU citizenship rights as well as the social rights enshrined in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.[32]

Accommodating earlier criticism of a lack of democratic legitimacy and procedural transparency, a completely new method – the Convention – was chosen to draft the charter. The Convention's meetings were public, attended by various observers, and many groups from civil society were invited to submit contributions.[33] One year after the constituent meeting of the Convention, the Charter of Fundamental Rights was signed and proclaimed by the presidents of the Council, the European Parliament and the Commission during the European Council of Nice in 2000.[34] The result was ambiguous. While the Charter contained a broad variety of rights, it *was not given legally binding status* mainly because it also listed social rights, which not all Member States were ready to accept as binding.

The development of EU fundamental rights profited from a mutual influence between the Court of Justice and the EU legislator, even though the former's role was dominant up to the new millennium. When the Court in the early 1970s started to develop a jurisprudence of fundamental rights, there was no express legal basis in Union law to base it on. In 1977, the Council, European Parliament and Commission passed a joint declaration in which they stressed

> the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[35]

---

[32] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 237.

[33] The Convention was composed of representatives of the Heads of State and Government, of the national parliaments, of the European Parliament and the Commission. It was chaired by Roman Herzog, former President of Germany and of the German Constitutional Court. In addition, it was attended by observers from the Court of Justice, the Committee of the Regions, the Economic and Social Committee, the Ombudsman, and – from outside the EU institutions – the Council of Europe. "The Charter of Fundamental Rights of the European Union – Annex: The Convention Responsible for Drafting the Charter of Fundamental Rights", available at http://www.europarl.europa.eu/charter/composition_en.htm.

[34] Conclusions of the Presidency at the Nice European Council.

[35] Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 103, 27.04.1977, 1.

The EU legislator expressly referred to the Court's fundamental rights case law and to the same sources that the Court too indicated as sources of inspiration. Two years later, the Court of Justice in return referred to this declaration in *Hauer*.[36]

The other aforementioned documents that influenced the Charter of Fundamental Rights of the EU were the Community Charter of the Fundamental Social Rights of Workers,[37] the Maastricht Treaty[38] with its citizenship provisions and the European Social Charter.[39] The Community Charter was adopted by the European Council in 1989 in the form of a declaration. It established the major principles on which European labour law should be modelled; the Commission was supposed to take action in this matter.[40] The Maastricht Treaty introduced the Union citizenship, which offered a couple of political rights to EU citizens, including diplomatic protection. By contrast, the European Social Charter[41] was not adopted by the Union but passed by the Council of Europe in 1961 as the natural complement of the ECHR; it contains social and economic human rights and was revised in 1996.[42]

The Lisbon Treaty and the Charter of Fundamental Rights of the EU also *redefined the relationship of the EU to the ECHR*. The EU gained legal personality: it can enter legally binding acts and enjoys in each of the Member States "the most extensive legal capacity accorded to legal persons under their laws."[43] According to the revised Treaties, the EU itself shall accede to the ECHR.[44] Once this occurs, the EU and its institutions will be subjected to the jurisdiction of the ECtHR – a major readjustment of the judicial architecture of the European High Courts. However, the fundamental rights as guaranteed by the Convention and resulting from the constitutional traditions common to the Member States form in any event already general principles of EU law.[45]

---

[36] C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727, para. 15.

[37] "Community Charter of the Fundamental Social Rights of Workers", available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf.

[38] Treaty on European Union, OJ C 191, 29.07.1992.

[39] "European Social Charter (revised)", available at http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm.

[40] The Community Charter was not signed by the UK at the time of its adoption but only later in 1998 after Tony Blair was elected as Prime Minister: "Community Charter of Fundamental Social Rights of Workers", available at http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_en.htm.

[41] Available at "European Social Charter (revised)".

[42] "The European Social Charter", available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp.

[43] Arts 47 TEU and 335 TFEU. Prior to the TFEU, the situation was more complex. Only the three communities had legal personality but not the EU. Agreements relevant for the Internal Market were concluded either by the EC, the Member States or both of them. For a publication on mixed agreements, cf. Hillion, C., *Mixed Agreements Revisited – The EU and Its Member States in the World*, Oxford: Oxford University Press, 2010.

[44] Art. 6(2) TEU.

[45] Art. 6(3) TEU.

At the time of writing, the EU's accession to the ECHR was not yet finalised, but the entry into force of Protocol No 14 in 2010 provided the necessary legal basis for this step.[46] A draft accession agreement of the EU to the ECHR was reached in April 2013.[47] In spite of the yet to finalise accession process, the EU is already *indirectly* subjected to the ECHR. All EU Member States ratified the ECHR. The ECtHR made it clear that the Signatory States have to comply with the ECHR, irrespective of whether or not they are members of the EU. The question whether the ECHR is directly applicable in a case is a matter for the national law to decide. Some countries follow a dualist, others a monist approach. In any case, *the veil of EU law does not prevent* the Signatory States from being under a legal obligation to respect the ECHR. The ECtHR has been very outspoken on this point, for instance in the well-known *Bosphorus* case,[48] a kind of *Solange* judgment of the Strasbourg Court similar to that of the German Constitutional Court.[49] EU law must thus comply with the ECHR.

11.3 EU Fundamental Rights in Gambling Law

11.3.1 Applicable Rights

The status of the Charter[50] has been a controversial issue. It became *legally binding only with the entry into effect of the Lisbon Treaty* and has now the same legal status as the Treaties,[51] thus holding the potential to substantially add to the constitutional reading of the Court. The adoption of the Lisbon Treaty gave the Charter a more prominent place in the legal architecture of the Union.[52]

It is important to note that, irrespective of its legal status, the Charter *reaffirms rights* that were already recognised earlier. There are ample indications for this position. The preamble itself reaffirms

[46] "Council of Europe, Directorate of Communication, Press release 437(210) of 31 May 2010", available at https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.

[47] "Council of Europe, Secretary General, Newsroom of 4 April 2013", available at http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10.

[48] Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland Application no 45036/98 [2005].

[49] Solange I BVerfGE 37, 271 *et seq*.

[50] Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

[51] Art. 6(1) TEU.

[52] On the other hand, there are a few elements that may reduce the Charter's importance. For instance, the Charter outlines "rights, freedoms and principles" (Charter, Preamble, *i.f.*) with principles being judicially cognisable only in the interpretation of implementing Union legislative and executive acts and implementing Member States acts (Charter, Art. 52(5)).

> the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.[53]

The fact that the Charter reaffirms formerly recognised rights was also noted by members of the Court of Justice. Prior to the entry into effect of the Lisbon Treaty and shortly after the Charter's initial proclamation in Nice, Advocates General and the General Court began referring to the Charter. According to Advocate General Tizzano

> the Charter […] is not in itself binding. However, […] the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. […] in particular, we cannot ignore [the Charter's] clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved […] in the Community context.[54]

The General Court[55] and the Court of Justice[56] confirmed the reaffirming character of the Charter.

Consequently, even where this chapter refers to provisions of the Charter, the relevant rights were already relied upon prior to the Lisbon Treaty, simply sometimes under a slightly different term. *Three fundamental rights* are of main interest for the purpose of this analysis: Article 16 (freedom to conduct a business), Article 15 (freedom to choose an occupation and right to engage in work) and Article 11 (freedom of expression and information).

Article 16 protects the *freedom to conduct a business*.[57] Unsurprisingly, any business must be conducted "in accordance with Union law and national laws and practices."[58] This 'limitation' does not further restrict the fundamental right since fundamental rights can generally be limited if provided by law.[59] The interpretation of the fundamental rights is guided by the Explanations Relating to the Charter of Fundamental Rights.[60] According to these Explanations, Article 16 is based on the case law of the Court of Justice, which recognised the freedom to exercise an

---

[53] Charter, Preamble.

[54] Opinion of Advocate General Tizzano in C-173/99 The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) ECR I-4881, paras 27–28.

[55] T-177/01 Jégo-Quéré & Cie SA v Commission [2002] ECR II-2365, para. 42: "In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union."

[56] C-540/03 Parliament v Council ('family reunification') [2006] ECR I-5769, para. 38.

[57] "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."

[58] Charter, Art. 16.

[59] Charter, Art. 52(1); confirmed in Explanations to Art. 16.

[60] Explanations Relating to the Charter of Fundamental Rights, OJ C 303/02, 14.12.2007; according to this document, the Explanations do not have the status of law, but they are "a valuable tool of interpretation intended to clarify the provisions of the Charter" (Explanations, *i.i.*).

economic or commercial activity[61] as well as the freedom to contract.[62] In addition – and neglected by the Explanations – the Court also recognised the right to trade.[63] The Explanations further refer to Article 119(1) TFEU protecting free competition.[64]

The example of the fundamental right to conduct a business illustrates that the *Charter does not simply protect human rights already protected under the ECHR*. The two instruments differ in their *genesis and purpose*. Contrary to the Council of Europe, which was founded to protect a minimum level of classic human rights, the economic dimension has always been central to the EU integration process. While the *right to conduct a gambling business* is protected under the Charter, it falls *outside the scope of the Convention*, *except where national law determines* '*civil rights*' of gambling operators.

> In view of the status of the Convention within the legal order of Sweden, the Court observes firstly that the Convention does not grant to individuals or companies the right to provide betting and gaming services. Such a right can be derived neither from Article 6 § 1 nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said to exist in any particular case must be answered solely with reference to domestic law. In deciding whether a right, civil or otherwise, could arguably be said to be recognised by Swedish law, the Court must have regard to the wording of the relevant legal provisions and to the way in which these provisions are interpreted by the domestic authorities.[65]

Therefore, where national law does not provide for a right to acquire a licence but rather involves a mere *allocation of a limited number of concessions*, the Convention is regularly not applicable in the absence of any determination of 'civil rights'. With regard to *gambling consumers* finally, *Article 1 of Protocol No 1* does not confer a right to possess gambling goods such as gaming machines. The provision

---

[61] The CJEU referred in *Nold* to the "right freely to choose and practice their trade or profession"; cf. C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 14, and in *Spa Eridania* to the right to "the carrying on of economic activity"; cf. C-230/78 SpA Eridania-Zuccherifici Nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali ECR-2749, para. 20.

[62] "Freedom to contract": C-151/78 Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture [1979] ECR 1, para. 20; "contractual freedom": C-240/97 Spain v Commission [1999] ECR I-6571, para. 99.

[63] C-240/83 Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU) [1985] ECR 531, para. 9.

[64] "1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

[65] Ladbrokes Worldwide Betting v Sweden, Application no 27968/05 [2008] (no numbering of paragraphs).

only protects property *but not a right to acquire property*.[66] The different scope of the Convention and the Charter must not be neglected.

The scope of application of Article 16 of the Charter is *more general and broader* than that of Articles 15 and 11. Generally, it applies to situations where the freedom to conduct a business is somehow restricted. This is significantly the case where monopolistic structures or strict licensing/authorisation systems are in place. Gambling businesses are regularly conducted by legal persons but may exceptionally be conducted by natural persons as well. Article 16 protects both of them.

Article 15 protects the *freedom to choose an occupation and the right to engage in work*.[67] As opposed to Article 16, this provision *only protects natural persons*. The Explanations on Article 15 deal with its three paragraphs separately. Article 15(1) refers first to the case law of the Court of Justice protecting the freedom to choose an occupation.[68] Moreover, the paragraph draws upon Article 1(2) of the European Social Charter and Point 4 of the Community Charter of the Fundamental Social Rights of Workers. The former protects the right to work and calls the parties "to protect effectively the right of the worker to earn his living in an occupation freely entered upon." The latter holds that "[e]very individual shall be free to choose and engage in an occupation according to the regulations governing each occupation." Hence, the first paragraph applies to situations where somebody cannot pursue gambling activities as an occupation (Article 15(1)), either by offering gambling services or by receiving these services in the sense of a professional occupation.[69]

Article 15(2) deals with the fundamental freedoms of workers, services and establishment. The fact that these 'fundamental freedoms' are listed in the Charter also makes them take the shape of 'fundamental rights'.

---

[66] Linde v Sweden, file no 11628/85 [1986] (Commission Decision) (no numbering of paragraphs).

[67] "1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

[68] C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491, para. 14; C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727, para. 31; C-234/85 Staatsanwaltschaft Freiburg v Franz Keller [1986] ECR 2897, para. 8.

[69] According to the odds of games of chance, gambling cannot be a sustainable basis to make a living for the player. Hence, the most relevant situation would regard games that hold a strong skill component such as Texas hold'em poker in tournament form. While poker is considered in some European jurisdictions a game of skill, it is considered a game of chance in other jurisdictions: cf. poker sections in Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997-2010*. For the qualification of poker as a game of chance, skill or sport, cf. Diaconu, M., and Veuthey, A. (2012). "Poker – Game of Chance, Mind Game or Sport?", *Causa Sport, 1*, 32–36.

According to the Explanations, paragraph 3 is based on Article 153(1)(g) TFEU[70] and Article 19(4) of the European Social Charter.[71] They both intend to improve the conditions of employment of migrant workers. Whereas the TFEU provision is rather programmatic, the provision from the European Social Charter would appear to provide a right to 'treatment not less favourable' than towards nationals. A potential application of Article 15(3) could be the following. If national measures restricted the employment of casino staff to nationals of that country, Union citizens and nationals of third countries entitled to work in the Union (Article 15(3)) would be protected in their seeking for employment and working in this field (Article 15(1–2)).

Finally, Article 11 protects the *freedom of expression and information*.[72] Freedom of expression is relevant in that it also covers *free commercial speech*, at least as interpreted by the ECtHR. According to the Explanations, Article 11 corresponds to *Article 10 of the ECHR*;[73] therefore, the meaning and scope of this right is identical to that of the ECHR. In fact, this is considered to be a minimum threshold and the equivalence requirement does not prevent Union law from providing more extensive protection.[74] According to the Explanations, restrictions to the freedom of expression

[70] "1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

[…]

(g) conditions of employment for third-country nationals legally residing in Union territory."

[71] "With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

[…]

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

a. remuneration and other employment and working conditions;
b. membership of trade unions and enjoyment of the benefits of collective bargaining;
c. accommodation."

[72] "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

[73] Article 10 ECHR:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[74] Charter, Art. 52(3).

and information may not exceed those limitations provided for by the Convention (Article 10(2)).

Freedom of expression and information is most relevant in the field of *advertising*.[75] Restrictions to gambling services are very common; usually, only licensed operators are allowed to feature advertising. In some jurisdictions, advertising is supposed to be informative rather than aggressive.[76]

11.3.2 Level of Protection and Interpretation

Due to the rather complex interplay of EU fundamental rights, ECHR and constitutional laws, the issue of the level of protection is very important. The Lisbon Treaty introduced a couple of aspects that are relevant in this regard. Prior to Lisbon, EU fundamental rights were *de iure* not necessarily protected at the same level as their corresponding rights at national and ECHR level. The Court of Justice insisted in keeping the autonomy of deciding on the level of protection.[77] Yet, the Court of Justice, subsequent to *Solange I* and similar rulings, was aware that it could not simply affront constitutional courts with a low standard of protection. In *Omega*, it even went as far as to accommodate national sensibilities to the potential detriment of a homogeneous application of EU Internal Market law.[78]

The Charter eliminates some legal uncertainty. It contains *four guiding principles* that inform the level of protection and the interpretation of EU fundamental rights.[79] First, Article 53 provides that the protection offered by national constitutions and international treaties is not to be undermined.[80] According to the Explanations, this provision intends to at least *maintain the current level of protection*.[81] In the unlikely event of the ECtHR lowering the protection level, the Court of Justice would remain bound by the higher protection level as formerly practised ('standstill'). On the

---

[75] For a detailed discussion of the protection of commercial communication in EU law, cf. Oesch, M., "Der Schutz kommerzieller Kommunikation im EU-Recht" in *Kommunikation*: *Festschrift für Rolf H. Weber zum 60. Geburtstag*, Heinemann, A., Hilty, R.M., Nobel, P., et al. (Eds.), Bern: Stämplfi Verlag, 2011, 605–620.

[76] Cf. advertising sections in Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

[77] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

[78] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

[79] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 242.

[80] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[81] Explanations on Art. 53.

other hand, if the ECtHR were to raise the protection level, the Court of Justice would arguably have to follow.[82]

Secondly, the Charter is composed of very different categories of rights, from classic defence rights to social rights. Insofar as rights correspond to rights guaranteed by the ECHR the meaning and scope shall be identical. However, Union law can offer more extensive protection.[83] This represents the practice of the Court of Justice in its case law. The Court's practice was criticised as a 'cut-out and paste' reliance on the ECtHR's jurisprudence[84] and that it did not take sufficient account of the substantial differences to the ECHR and the Council of Europe whose level of integration for instance was far less deep.[85]

The third and fourth guiding principles can be seen as a kind of safeguard measure by the governments to prevent the Court from becoming 'too creative' in its interpretation of EU fundamental rights. Certainly, the Charter does not introduce rights that were unknown earlier to the EU legal order. But considering that the Charter is granted the same legal value as the Treaties and the Court's affinity for a dynamic and teleological interpretation of EU law, concerns about a further intensified constitutional reading of EU law may not have been completely unfounded. Article 52(7) states that Union and national courts must give "due regard" to the Explanations.[86] It thus underlines the historic will of the legislator as method of interpretation. However, its significance may be limited since the Explanations mainly point at the source of the respective rights but not the scope and content.[87] Finally, Article 52(4) prescribes that rights resulting from the constitutional traditions common to the Member States should also be interpreted in harmony with those traditions.[88] This principle found prominent expression in *Omega* where human dignity served as justification ground to restrict the freedom to provide services.[89]

---

[82] Charter, Arts 53 and 52(3) *i.f. e contrario*. Lenaerts, K. (2012). "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", *Europarecht, 47*(1), 3–17, at 12.

[83] "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[84] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 243.

[85] Greer, and Williams, "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?", at 462.

[86] "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

[87] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 243.

[88] "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[89] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

11.3.3 Relationship Between EU Fundamental Rights and EU Fundamental Freedoms

In more recent years, EU fundamental rights raised most attention when they were used to justify national measures restricting EU fundamental freedoms. Prominent cases included *Schmidberger*, *Omega*, *Viking* and *Laval*. In these cases, the Court of Justices acknowledged that there were additional limits to fundamental freedoms and balanced the interest in the application of fundamental freedoms with the interest in respecting fundamental rights. Especially in *Schmidberger*, the Court used a methodology and language that is reminiscent of the approach of the ECtHR when it attempts to 'strike a fair balance'. The diverging interests need to be reconciled. In *Viking*, the Court summarised its approach.

> In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods […].
>
> However, in Schmidberger and Omega, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality […].
>
> It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article [49 TFEU] inapplicable to the collective action at issue in the main proceedings.[90]

The constellation, which is of interest for this analysis is a different one: Can a party rely on fundamental rights *in addition* to it relying on fundamental freedoms? As opposed to the earlier mentioned constellation, precedent is scarce in this case. The 'cause célèbre' in this context is *ERT*.[91]

Elliniki Radiophonia Tileorassi Anonimi Etairia ('*ERT*') was a Greek radio and television undertaking that was granted exclusive broadcasting rights. Notwithstanding these exclusive rights, Dimotiki Etairia Pliroforissis ('DEP'), a municipal information company, and Mr Kouvelas, Mayor of Thessaloniki, set up a television station. ERT was seeking an injunction prohibiting the broadcasting as well as an order to seize and sequestrate the technical equipment before the Thessaloniki Regional Court, which referred the case to the Court of Justice. DEP and Kouvelas relied mainly on the provisions relating to competition and the

---

[90] C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779, paras 45–47. For a very similar wording, cf. the judgment in *Laval*, handed down one week after *Viking*: C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767, paras 93–96.

[91] C-260/89 Elliniki Radiophonia Tiléorassi AE ('ERT') and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et alii [1991] ECR I-2925.

freedom to provide services as well as on the freedom of expression as guaranteed in Article 10 ECHR. The government justified the restrictions by public policy interests (Article 62 referring to Article 52 TFEU). The objective was to avoid disturbances due to a restricted number of channels.

The Court recalled that fundamental rights, such as Article 10 ECHR, formed an integral part of the general principles of EU law. Measures incompatible with those rights could not be accepted. Where rules of the Convention fell "within the scope of Community law," the Court of Justice had jurisdiction.

> In particular, where a Member State relies on the combined provisions of [Articles 52 and 62] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, *such justification*, *provided for by Community law*, *must be interpreted in the light of the general principles of law and in particular of fundamental rights*. Thus the national rules in question *can fall under the exceptions* provided for by the combined provisions of [Articles 52 and 62] *only if they are compatible with the fundamental rights* the observance of which is ensured by the Court.
>
> It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions *having regard to all the rules of Community law*, *including freedom of expression*, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.[92]

ERT is of utmost relevance for several reasons. First of all, as opposed to earlier cases, *ERT* states that the Court of Justice can assess the compatibility with fundamental rights as soon as the situation "fall[s] with the scope of Community law."[93] In earlier cases, the Court had argued that it did not have jurisdiction over situations where national rules did not *implement* provisions from Community law.[94] In *ERT*, the situation was that the freedom to provide services could have been obstructed, and the government relied on Treaty exceptions to justify the restrictions. Hence, *ERT* expanded the scope of EU fundamental rights law quite significantly.[95] This has been met with criticism[96] but also with more accommodating views.[97]

Second, if national measures fall within the scope of Union law, they become subject to a *twofold test*. They will not only be assessed by the requirements of the provisions on the fundamental freedoms but also in the light of EU fundamental rights.

---

[92] Ibid., paras 43–44. Italic emphasis added.

[93] Ibid., para. 42.

[94] C-12/86 Meryem Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719, para. 28 *i.f.*; C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 19. Less clear wording but often cited in this context: C-60/84 and C-61/84 (Joined Cases) Cinéthèque SA et alii v Fédération nationale des cinémas français [1985] ECR 2605, paras 25–26.

[95] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 254.

[96] Huber holds the view that, especially with the abolition of the pillar structure (post-Lisbon), there is virtually no area of life left that would not lie within the scope of Community law: Huber, P.M. (2008). "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", *European Public Law, 14*(3), 323–333, at 327.

[97] Eeckhout, P. (2002). "The EU Charter of Fundamental Rights and the Federal Question", *Common Market Law Review, 39*(5), 945–994.

The Court of Justice described this twofold test in more detail in the subsequent judgment *Familiapress*.[98] The facts were about a prohibition on selling publications, which offered the chance to take part in competitions of prize games. The government here relied on 'press diversity' as an overriding requirement[99] that could justify restrictions on the free movement of goods. After recalling *ERT*, the Court described the due assessment:

> it must therefore be determined whether a national prohibition […] is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.[100]

Certainly, one may argue that the Court of Justice in *Familiapress* did not separately assess whether the measures where proportionate in relation to intra-Union trade on the one hand and freedom of expression on the other. Sceptics could thus conclude that the Court of Justice would simply apply the same standard of review in relation to both aspects. However, it should not be neglected that the Court left the proportionality assessment to the national court and offered several criteria that this court would have to take into account. It is not unreasonable to argue a stricter standard of review where a national measure restricts both EU fundamental freedoms and EU fundamental rights.[101] At least, this is what a grammatical and teleological interpretation of the Preamble of the Charter suggests: The 'telos' of ensuring EU fundamental freedoms requires a strengthening of EU fundamental rights.[102]

Future cases will show whether the Court is willing to give guidance that provides separate criteria relating to the proportionality of fundamental freedoms and fundamental rights. The Charter mentions an aspect of fundamental rights that may well justify an assessment that gives special attention to EU fundamental rights. Article 52 on the scope and interpretation of rights and principles states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and

[98] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997]

[99] The Court of Justice thus applied this twofold test both in situations relating to Treaty exceptions (*ERT*) and overriding requirements (*Familiapress*). This is relevant in that the gambling cases have generally been dealt with by overriding requirements.

[100] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689, para. 27.

[101] Concurring: Frenz, W. (2011). "Annäherung von europäischen Grundrechten und Grundfreiheiten", *Neue Zeitschrift für Verwaltungsrecht, 30*(16), 961–964.

[102] See in this context the Preamble of the Charter, third and fourth indent: "[the Union] ensures free movement of persons, goods, services and capital, and the freedom of establishment. To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

> genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[103]

The provision refers to an important aspect of the doctrine on human and fundamental rights. The essence of the right must in principle be respected, the core of a right is not supposed to be violated. The German-speaking literature refers to 'Kerngehalt' or 'Wesensgehaltsgarantie'.[104] While it is difficult to predict where the Court of Justice will draw the line regarding the essence of fundamental rights, the criterion obviously is only relevant in situations of very far-reaching restrictions to economic freedom.

The total ban of an activity, such as gambling services or of a certain type of game, would need to be assessed under a *national* fundamental rights perspective and not under Union law if there was no intra-Union trade element to it. The other extreme restriction is the complete nationalisation of a sector with only one monopolist remaining. In this situation, other operators (national or foreign) do not have any possibility of exercising this activity.

Article 52(1) did not introduce a novel element to the EU legal order. It can be seen as a confirmation of a doctrine found in the "constitutional traditions and international obligations common to the Member States."[105] The Court of Justice too had used similar language in its case law prior to Lisbon. It referred to the essence of the right for instance in *Wachauf*, a case decided two years prior to *ERT*:

> restrictions may be imposed on the exercise of those [fundamental] rights […] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, *impairing the very substance of those rights*.[106]

In the following paragraph, the Court seemed to suggest that the core of the fundamental right concerned would indeed be violated if a certain regulatory solution were chosen. It called the Member State to apply the Union law "in a manner consistent with the requirement of the protection of fundamental rights."[107]

---

[103] Charter, Art. 52(1).

[104] Art. 36(4) of the Federal Constitution of the Swiss Confederation of 18 April 1999 states: "Der Kerngehalt der Grundrechte ist unantastbar." (French language version: "L'essence des droits fondamentaux est inviolable.") The German 'Grundgesetz' states in Art. 19(2): "In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden." *Ex multis*, cf. Drews, C., *Die Wesensgehaltsgarantie des Art. 19 II GG*, Baden-Baden: Nomos, 2005.

[105] Charter, preamble, indent 5. Cf. also Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 9.

[106] C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 18. Italic emphasis added. For further examples in the case law, cf. Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at fn 34.

[107] C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, para. 22.

11.4 Scope of Application After the Treaty of Lisbon?

Prior to the abolition of the three-pillar structure, the Court of Justice applied two different tests. It limited its *ERT* formula ('fall within the *scope* of Community law') to situations under the first pillar. For situations under the third pillar, it applied, even after *ERT*, the formula 'when *implementing* the law of the Union'.[108]

With the entry into force of the Lisbon Treaty, the Union acquired legal personality and the pillar structure was abandoned. It is thus clear that the Court may not necessarily continue to make the aforementioned differentiation between the different pillars. The Charter seems to offer guidance in this context.

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are *implementing* Union law.[109]

It would appear that this provision indicates that the drafters of the Charter called for a narrower scope of application of EU fundamental rights than the Court of Justice used to give under the *ERT* formula. However, the Explanations are far from being clear on this point, and it will be – again – for the Court of Justice to find an appropriate interpretation.[110] In fact, the Explanations on Article 51(1) make reference to the Court's case law, noting that

> it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the *scope* of Union law.[111]

Besides other judgments, the Explanations also expressly refer to the *ERT* ruling. According to the wording of the Explanations and the express reference to *ERT*, the drafters seem to nevertheless favour the wider scope of application from *ERT*. The Explanations, however, take yet a different direction, claiming that the Court of Justice had "confirmed this case law" and referring to the *Karlsson* case. In that case, the Court had used the formula "binding on Member States when they *implement* Community rules."[112] This case related to a situation where the Swedish authorities had applied EU secondary law and national law implementing EU law. Thus, there was no need for the Court to resort to the *ERT* formula, which applied to a situation relating only to the fundamental freedoms from primary law. Considering the facts in *Karlsson*, the Court could have also resorted to the

---

[108] Chalmers, Davies, and Monti, *European Union Law*: *Text and Materials*, at 254. For an illustrative case, cf. C-355/04 P Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council [2007] ECR I-1657, para. 51.

[109] Charter, Art. 51(1) first phrase. Italic emphasis added.

[110] Concurring: Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 4. Scholars disagree on the meaning of "when they are implementing Union law". For the literature, cf. the next couple of paragraphs.

[111] Italic emphasis added.

[112] C-292/97 Kjell Karlsson et alii [2000] ECR I-2737, para. 37. Italic emphasis added.

alternative formula known from *Wachauf* and other cases. In sum, the Explanations make Article 51(1) much more ambiguous than the provision appears at first sight.

According to Huber, certain members of the Convention tried to narrow the Court of Justice's formula. He also noted unclear Explanations of the Convention as well as diverging language versions.[113] Kober observed that a systematic limitation of the Court's jurisdiction could not be identified from the discussions in the Convention nor had any critical discussion of *ERT* or *Familiapress* taken place in the Convention. He further argued that at least the German version of the Charter ("Durchführung des Rechts der Union") also covered the observance of primary law.[114] This is all the more remarkable since the attempts to limit the Court's jurisdiction had come, according to Huber, from two German members (and one French member).[115]

As a result, it is certainly not excluded that the Court of Justice will hold that the Charter applies where national measures fall within the scope of Union law,[116] and that it might abandon the narrower formula formerly used in relation to second and third pillar issues. In any event, a two-tier approach with a narrower scope applying to the Charter's fundamental rights and a wider scope applying to fundamental rights recognised in the case law as general principles of EU law does not seem to be desirable.[117]

---

[113] Huber, "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", at 331–332.

[114] Kober, M., Der Grundrechtsschutz in der Europäischen Union: Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union, Europäisches und Internationales Recht, vol. 71, Nolte, G., and Streinz, R. (Eds.), Munich: Herbert Utz Verlag, 2009, at 175.

[115] Huber, "The Unitary Effect of the Community's Fundamental Rights: The ERT-Doctrine Needs to Be Reviewed", at 331. For further literature on these and related aspects, cf. Rosas, A.K. (2011). "L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice – un premier bilan'", *Il Diritto dell'Unione European, 16*(1), 1–28; Lenaerts, K., and Gutiérrez-Fons, J.A. (2010). "The Constitutional Allocation of Powers and General Principles of EU Law", *Common Market Law Review, 47*(6), 1629–1669; Egger, A. (2006). "EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited", *Yearbook of European Law, 25*(1), 515–553; Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press 2006, at 363.

[116] Concurring, *ex multis*: Brosius-Gersdorf, F., Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte: Die Grundrechtsbindung der Mitgliedstaaten nach der Rechtsprechung des EuGH, der Charta der Grundrechte der Europäischen Union und ihre Fortentwicklung, Berlin: Duncker & Humblot 2005. This author's analysis relates to Art. II-111 of the Constitutional Treaty which had the identical wording as Art. 51(1) of the Charter.

[117] Concurring: Advocate General Bot in his opinion in C-108/10 Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca (2011) ECR I-7491, paras 119–120 (the CJEU did not address this issue in its judgment); Lenaerts, "Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung", at 16.

11.5 Results

Chapter 11 examined the potential role of EU fundamental rights in the gambling jurisprudence. Section 11.1 outlined the development of fundamental rights in the case law. The Court of Justice's jurisprudence on the supremacy of EU law triggered opposition from constitutional courts, which saw the effective protection of national fundamental rights endangered. In response, the Court of Justice developed a rich case law on autonomously interpreted EU fundamental rights and referred to two main sources of inspiration: the constitutional traditions common to the Member States as well as international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, in particular the ECHR. Similarly, the EFTA Court too recognised fundamental rights as general principles of EEA law.

Section 11.2 showed that the EU legislator and judiciary mutually influenced each other over several decades in the development of the protection of EU fundamental rights. A novel, mixed institution – the Convention – was in charge of drafting the Charter. That document became legally binding with the entry into effect of the Lisbon Treaty. According to the revised EU Treaties, the EU itself shall accede to the ECHR.

Section 11.3 first inquired which EU fundamental rights could apply to gambling activities. The latter can fall within the ambit of three rights. First, the *freedom to conduct a business* (Article 16) protects in particular the freedom to exercise an economic or commercial activity, the freedom to contract and the freedom to trade, both of natural and legal persons. Secondly, the *freedom to choose an occupation and right to engage in work* (Article 15) protects natural persons. Thirdly, the *freedom of expression and information* (Article 11) is relevant for the gambling jurisprudence in that it also covers *free commercial speech*, including the advertising of gambling services. The Charter contains guiding principles for its interpretation and notes *inter alia* that the respect for EU fundamental rights is meant to be maintained (*at least*) *at the level of national constitutions and international treaties*, *namely the ECHR*.

Finally, Sect. 11.3 examined the relationship of EU fundamental rights and EU fundamental freedoms. The Court of Justice developed two important points in *ERT* and *Familiapress*. First, Member States are bound by EU fundamental rights if the facts of the case "fall within the scope of Community law." While the abandonment of the pillar structure does not necessarily mean that the Court of Justice will apply this approach to all areas of EU law, gambling activities relate in any event to the Internal Market (formerly under the first pillar). Secondly, in those situations, a *twofold test applies to the national measures*. Are there measures available that would be less restrictive of *both* intra-Union trade and EU fundamental rights? In relation to EU fundamental rights, an additional criterion is mentioned both in the Charter and the jurisprudence: *Restrictions must respect the essence of fundamental rights* ('*Kerngehalt*'), a criterion which at least holds the *potential* to argue against the nationalisation of a national gambling market leading to a total prevention of other operators to exercise their fundamental rights.

Section 11.4 examined whether the scope of application changed with the Lisbon Treaty. Article 51 of the Charter at first sight seems to answer this question in the affirmative, noting that the Charter applies to "the Member States only when they are implementing Union law." However, the 'travaux préparatoires' sent ambiguous signals by using unclear language and an express reference to the *ERT* judgment, thus suggesting that the broader scope from the case law continues to be applicable, that is, if the facts of the case fall within the scope of Union law. It will be therefore again for the Court of Justice to interpret the ambiguous signals surrounding the scope of application of EU fundamental rights.

Chapter 12
Epilogue

In the literature on European gambling law, many contributions take a strong normative stance on the question whether the national gambling markets should be harmonised. Arguably, that question is of a *political* nature. It is primarily for the EU legislator, that is, the Council and the Parliament, to decide which steps are required by the goals of an *Internal Market*.[1]

This book did not look into the issue of harmonisation of national gambling markets. Instead, it gave a *legal* analysis of the gambling jurisprudence of the Court of Justice.[2] A central research question related to the use of the *margin of appreciation* and how this was combined with a *proportionality review* of national measures. The contours of these legal concepts have been developed by the European High Courts through a rich body of jurisprudence. In its early case law on gambling, the Court of Justice granted an *unlimited margin of appreciation* to Member States in relation to restrictions of gambling services. It did not review the proportionality of national measures. This very unusual approach was based on the conception that gambling was of *peculiar nature*.[3] The Court largely followed the opinion of Advocate General Gulmann who had argued:

> What is more important, however, in my view, is that the Court in the present case is considering a market of a very special nature where the rules of all the Member States show that the general mechanisms of the market cannot and should not apply.[4]

Political considerations relating to the principle of subsidiarity and a *moral perspective* on games of chance clearly influenced the early case law. *Financial interests* (the financing of social activities) – normally the only justification ground

[1] Arts 4(2)(a), 26, 114 TFEU as well as Art. 3(3) TEU.

[2] For comprehensive summaries of the findings, the reader is referred to the results sections of this book.

[3] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

[4] Opinion of Advocate General Gulmann in ibid., para. 120; cf. also ibid. (judgment), para. 60–61.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_12,

that cannot be recognised as a mandatory requirement of public interest – were found to be relevant.

> So far as I can see, not one of the Member States considers it appropriate to have free competition in this area with the consequences that are detailed above. There would be competition that could hardly fail to have far-reaching consequences for a number of lotteries of long-standing which are a major source of finance for important benevolent and public-interest organizations.[5]

Private and public operators as well as charities can experience conflicts of interest by running games of chance and profiting from the gambling proceeds. However, contrary to some Advocates General and the EFTA Court, the Court of Justice only recently addressed the conflict of interest that public authorities and charities experience. In this author's view, sound gambling regulation must defuse the conflicts of interests, putting in place a regulator that independently can address the risks that games of chance involve. This must be done *irrespective* of the chosen regulatory model (monopolies, strict or liberal licensing system).

Since the financing of social activities was not accepted as a sufficient justification ground by the Court of Justice, restrictions were justified by concerns relating to *crime*, *public morality* and *gambling addiction*. In the Court's view, the peculiar nature of games of chance was reflected in these concerns; a wide margin of appreciation was therefore justified.[6]

This book questioned the notion that gambling was of a peculiar nature. With regard to *crime*, the case law of the EFTA Court and the post-*Gambelli* case law of the Court of Justice show that the Internal Market Courts did not grant a wide margin of appreciation in relation to these concerns – with the exception of Internet gambling. The two other aspects, public morality and gambling addiction, remained to be assessed by this author. It was argued that only *core cases of morality*, that is, where the moral concerns regard the *activity as such*, could justify a wide margin of appreciation. The rich case law of the ECtHR on the doctrine of the margin of appreciation supports this view. Only where cases touch upon moral concerns *exclusively*, is wide discretion granted. While historical sources show that Christian religious leaders condemned the game and the players as immoral, it is hard to argue in twenty-first century Europe that the activity of playing games of chance is immoral.

Legitimate concerns can be noted in relation to the *potential negative side effects* of gambling. These risks need to be addressed by appropriate regulation. They regard

---

[5] Opinion of Advocate General Gulmann in ibid., paras 120–121. Later on, the CJEU specified that the financing of these purposes could only constitute an incidental beneficial consequence: C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

[6] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60–61; the public interest objectives were summarised by the two terms 'consumer protection' and 'public order': C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 45. For the legislative branch, cf. *ex multis* Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive'), Preamble, recital 25 as well as Art. 2(2)(h).

in particular the *addiction* to games of chance. The leading medical manual DSM-5 recognises 'gambling disorder' as a mental disorder that is now grouped in the category 'substance-related and addictive disorders'. A comparison of the diagnostic criteria makes it evident that gambling addiction is very similar to other expressions of addiction; a view that is supported by solid empirical evidence. Therefore, the answer to one of the central research questions is that gambling addiction is not of a peculiar nature. The concerns regarding the addiction to games of chance are best addressed from a *holistic* perspective on addiction.

Another central research question inquired whether the general criteria of the doctrine of the margin of appreciation suggest a wide margin of appreciation for gambling cases. The detailed criteria established by the ECtHR in relation to this doctrine show that a wide margin of appreciation can be granted in relation to health and crime concerns if justified by the factors *urgency and severity*. Gambling addiction is not a new phenomenon that recently emerged. Also, the Court itself found that it was not shown "that gambling addiction had reached a dimension which could justify relying on public health grounds."[7] The general criteria steering the use of the doctrine of the margin of appreciation do not suggest a margin of appreciation as wide as granted in the gambling jurisprudence.

With its judgment in *Gambelli*, the Court of Justice started to combine the margin of appreciation with a *review of the suitability and necessity* of national measures. Different standards were applied to different aspects. The Court reviewed closely tender procedures and penalties imposed on potential licencees. Other aspects were reviewed very leniently, namely situations involving *Internet gambling*. The lenient review was based on assumptions that the Court of Justice expressed in its judgments regarding certain aspects of games of chance.

One research question inquired to which extent these assumptions find empirical support in the state of research on gambling addiction. The answer is mixed and must differentiate between different statements of the Court of Justice. Indeed, there is empirical evidence supporting the view that a *controlled expansion* of gambling services does not necessarily lead to increased prevalence of gambling disorder. Scholarship explains this with mechanisms of social adaptation. Studies further show that a critical stance is justified towards *expensionist advertising policies* that do not restrict content and messaging. Advertising can negatively impact pathological gamblers and adolescents. Yet, there are no indications in the research that would suggest that these findings apply to the situation of exclusive right holders only.

Other aspects found less empirical support. There is no evidence available that would support the perception that *competition* among licensed operators necessarily leads to higher prevalence of gambling disorder. With regard to the *Internet*, series of epidemiological studies do not support the view that Internet gambling has led to a sharp increase of gambling disorder. Studies on actual online gambling behaviour show that the large majority of gamblers play moderately. The Internet brings new and different risks but also new opportunities for addressing them.

[7] C-153/08 Commission v Spain [2009] ECR I-9735, para. 40. As a consequence, the CJEU dealt with this case, as it usually did, as a matter for consumer protection.

Certainly, the general principles of the doctrine of the margin of appreciation justify that a court grants discretion to *experts and local authorities* in relation to certain aspects. They are in a better position to assess studies on gambling addiction or weigh complex factors when deciding about concrete steps ('medical discretion'). National judges and the European High Courts cannot be expected to review these aspects. But a close proportionality review can ensure that governments effectively address the interests of those whose protection serves as the central justification for restrictions to gambling services: the consumers.

The Court of Justice would not invade medical discretion by asking the national courts to closely inquire whether the national gambling policies are based on a sound scientific approach. The scrutiny of decisions of the executive power by the judicial power forms an important element in a state based on the rule of law. Judicial review can verify whether the responsible authorities pursue professional standards. The case law of the ECtHR correctly notes that judicial review is of particular importance where little scrutiny is exercised by the legislative branch. An effective judicial review does not only assess whether certain standards of due process are met (for instance, requirements in licensing procedures) but also whether the gambling policies fulfil minimum standards. Relevant questions in this context include: Have the authorities elaborated a comprehensive gambling policy with concrete steps of how to address the gambling-related risks? Are the measures based on empirical evidence? Have the authorities relied on the most recent scientific information internationally available? Have the authorities inquired into international best practice? Are the measures against gambling addiction consistent with similar measures taken in relation to other expressions of addiction (holistic and coherent policy)? What preventive measures have the authorities put in place?

In the field of the precautionary principle, that is, in situations where there is *scientific uncertainty regarding the existence or extent of a risk*, the Court of Justice has imposed those requirements. There is no lack of empirical evidence regarding the existence and extent of gambling addiction globally. *E maiore minus*, there is no reason why the Court of Justice and national courts should not review whether minimum requirements are properly addressed in gambling policies.

Until recently, the Court of Justice kept underlining the role of national courts in reviewing the proportionality of national measures. The reluctant guidance, however, was joined by a reluctance of many national courts to engage in a meaningful proportionality review. This *judicial vacuum* arguably did not serve the interests of consumer protection. In the absence of judicial scrutiny, severe shortcomings of gambling policies remained uncovered. In half of the EU/EEA Member States, no studies are available on the prevalence of gambling disorder. Such studies are the very basics of a responsible gambling policy as they allow the spread of the disorder and its development to be monitored. Understandably, researchers inquire issues for which funding is available. Providing the necessary funds is part of a responsible gambling policy.

The comparison with the gambling jurisprudence of the EFTA Court demonstrated that this court applied a stricter proportionality review. It reviewed the suitability and necessity of the measures in quite some detail and gave substantial guidance to

national courts. Its approach also seemed to be less influenced by moral perceptions of games of chance. Importantly, it underlined the relevance of reviewing the gambling policy as it is actually practised. While the differences in the gambling case law of the two Internal Market Courts used to be significant, recent judgments of the Court of Justice show an *alignment towards a practice of a stricter proportionality review*. It also started to give *more substantial guidance* to national courts.

Society as a whole has an interest in a high level of protection from gambling-related harm. The Internal Market Courts and the national courts have an important role to play in ensuring that national restrictions to gambling services truly serve consumer interests. Yet, their case law cannot substitute for responsible gambling regulation. This is the task of the legislator, be it at regional, national or European level. Irrespective of the question of harmonisation of gambling markets, there are meaningful ways of cooperating at European level to protect the health of gambling consumers. In the aftermath of the Green Paper, it seems that the European Commission is indeed determined to address gambling-related risks.[8]

[8] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee on the Regions: Towards a Comprehensive European Framework for Online Gambling, COM (2012) 596 final, SWD (2012) 345 final. In its Communication, the European Commission prioritised five action areas: compliance of national regulatory frameworks with EU law; enhancing administrative cooperation and efficient enforcement; protecting consumers and citizens, minors and vulnerable groups; preventing fraud and money laundering; safeguarding the integrity of sports and preventing match-fixing.

Bibliography

Books and Edited Books

Aasved, M. J. (2003). *The biology of gambling* (The gambling theory and research series, Vol. 13). Springfield: Charles C Thomas Publisher Ltd.

American Psychiatric Association (Ed.) (2013). *Diagnostic and statistical manual of mental disorders: DSM-5* (Vol. 5). Washington, DC/London: American Psychiatric Publishing.

Andrew, D. T. (2013). *Aristocratic vice: The attack on duelling, suicide, adultery, and gambling in eighteenth-century England*. New Haven: Yale University Press.

Andenas, M., & Roth, W.-H. (2002). *Services and free movement in EU Law*. Oxford: Oxford University Press.

Arai-Takahashi, Y. (2002). *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Intersentia Uitgevers NV: Antwerp/Oxford/New York.

Baker, A. (2000). *Serious shopping: Essays in psychotherapy and consumerism*. London: Free Association Books.

Bandler, R., & Grinder, J. (1979). *Frogs into princes*: *Neuro linguistic programming.* Moab: Real People Press.

Bartlett, P., Lewis, O., & Thorold, O. (2007). *Mental disability and the European convention on human rights*. Leiden/Boston: Martinus Nijhoff Publishers.

Baudenbacher, C. (1997). *A brief guide to European state aid law* (European Business Law and Practice Series, Vol. 13). The Hague/London/Boston: Kluwer Law International.

Baudenbacher, C. (2008). *EFTA Court – Legal framework and case law* (3rd ed.). Luxembourg: EFTA Court.

Baudenbacher, C. (2010). *The EFTA Court in action – Five lectures*. Stuttgart: German Law Publishers.

Baudenbacher, C., & Brauchlin, E. (Eds.) (1993) *Nach dem schweizerischen Nein und dem liechtensteinischen Ja zum EWR*. St.Gallen: Wissenschaftlicher Verlag.

Baudenbacher, C., & Planzer, S. (2011). *The role of precedent* (International Dispute Resolution Conference, Vol. 3). Stuttgart: German Law Publishers.

Bodo, C., Gordon, C., & Ilczuk, D. (Eds.) (2004). *Gambling on culture: State lotteries as a source of funding for culture – The arts and heritage*. Amsterdam: Circle.

Bogart, W. A. (2001). *Permit but discourage – Regulating excessive consumption*. Oxford/ New York: Oxford University Press.

Bogenschneider, K., & Corbett, T. (2010). *Evidence-based policymaking: Insights from policy-minded researchers and research-minded policymakers*. New York: Routledge.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9,

Breitenmoser, S. (1986). *Der Schutz der Privsphäre gemäss Art. 8 EMRK*. Basel: Helbing & Lichtenhahn.

Brems, E. (2001). *Human rights*: *Universality and diversity* (International Studies in Human Rights, Vol. 66). The Hague: Martinus Nijhoff Publishers.

Brosius-Gersdorf, F. (2005). *Bindung der Mitgliedstaaten an die Gemeinschaftsgrundrechte: Die Grundrechtsbindung der Mitgliedstaaten nach der Rechtsprechung des EuGH, der Charta der Grundrechte der Europäischen Union und ihre Fortentwicklung*. Berlin: Duncker & Humblot.

Brownell, K., & Gold, M. (Eds.) (2012). *Food and Addiction: A comprehensive handbook*. Oxford/New York: Oxford University Press.

Cabot, A., & Pindell, N. (Eds.) (2013). *Regulating internet gaming: Challenges and opportunities*. Las Vegas: UNLV Gaming Press.

Cabot, A. N., & Balestra, M. (2005). *Internet gambling report VIII: An evolving conflict between technology & law*. Missouri: River City Group.

Chalmers, D., Davies, G., & Monti, G. (2010). *European Union law: Text and materials*. Cambridge/New York: Cambridge University Press.

Christoffersen, J. (2009). *Fair balance*: *Proportionality*, *subsidiarity and primarity in the European Convention on Human Rights* (International Studies in Human Rights, Vol. 99). Leiden: Martinus Nijhoff Publishers.

Clayton, R., & Tomlinson, H. (2000). *Law of human rights*. Oxford: Oxford University Press.

Cnossen, S. (2009). *Taxation and regulation of smoking, drinking and gambling in the European Union*. The Hague: CPB Netherlands Bureau for Economic Policy Analysis.

Collins, P. (2003). *Gambling and the public interest*. Westport, CT: Praeger Publishers.

Cooper, A. F. (2011). *Internet gambling offshore: Caribbean struggles over casino capitalism*. Houndmills/Basingstoke/Hampshire: Palgrave Macmillan.

Coryn, T., Fijnaut, C., & Littler, A. (2008). *Economic aspects of gambling regulation: EU and US perspectives*. Leiden: Martinus Nijhoff Publishers.

Craig, P. (2006). *EU administrative law*. Oxford: Oxford University Press.

Davidson, D. K. (2003). *Selling sin: The marketing of socially unacceptable products* (2nd ed.). Westport, CT: Praeger Publishers.

de la Feria, R. (Ed.) (2013). *VAT exemptions: Consequences and design alternatives* (Eucotax Series on European Taxation). Alphen aan den Rijn: Kluwer Law International.

de Sadeleer, N. (2005). *Environmental principles: From political slogans to legal rules*. Oxford: Oxford University Press.

de Ste Croix, G. (1981). *The class struggle in the ancient Greek world*. Ithaca: Cornell University Press.

Derevensky, J. L. (2012). *Teen gambling: Understanding a growing epidemic*. Lanham, MD: Rowman & Littlefield Publishers.

Diaconu, M. (2010). *International trade in gambling services* (Global Trade Law Series). Alphen aan den Rijn: Kluwer Law International.

Drews, C. (2005). *Die Wesensgehaltsgarantie des Art. 19 II GG*. Baden-Baden: Nomos.

Dunstan, R. (1997). *Gambling in California*. Sacramento: California Research Bureau, California State Library.

Eckert, D. (2010). *Weltkrieg der Währungen: Wie Euro, Gold und Yuan um das Erbe des Dollar kämpfen – und was das für unser Geld bedeutet*. Munich: FinanzBuch Verlag.

Emiliou, N. (1996). *The principle of proportionality in European law – A comparative study*. The Hague/London/Boston: Kluwer Law International.

Ferentzy, P., & Turner, N. E. (2013). *The history of problem gambling: Temperance, substance abuse, medicine, and metaphors*. New York: Springer.

Gabriel, K. (1996). *Gambler way: Indian gaming in mythology, history, and archaeology in North America*. Boulder, CO: Johnson Books.

Gasser, U. (2002). *Kausalität und Zurechnung von Information als Rechtsproblem*. Doctoral thesis submitted at the University of St.Gallen. Munich: Verlag C.H. Beck.

Gebauer, K. (2007). *Parallele Grund- und Menschenrechtsschutzsysteme in Europa? Ein Vergleich der Europäischen Menschenrechtskonvention und des Strassburger Gerichtshofs mit dem*

Grundrechtsschutz in der Europäischen Gemeinschaft und dem Luxemburger Gerichtshof (Hamburger Studien zum Europäischen und Internationalen Recht, Vol. 45). Berlin: Duncker & Humblot.

Gerrekens, L., & Küpper, A. (Eds.) (2012). *Hasard: Der Spieler in der deutschsprachigen Literaturgeschichte*. Würzburg: Königshausen & Neumann.

Grant, J. E., & Potenza, M. N. (2004). *Pathological gambling – A clinical guide to treatment*. Washington, DC: American Psychiatric Publishing.

Greer, S. (1997). *The exceptions to articles 8 to 11 of the European Convention on Human Rights* (Human Rights Files, Vol. 15). Council of Europe (Ed.). Strasbourg: Council of Europe Publishing.

Greer, S. C. (2000). *The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights* (Human Rights Files, Vol. 17). Council of Europe (Ed.). Strasbourg: Council of Europe Publishing.

Grinols, E. L. (2004). *Gambling in America: Costs and benefits*. Cambridge: Cambridge University Press.

Grote, R., Marauhn, T., & Meljnik, K. (2006). *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*. Tübingen: Mohr Siebeck.

Hailbronner, K., & Jochum, G. (2006). *Europarecht II: Binnenmarkt und Grundfreiheiten*. Stuttgart: W. Kohlhammer Verlag.

Haltern, U. (2007). *Gemeinschaftsrechtliche Aspekte des Glückspiels* (Schriften zum europäischen Recht, Vol. 129). Magiera, S., Merten, D., Niedobitek, M., et al. (Eds.)., Berlin: Duncker & Humblot.

Harbo, T.-I. (2010). *The function of proportionality analysis in European law.* Ph.D. thesis submitted at the EUI. Florence: European University Institute.

Heseler, F. (2013). *Der Einfluss des Europarechts auf die mitgliedstaatliche Glücksspielregulierung: Frankreich und Deutschland im Vergleich*, (Schriften des Europa-Instituts der Universität des Saarlandes - Rechtswissenschaft, Vol. 90). Baden-Baden: Nomos.

Hillion, C. (2010). *Mixed agreements revisited – The EU and its member states in the world*. Oxford: Oxford University Press.

Hörnle, J. (2009). *Cross-border internet dispute resolution*. Cambridge: Cambridge University Press.

Hörnle, J., & Zammit, B. (2010). *Cross-border online gambling law and policy*. Cheltenham, UK/ Northampton, MA: Edward Elgar.

Hottelier, M., Mock, H., & Puéchavy, M. (2011). *La Suisse devant la Cour européenne des droits de l'homme* (2nd ed.). Geneva/Zurich/Basel: Schulthess Médias Juridiques SA.

Huizinga, J. (1938). *Homo ludens: Versuch einer Bestimmung des Spielelements der Kultur*. Cologne: Verlagsanstalt Pantheon.

Kallick, M., Suits, D., Dielman, T., et al. (1979). *A survey of American gambling attitudes and behavior* (Research Report Series). Survey Research Center, Institute for Social Research (Ed.). Ann Arbor, MI: University of Michigan Press.

Kalt, K. (2004). *Zettel, Zahl und Zufall – Glück und Glücksspiel am Beispiel des Schweizer Zahlenlottos* (Zürcher Beitrage zur Alltagskultur, Vol. 13). Zürich: Volkskundliches Seminar der Universitat Zürich.

Kastanas, E. (1996). *Unité et diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour Européenne des droits de l'homme*. Bruxelles: Établissements Émile Bruylant.

Khantzian, E. J., & Albanese, M. J. (2008) *Understanding addiction as self medication: Finding hope behind the pain*. Lanham, MD: Rowman & Littlefield Pub Inc.

Kingma, S. F., & van Lier, T. (2006). *The leeway of lotteries in the European Union – A pilotstudy on the liberalisation of gambling markets in the EU*. Amsterdam: Dutch University Press.

Kober, M. (2009). Der Grundrechtsschutz in der Europäischen Union: Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union (Europäisches und internationales Recht, Vol. 71). Nolte, G., & Streinz, R. (Eds.). Munich: Herbert Utz Verlag.

Koch, O. (2003). *Der Grundsatz der Verhältnismässigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Schriften zum Europäischen Recht, Vol. 92). Berlin: Duncker & Humblot.

Lilli, M. (1997). *The principle of proportionality in EC Law and its application in Norwegian law.* LL.M. thesis submitted at the EUI. Florence: European University Institute.
Linden, D. J. (2011). *The compass of pleasure: How our brains make fatty foods, orgasm, exercise, marijuana, generosity, vodka, learning, and gambling feel so good*. New York: Penguin.
Littler, A. (2011). *Member states versus the European Union – The regulation of gambling*. Leiden: Martinus Nijhoff Publishers.
Littler, A., & Fijnaut, C. (2007). *The regulation of gambling: European and national perspectives*. Leiden: Martinus Nijhoff Publishers.
Mankiw, N. G. (2007). *Principles of economics* (4th ed.). South Western: Thomson.
Marlatt, G. A., & Gordon, J. R. (1985). *Relapse prevention: Maintenance strategies in the treatment of addictive behaviors*. New York: Guilford Press.
Mazur, J. (2010). *What's luck got to do with it? The history, mathematics, and psychology behind the gambler's illusion*. Princeton, NJ: Princeton University Press.
Meyer, G., Hayer, T., & Griffiths, M. (2009). *Problem gambling in Europe: Challenges, prevention, and interventions*. New York: Springer.
Montesquieu, C.-L. (1748). *De L'Esprit Des Lois*. Geneva: Barrillot et Fils.
Muzny, P. (2005). *La technique de proportionnalité et le juge de la convention européenne des droits de l'homme: Essai sur un instrument nécessaire dans une societé democratique*. Aix-en-Provence: Presses universitaires d'Aix-Marseille.
National Research Council (1999). *Pathological gambling: A critical review*. Washington, DC: National Academy Press.
Orford, J. (2011). *An unsafe bet? The dangerous rise of gambling and the debate we should be having*. Chichester, Malden: Wiley-Blackwell.
Palfrey, J., & Gasser, U. (2008). *Born digital: Understanding the first generation of digital natives*. New York: Basic Books.
Pérrard, L. (2008). *Monopole des loteries et paris en Suisse: État des lieux et perspectives – Remise en question du monopole détenu par les operateurs de loteries et paris* (Cahier de l'IDHEAP, Vol. 236). Chavannes-Lausanne: Institut de hautes études en administration publique.
Petry, N. M. (2005). *Pathological gambling: Etiology, comorbidity, and treatment*. Washington, DC: American Psychological Association.
Pollak, C. (1991). Verhältnismässigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs (Schriftenreihe Europäisches Recht, Politik und Wirtschaft). Schwarze, J. (Ed.). Baden-Baden: Nomos Verlagsgesellschaft.
Premper, V. (2006). *Komorbide psychische Störungen bei pathologischen Glücksspielern – Krankheitsverlauf und Behandlungsergebnisse*. Lengerich: Pabst Science Publishers.
Rose, N. (1986). Gambling and the law. Hollywood: Gambling Times Incorporated.
Rose, N., & Owens, M. (2005). *Internet gaming law* (1st ed.). Larchmont, NY: Mary Ann Liebert Inc. Publishers.
Rose, N., & Owens, M. (2009). *Internet gaming law* (2nd ed.). New Rochelle, NY: Mary Ann Liebert Inc. Publishers.
Rupp-Swienty, A. (1999). *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*. Munich: VVF.
Sartre, J.-P. (1946). *L'existentialisme est un humanisme*. Paris: Nagel.
Scheule, R. M. (2012). *Spielen: Philosophisch-theologische Annäherung an einen menschlichen Grundvollzug* (Fuldaer Hochschulschriften). Disse, J. (Ed.). Würzburg: Echter Verlag GmbH.
Schüll, N. D. (2012). *Addiction by design: Machine gambling in Las Vegas*. Princeton, NJ: Princeton University Press.
Schwartz, D. G. (2006). *Roll the bones: The history of gambling*. New York: Gotham Books.
Schwarze, J. (2005). *Europäisches Verwaltungsrecht* (2nd ed.). Baden-Baden: Nomos Verlagsgesellschaft.

Schrauwen, A. (Ed.) (2005). *The rule of reason and its relation to proportionality and subsidiarity* (The Hogendrop Papers). Groningen: Europa Law Publishing.
Shaffer, H. J., Hall, M. N., & Vander Bilt, J. (1997). *Estimating the prevalence of disordered gambling behaviour in the United States and Canada: A meta-analysis*. Cambridge, MA: Harvard Medical School.
Shaffer, H. J., & Jones, S. B. (1989). *Quitting cocaine: The struggle against impulse*. Cambridge, MA: Lexington Books.
Shaffer, H. J., LaBrie, R. A., LaPlante, D. A., et al. (2002). *Evaluating the Iowa Department of Public Health Gambling Treatment Program: Four years of evidence*. Boston, MA: Division on Addiction, Harvard Medical School.
Shaffer, H. J., LaBrie, R. A., Caro, G., et al. (2004). *Disordered gambling in Missouri: Regional differences in the need for treatment*. Boston, MA: Harvard Medical School, Division on Addictions.
Spapens, T., Littler, A., & Fijnaut, C. J. (2008). *Crime, addiction and the regulation of gambling*. Leiden: Martinus Nijhof Publishers.
Sternberger, D. (1990). *Verfassungspatriotismus*. Frankfurt am Main: Insel.
Swiss Institute of Comparative Law (Ed.) (2004) *Cross-border gambling on the Internet – Challenging National and International Law* (Publications of the Swiss Institute of Comparative Law, Vol. 47). Zurich: Schulthess.
Tepperman, L., Albanese, P., Stark, S., et al. (2013). *The Dostoevsky effect: Problem gambling and the origins of addiction*. Don Mills, ON: OUP Canada.
Thaler, R. H., & Sunstein, C. R. (2008). *Nudge: Improving decisions about health, wealth, and happiness*. New Haven CT/London: Yale University Press.
The Migration Observatory (2011). *Top ten problems in the evidence base for public debate and policy-making on immigration in the UK*. Oxford: University of Oxford.
Thompson, W. N. (2001). *Gambling in America: An encyclopedia of history, issues, and society (Vol. 1)*. Santa Barbara: ABC-CLIO Inc.
Thompson, W. N. (2010). *The international encyclopedia of gambling (Vol. 1)*. Santa Barbara: ABC-CLIO.
Tridimas, T. (2006). The general principles of EU law (2nd ed.). Oxford/Portland: Oxford University Press.
Unger, B., & Ferwerda, J. (2011). *Money laundering in the real estate sector*: *Suspicious properties*. Cheltenham: Edward Elgar.
Vaillant, G. E. (1983). *The natural history of alcoholism: Causes, patterns, and paths to recovery*. Cambridge, MA: Harvard University Press.
Vaillant, G. E. (1995). *The natural history of alcoholism revisited*. Cambridge, MA: Harvard University Press.
Walker, D. M. (2007). *The economics of casino gambling*. Berlin/Heidelberg/New York: Springer.
Weber, M. (1904–1905). *Die protestantische Ethik und der Geist des Kapitalismus*. (Archiv für Sozialwissenschaft und Sozialpolitik). Nördlichen: Druckerei C.H. Beck.
Whelan, J., Steenbergh, T., & Meyers, A. (2007). *Problem and pathological gambling*. Cambridge, MA: Hogrefe & Huber.
Young, K. S., & de Nabuco Abreu, C. (Eds.) (2011). *Internet addiction: A handbook and guide to evaluation and treatment*. Hoboken, NJ: Wiley.
Yourow, H. C. (1996). *The margin of appreciation doctrine in the dynamics of European human rights jurisprudence*. The Hague: Kluwer.
Zander, J. (2010). *The application of the precautionary principle in practice – Comparative dimensions*. Cambridge, MA: Cambridge University Press.
Zinberg, N. E. (1984). *Drug, set, and setting: The basis for controlled intoxicant use*. New Haven, CT: Yale University Press.
Zollinger, M. (1997). *Geschichte des Glücksspiels: Vom 17. Jahrhundert bis zum Zweiten Weltkrieg*. Vienna/Cologne/Weimar: Böhlau Verlag.

Book Sections

Abrahams, G. (2007). Cards and cardplaying. In M. Berenbaum & F. Skolnik (Eds.), *Encyclopaedia Judaica* (2nd ed., pp. 467–468). Detroit: Detroit Macmillan Reference.

Alemanno, A. (2007). The shaping of the precautionary principle by European Courts: From scientific uncertainty to legal certainty. In L. Cuocolo & L. Luparia (Eds.), *Valori costituzionali e nuove politiche del diritto* (pp. 11–24). Matelica: Halley.

Asensi, S., & Serebrianskaia, A. (2012). Spain. In J. Harris (Ed.), *Gaming law: Jurisdictional comparisons* (pp. 303–314). London: European Lawyer Reference Series (Thomson Reuters).

Badura, P. (2008). Verfassungsrechtliche und gemeinschaftsrechtliche Fragen einer Neuordnung des Glücksspielwesens in Deutschland. In J. Ennuschat (Ed.), *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*. Munich: Verlag Franz Vahlen.

Baudenbacher, C. (2005). The EFTA Court ten years on. In C. Baudenbacher, P. Tresselt & T. Orlygsson (Eds.), *The EFTA Court ten years on* (pp. 13–51). Oxford/Portland: Hart Publishing.

Baudenbacher, C. (2006). Sven Norberg and the European Economic Area. In M. Johansson, N. Wahl & U. Bernitz (Eds.), *Liber Amicorum in honour of Sven Norberg – A European for all seasons* (pp. 37–59). Brussels: Bruylant.

Baudenbacher, C. (2007a). The definition of the precautionary principle in European law: A product of judicial dialogue. In C. Baudenbacher & H. Bull (Eds.), *European integration through interaction of legal regimes* (pp. 1–31). Oslo: Universitetsforlaget.

Baudenbacher, C. (2007b). Der EFTA-Gerichtshof und sein Verhältnis zu den Gemeinschaftsgerichten. In M. Hilf, J. A. Kämmerer & D. König (Eds.), *Höchste Gerichte an ihren Grenzen*. Berlin: Duncker & Humblot.

Baudenbacher, C. (2007c). Fundamental rights in EEA law or: How far from Bosphorus is the European Economic Area Agreement? In S. Breitenmoser, B. Ehrenzeller, M. Sassòli, et al. (Eds.), *Human rights, democracy and the rule of law: Liber amicorum Luzius Wildhaber* (pp. 59–89). Baden-Baden: Nomos Verlagsgesellschaft.

Baudenbacher, C. (2008a). The EFTA Court, the ECJ, and the Latter's Advocates General – A tale of judicial dialogue. In A. Arnull, P. Eeckhout & T. Tridimas (Eds.), *Continuity and change in EU Law – Essays in honour of Sir Francis Jacobs* (pp. 90–122). Oxford: Oxford University Press.

Baudenbacher, C. (2008b). Introduction to 'Methods of interpretation – judicial dialogue'. In C. Baudenbacher & E. Busek (Eds.), *The role of international courts* (pp. 171–174). Stuttgart: German Law Publishers.

Baudenbacher, C. (2008c). Zur Auslegung des EWR-Rechts durch den EFTA-Gerichtshof. In G. Müller, E. Osterloh & T. Stein (Eds.), *Festschrift für Günter Hirsch zum 65. Geburtstag* (pp. 27–50). Munich: Verlag C.H. Beck.

Baudenbacher, C. (2009). Some considerations on the dialogue between high courts. In C. Baudenbacher (Ed.), *Dispute resolution* (pp. 175–190). Stuttgart: German Law Publishers.

Baudenbacher, C. (2010). Anmerkungen zur Rolle des EFTA-Gerichtshofs bei der Gewährleistung von Homogenität und Rechtssicherheit im Europäischen Wirtschaftsraum. In T. Heidel, A. Herlinghaus, H. Hirte, et al. (Eds.), *Festschrift für Wienand Meilicke* (pp. 33–48). Baden-Baden: Nomos Verlagsgesellschaft.

Becker, T., & Dittmann, A. (2008). Gefährdungspotentiale von Glücksspielen und regulatorischer Spielraum des Gesetzgebers. In J. Ennuschat (Ed.), *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten* (pp. 113–151). Munich: Verlag Franz Vahlen.

Bellegarde, J. D., & Potenza, M. N. (2010). Neurobiology of pathological gambling. In D. Ross, H. Kincaid, D. Spurret, et al. (Eds.), *What is addiction?* (pp. 27–51). Cambridge, MA: MIT Press.

Bernhard, B. J., & Montgomery, A. (2012). The only thing certain is uncertainty? Internet gambling in the United States, 1961–2011. In R. Williams, J. Wood, T. Robert, et al. (Eds.), *Routledge international handbook of internet gambling* (pp. 300–315). London/New York: Routledge.

Binde, P. (2010). "You could become a millionaire" – Truth, deception, and imagination in gambling advertising. In S. F. Kingma (Ed.), *Global gambling: Cultural perspectives on gambling organizations* (pp. 171–194). New York: Routledge.

Bronckers, M. (2005). Exceptions to liberal trade in foodstuffs: The precautionary approach and collective preferences. In C. Baudenbacher, P. Tresselt & T. Orlygsson (Eds.), *The EFTA Court ten years on* (pp. 105–114). Oxford/Portland: Hart Publishing.

Buland, R. (2008). Die Kultur des Spiels – Einige Aspekte zur Einführung. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 10–12). Karlsruhe: Braun Buchverlag.

Clotfelter, C. T. (2005). Gambling taxes. In S. Cnossen (Ed.), *Theory and practice of excise taxation: Smoking, drinking, gambling, polluting, and driving* (pp. 84–119). Oxford: Oxford University Press.

Collins, P. (2010). Defining addiction and identifying the public interest in liberal democracies. In D. Ross, H. Kincaid, D. Spurret, et al. (Eds.), *What is addiction?* (pp. 410–433). Cambridge, MA: MIT Press.

Craig, P. (1999). Unreasonableness and proportionality in UK Law. In E. Ellis (Ed.), *The principle of proportionality in the laws of Europe* (pp. 85–106). Oxford/Portland: Hart Publishing.

Cunningham-Williams, R. M., Cottler, L. B., & Womack, S. B. (2004). Epidemiology. In J. E. Grant & M. N. Potenza (Eds.), *Pathological gambling – A clinical guide to treatment* (pp. 25–36). Arlington: American Psychiatric Publishing.

Derevensky, J., Gupta, R., & Csiernik, R. (2003). Problem gambling: Current knowledge and clinical perspectives. In R. Csiernik & W. Rowe (Eds.), *Responding to the oppression of addiction – Canadian social work perspectives* (2nd ed., pp. 359–378). Toronto: Canadian Scholars Press.

Ennuschat, J. (2006). Aktuelle Entwicklungen in der Rechtsprechung von EuGH und BVerfG. In T. Becker & C. Baumann (Eds.), *Gesellschafts- und Glücksspiel: Staatliche Regulierung und Suchtprävention – Beiträge zum Symposium 2005 der Forschungsstelle Glücksspiel* (pp. 69–74). Schriftenreihe zur Glücksspielforschung. Frankfurt am Main: Peter Lang Europäischer Verlag der Wissenschaften.

Ennuschat, J. (2008). Zur gemeinschafts- und verfassungrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele. In J. Ennuschat (Ed.), *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*. Munich: Verlag Franz Vahlen.

Forrest, D. (2012). Online gambling: An economics perspective. In R. J. Williams, R. T. Wood & J. Parke (Eds.), *Routledge international handbook of internet gambling* (pp. 29–45). London/New York: Routledge.

Gasser, U. (2011). Responsibility for human rights violations, acts or omissions, within the 'sphere of influence' of companies. In G. Nystuen, A. Follesda & O. Mestad (Eds.), *Human rights, corporate complicity and disinvestment* (pp. 107–131). Cambridge: Cambridge University Press.

Geeroms, S. M. F. (2004). Cross-border gambling on the internet under the WTO/GATS and EC rules compared: A justified restriction on the freedom to provide services? In Swiss Institute of Comparative Law (Ed.), *Cross-border gambling on the internet – Challenging national and international law* (pp. 143–180). Zurich/Basel/Geneva: Schulthess.

Green, N. (1999). Proportionality and the supremacy of parliament in the UK. In E. Ellis (Ed.), *The principle of proportionality in the laws of Europe* (pp. 145–164). Oxford/Portland: Hart Publisher.

Häberling, G. (2012). Internet gambling policy in Europe. In R. J. Williams, R. T. Wood & J. Parke (Eds.), *Routledge international handbook of internet gambling* (pp. 284–299). London/New York: Routledge.

Harris, J., & Hagan, J. (2012). United Kingdom. In J. Harris (Ed.), *Gaming law: Jurisdictional comparisons* (pp. 331–346). London: European Lawyer Reference Series (Thomson Reuters).

Hattler, C. (2008). <… und es regiert der Würfelbecher> – Glücksspiel in der Antike. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 26–34). Karlsruhe: Braun Buchverlag.

Hoffmann, L. (1999). The influence of the European principle of proportionality upon UK law. In E. Ellis (Ed.), *The principle of proportionality in the laws of Europe* (pp. 107–115). Oxford/Portland: Hart Publishing.

Hofmann, J., & Spitz, M. (2012). Germany. In J. Harris (Ed.), *Gaming law: Jurisdictional comparisons* (pp. 107–119). London: European Lawyer Reference Series (Thomson Reuters).

Hubben, J. H. (2005). Decisions on Competency and Professional Standards. In J. K. M. Gevers, E. H. Hondius & J. H. Hubben (Eds.), *Health law, human rights and the biomedicine convention: Essays in honour of Henriette Roscam Abbing*. Leiden/Boston: Martinus Nijhof Publishers.

Johansson, M. (2012). The two EEA courts – Sisters in arms. In EFTA Court (Ed.), *Judicial protection in the European Economic Area* (pp. 212–217). Stuttgart: German Law Publishers.

Jung, C. (2008). Losen unterm Kreuz. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 35–41). Karlsruhe: Braun Buchverlag.

Kaering-Joulin, R. (1992). Public morals. In M. Delmas-Marty (Ed.), *The European Convention for the Protection of Human Rights*. Dordrecht/Boston/London: Kluwer Academic Publishers.

Koger, A. (2008). Spielkarten und Glücksspiel. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 62–84). Karlsruhe: Braun Buchverlag.

LaPlante, D. A., Nelson, S. E., LaBrie, R. A., et al. (2012). The bwin.party Division on Addiction research collaborative: Challenges for the 'normal science' of internet gambling. In R. J. Williams, R. T. Wood & J. Parke (Eds.), *Routledge international handbook of internet gambling* (pp. 29–45). London/New York: Routledge.

Larouche, P. (2007). Introduction – A view from the outside. In A. Littler & C. Fijnaut (Eds.), *The regulation of gambling: European and national perspectives* (pp. 1–7). Leiden: Martinus Nijhoff Publishers.

Maass, M. (2008). Wie haben die Griechen und Römer gewettet? – Zur antiken Sportwette. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 148–152). Karlsruhe: Braun Buchverlag.

Macdonald, R. S. J. (1987). The margin of appreciation in the jurisprudence of the European Court of Human Rights. In A. Giuffrè (Ed.), *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago* (Vol. III). Instituto di Diritto Internationale e della Navigazione: Milan.

Maduro, M. P. (2008). The European Court of Justice. In C. Baudenbacher & E. Busek (Eds.), *The role of international courts* (pp. 207–226). Stuttgart: German Law Publishers.

Maisto, S. A., & Connors, G. J. (1988). Assessment of treatment outcome. In D. M. Donovan & G. A. Marlatt (Eds.), *Assessment of addictive behaviours* (pp. 421–453). New York/London: The Guilford Press.

Matscher, F. (1993). Methods of interpretation of the convention. In R. S. J. Macdonald, F. Matscher & H. Petzold (Eds.), *The European system for the protection of human rights* (pp. 63–79). Dordrecht: Martinus Nijhoff Publishers.

McBride, J. (1999). Proportionality and the European Convention on Human Rights. In E. Ellis (Ed.), *The principle of proportionality in the laws of Europe* (pp. 23–35). Oxford/Portland: Hart Publishing.

McGuire, W. (1964). Inducing resistance to persuasion. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. I, pp. 191–229). New York: Academic Press.

Miers, D. (2011). A view from the British isles. In A. Littler, N. Hoekx & C. Fijnaut (Eds.), *In the shadow of Luxembourg: EU and national developments in the regulation of gambling* (pp. 119–152). Leiden/Boston: Martinus Nijhoff Publishers.

Oesch, M. (2011). Der Schutz kommerzieller Kommunikation im EU-Recht. In A. Heinemann, R. M. Hilty, P. Nobel, et al. (Eds.), *Kommunikation: Festschrift für Rolf H. Weber zum 60. Geburtstag* (pp. 605–620). Bern: Stämplfi Verlag.

Petry, N. M. (2010). Impulsivity and its association with treatment development for pathological gambling and substance use disorders. In D. Ross, H. Kincaid, D. Spurret, et al. (Eds.), *What is addiction?* (pp. 335–347). Cambridge, MA: MIT Press.

Petry, N. M., & Madden, G. J. (2010). Discounting and pathological gambling. In G. J. Madden & W. K. Bickel (Eds.), *Impulsivity: The behavioral and neurological science of discounting* (pp. 273–294). Washington, DC: American Psychological Association.

Potenza, M. N. (2009). Gambling and morality: A neuropsychiatric perspective. In A. Wolfe & E. C. Owens (Eds.), *Gambling: Mapping the American moral landscape* (pp. 175–191). Waco, TX: Baylor University Press.

Prochaska, J. O., & DiClemente, C. C. (1985). Common processes of self-change in smoking, weight control, and psychological distress. In S. Shiffman & T. Wills (Eds.), *Coping and substance abuse: A conceptual framework*. San Diego: Academic Press.

Raikhel, E., & Garriott, W. (2013). Introduction. In E. Raikhel & W. Garriott (Eds.), *Addiction trajectories* (pp. 1–35). Durham/London: Duke University Press.

Ritaine, E. C., & Lein, E. (2006). Les jeux de hasard dans l'Union européenne: Panorama de droit comparé et implications sur la libre circulation des services. In A. Epiney, A. Egbuna-Joss & M. Wyssling (Eds.), *Annuaire Suisse de droit européen* (pp. 465–478). Bern/Zurich: Staempfli Verlag/Schulthess Verlag.

Ross, D., & Kincaid, H. (2010). Introduction: What is addiction? In D. Ross & H. Kincaid (Eds.), *What is addiction?* (pp. vii–xl). Cambridge, MA: MIT Press.

Ruse-Kahn, H. G. (2010). 'Gambling' with sovereignty: Complying with international obligations or upholding national autonomy. In M. Kolsky Lewis & S. Frankel (Eds.), *Economic law and national autonomy* (pp. 141–166). Cambridge/New York: Cambridge University Press.

Sacerdoti, G. (2008). Methods of interpretation by the Appellate Body of the WTO. In C. Baudenbacher & E. Busek (Eds.), *The role of international courts* (pp. 175–183). Stuttgart: German Law Publishers.

Schädler, U. (2007). Preface. In U. Schädler (Ed.), *Spiele der Menschheit: 5000 Jahre Kulturgeschichte der Gesellschaftsspiele*. Darmstadt: Wissenschaftliche Buchgesellschaft. Original version in French: Editions Slatkine Geneva.

Schroeder, T. (2010). Irrational action and addiction. In D. Ross, H. Kincaid, D. Spurret, et al. (Eds.), *What is addiction?* (pp. 391–407). Cambridge, MA: MIT Press.

Schumacher, D. M. (2008). "Des Teufels Spiel" – Glücksspiel in Mittelalter und früher Neuzeit. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 85–93). Karlsruhe: Braun Buchverlag.

Seim, A. (2008). "Mit gezinkten Karten" – Einige Aspekte des Falschspiels. In Badisches Landesmuseum Karlsruhe (Ed.), *Volles Risiko! – Glücksspiel von der Antike bis heute* (pp. 255–267). Karlsruhe: Braun Buchverlag.

Shaffer, H. J. (1994). Denial, ambivalence and countertransference hate. In J. D. Levin & R. H. Weiss (Eds.), *The dynamics and treatment of alcoholism: Essential papers* (pp. 421–437). Northdale, NJ: Jason Aronson Inc.

Shaffer, H. J. (1997). The psychology of stage change: The transition from addiction to recovery. In J. H. Lowinson, P. Ruiz, R. B. Millman, et al. (Eds.), *Substance abuse: A comprehensive textbook* (3rd ed.). Baltimore, MD: Lippincott Williams & Wilkins.

Shaffer, H. J., & Robbins, M. (1995). Psychotherapy for addictive behavior: A stage-change approach to meaning making. In A. Washton (Ed.), *Psychotherapy and substance abuse: A Practitioner's handbook* (pp. 103–123). New York: The Guilford Press.

Shinn, L. D. (2005). International Society for Krishna Consciousness. In L. Jones (Ed.), *Encyclopedia of religion* (Vol. 1, 2nd ed., pp. 4521–4524). Detroit: Macmillan Reference.

Skala, J. (2004). Money laundering and internet gambling: A suspicious affinity? In Swiss Institute of Comparative Law (Ed.), *Cross-border gambling on the internet – Challenging national and international law* (pp. 305–348). Publications of the Swiss Institute of Comparative Law, Vol. 47. Zurich: Schulthess.

Skouris, V. (2005). The ECJ and the EFTA Court under the EEA Agreement: A paradigm for international cooperation between judicial institutions. In C. Baudenbacher, P. Tresselt & T. Orlygsson (Eds.), *The EFTA Court ten years on* (pp. 123–129). Oxford/Portland: Hart Publishers.

Stein, T. (2008). Zum <Glück> haben wir den EuGH. In G. Müller, E. Osterloh & T. Stein (Eds.), *Festschrift für Günter Hirsch* (pp. 185–197). Munich: Verlag C.H. Beck.

Stein, T., & von Buttlar, C. (2008). Europarechtliche Konsequenzen eines begrenzten Lizenzierungsmodells für die (private) Veranstaltung von Sportwetten. In J. Ennuschat

(Ed.), *Aktuelle Probleme des Rechts der Glücksspiele* (pp. 81–111). Munich: Verlag Franz Vahlen.

Strejcek, G. (2003). Lotto und andere Glücksspiele im Spiegel der Weltliteratur. In G. Strejcek (Ed.), *Lotto und andere Glücksspiele – Rechtlich, ökonomisch, historisch und im Lichte der Weltliteratur betrachtet* (pp. 171–278). Vienna: Linde Verlag.

Timmermans, C. (2006). Creative homogeneity. In M. Johansson, N. Wahl & U. Bernitz (Eds.), *A European for all seasons: Liber amicorum in honour of Sven Norberg* (pp. 471–484). Brussels: Bruylant.

Tridimas, T. (1999). Proportionality in community law: Searching for the appropriate standard of scrutiny. In E. Ellis (Ed.), The principle of proportionality in the laws of Europe (pp. 65–84). Oxford: Hart Publisher.

Tridimas, T. (2005). The rule of reason and its relation to proportionality and subsidiarity. In A. Schrauwen (Ed.), *Rule of reason – Rethinking another classic of European legal doctrine* (The Hogendorp papers). Groningen: European Law Publishing.

Van Bael, I. (1990). Lessons for the EEC: More transparency, less discretion, and, at last, a debate? In J. H. Jackson & E. Vermulst (Eds.), *Anti-dumpting law and practice: A comparative study*. London: Harvester Wheatsheaf.

van der Wal, G. (2005). Quality of care, patient safety, and the role of the patient. In J. K. M. Gevers, E. H. Hondius & J. H. Hubben (Eds.), *Health law, human rights and the biomedicine convention: Essays in honour of Henriette Roscam Abbing*. Leiden/Boston: Martinus Nijhof Publishers.

Verbeke, A.-L. (2011). Gambling regulation in Europe: Moving beyond ambiguity and hypocrisy. In A. Litter, N. Hoekx, C. Fijnaut, et al. (Eds.), *In the shadow of Luxembourg: EU and national developments in the regulation of gambling* (pp. 251–259). Leiden/Boston: Martinus Nijhoff Publishers.

Villiger, M. (2009). Proportionality and the margin of appreciation: National standard harmonisation by international courts. In C. Baudenbacher & S. Planzer (Eds.), *Dispute resolution* (pp. 207–213). Stuttgart: German Law Publishers.

Vlaemminck, P. (2011). Is there a future for a comprehensive EU gambling services policy? In A. Litter, N. Hoekx, C. Fijnaut, et al. (Eds.), *In the shadow of Luxembourg: EU and National Developments in the Regulation of Gambling* (pp. 105–118). Leiden/Boston: Martinus Nijhoff Publishers.

Walker, M., Schellink, T., & Anjoul, F. (2008). Explaining why people gamble. In M. Zangeneh, A. Blaszczynski & N. E. Turner (Eds.), *In the pursuit of winning – Problem gambling theory, research and treatment* (pp. 11–31). New York: Springer.

Wood, R. T., Williams, R. J., & Parke, J. (2012). The relationship between internet gambling and problem gambling. In R. J. Williams, R. T. Wood & J. Parke (Eds.), *Routledge international handbook of internet gambling* (pp. 200–211). London/New York: Routledge.

Zinberg, N. E. (1984). Reflections on social policy and drug research. In *Drug, set, and setting: The basis for controlled intoxicant use.* New Haven, CT: Yale University Press.

Articles

Adams, P. J., Raeburn, J., & De Silva, K. (2009). A question of balance: Prioritizing public health responses to harm from gambling. *Addiction, 104*(5), 688–691.

Aharon, I., Etcoff, N., Ariely, D., et al. (2001). Beautiful faces have variable reward value: fMRI and behavioral evidence. *Neuron, 32*(3), 537–551.

Alber, S. (2007). Freier Dienstleistungsverkehr auch für Glücksspiele? Zur Rechtsprechung des EuGH zum Glücksspielbereich. *ERA Forum, 8*(3), 321–355.

Alemanno, A. (2001). Le principe de précaution en droit communautaire: stratégie de gestion des risques ou risque d'atteinte au marché intérieur? *Revue du droit de l'Union européenne*, (4), 917–953.

Alemanno, A. (2011a). The legality, rationale and science of tobacco display bans after the Philip Morris judgment. *European Journal of Risk Regulation, 2*(4), 591–599.
Alemanno, A. (2011b). The Philip Morris judgment: The EFTA Court enters the post-Keck debate with a precautionary twist. *European Law Reporter,* (9), 246–253.
Anagnostaras, G. (2012). Les jeux sont faits? Mutual recognition and the specificities of online gambling. *European Law Review, 37*(2), 191–203.
Andrle, J. D. (2006). A winning hand: A proposal for an international regulatory schema with respect to the growing online gambling dilemma in the United States. *UNLV Gaming Research & Review Journal, 10*(1), 59–93.
Barry, D., Clarke, M., & Petry, N. M. (2009). Obesity and its relationship to addictions: Is overeating a form of addictive behavior? *The American Journal on Addictions, 18*(6), 439–451.
Bass, F. M. (1969). A simultaneous equation regression study of advertising and sales of cigarettes. *Journal of Marketing Research, 6*(3), 291–300.
Baudenbacher, C. (1997a). The contribution of the EFTA Court to the homogeneous development of the law in the European Economic Area-Part I. *European Business Law Review, 8*(10), 239–248.
Baudenbacher, C. (1997b). The contribution of the EFTA Court to the homogeneous development of the law in the European Economic Area-Part II. *European Business Law Review, 8*(11/12), 254–258.
Baudenbacher, C. (1998). Vier Jahre EFTA-Gerichtshof. *Europäische Zeitschrift für Wirtschaftsrecht, 9*(13), 391–397.
Baudenbacher, C. (2003). The EFTA Court – An example of the judicialisation of international economic law. *European Law Review, 28*(6), 880–899.
Baudenbacher, C. (2004). Judicialization: Can the European model be exported to other parts of the world. *Texas International Law Journal, 39*(3), 381–400.
Baudenbacher, C. (2005). The EFTA Court: An actor in the European judicial dialogue. *Fordham International Law Journal, 28*(2), 353–391.
Baudenbacher, C. (2008). The goal of homogeneous interpretation of the law in the European Economic Area: Two courts and two separate legal orders, but law that is essentially identical in substance. *The European Legal Forum, 8*(1), 22–31.
Baudenbacher, C. (2011). The EFTA court remains the only non-EU-member state court: Observations on opinion 1/09. *European Law Reporter, 7*(8), 236–242.
Baudenbacher, C., & Bremer, F. (2010). European state aid and merger control in the financial crisis – From negative to positive integration. *Journal of European Competition Law & Practice, 1*(4), 267–285.
Beard, K. W., & Wolf, E. M. (2001). Modification in the proposed diagnostic criteria for internet addiction. *CyberPsychology and Behavior, 4*(3), 377–383.
Bechara, A., & Damasio, H. (2002). Decision-making and addiction (Part I): Impaired activation of somatic states in substance dependent individuals when pondering decisions with negative future consequences. *Neuropsychologia, 40*(10), 1675–1689.
Bechara, A., Dolan, S., & Hindes, A. (2002). Decision-making and addiction (Part II): Myopia for the future or hypersensitivity to reward? *Neuropsychologia, 40*(10), 1690–1705.
Becker, G. S., Grossman, M., & Murphy, K. M. (2004). *The economic theory of illegal goods: The case of drugs* (National Bureau of Economic Research Working Paper: working paper 10976). Available at SSRN http://ssrn.com/abstract=633635.
Bell, T. W. (1998). Internet gambling: Impossible to stop, wrong to outlaw. *Regulation, 21*(1), 16–17.
Betz, C., Mihalic, D., Pinto, M. E., et al. (2000). Could a common biochemical mechanism underlie addictions? *Journal of Clinical Pharmacy and Therapeutics, 25*(1), 11–20.
Bierut, L. J., Dinwiddie, S. H., Begleiter, H., et al. (1998). Familial transmission of substance dependence: Alcohol, marijuana, cocaine, and habitual smoking. *Archives of General Psychiatry, 55*(11), 982–988.
Bilt, J. V., Dodge, H. H., Pandav, R., et al. (2004). Gambling participation and social support among older adults: A longitudinal community study. *Journal of Gambling Studies, 20*(4), 373–389.

Binde, P. (2007). Selling dreams – Causing nightmares? *Journal of Gambling Issues,* (20), 167–192.

Binde, P. (2009). Exploring the impact of gambling advertising: An interview study of problem gamblers. *International Journal of Mental Health and Addiction, 7*(4), 541–554.

Binde, P. (2013). Why people gamble: A model with five motivational dimensions. *International Gambling Studies*, *13*(1), 81–97, advance online publication 14 August 2012.

Black, W., & Moyer, T. (1998). Clinical features and psychiatric comorbidity of subjects with pathological gambling behavior. *Psychiatric Services, 49*(11), 1434–1439.

Black, D. W., Monahan, P. O., Temkit, M. H., et al. (2006). A family study of pathological gambling. *Psychiatry Research, 141*(3), 295–303.

Bland, R. C., Newman, S. C., Orn, H., et al. (1993). Epidemiology of pathological gambling in Edmonton. *The Canadian Journal of Psychiatry/La revue canadienne de psychiatrie, 38*(2), 108–112.

Blaszczynski, A., Ladouceur, R., & Shaffer, H. J. (2004). A science-based framework for responsible gambling: The Reno model. *Journal of Gambling Studies, 20*(3), 301–317.

Block, J. J. (2008). Issues for DSM-V: Internet addiction. *American Journal of Psychiatry, 165*(3), 306–307.

Blocker, J. S., Jr. (2006). Did prohibition really work? Alcohol prohibition as a public health innovation. *American Journal of Public Health, 96*(2), 233–243.

Blume, S. B. (1994). Pathological gambling and switching addictions: Report of a case. *Journal of Gambling Studies, 10*(1), 87–96.

Bondolfi, G., Jermann, F., Ferrero, F., et al. (2008). Prevalence of pathological gambling in Switzerland after the opening of casinos and the introduction of new preventive legislation. *Acta Psychiatrica Scandinavica, 117*(3), 236–239.

Braverman, J., & Shaffer, H. J. (2012). How do gamblers start gambling: Identifying behavioural markers for high-risk internet gambling. *The European Journal of Public Health, 22*(2), 273–278. First published online 27 January 2010.

Braverman, J., LaPlante, D. A., Nelson, S. E., et al. (2013). Using cross-game behavioral markers for early identification of high-risk internet gamblers. *Psychology of addictive behaviors, 27*(3), 868–877.

Breiter, H. C., Aharon, I., Kahneman, D., et al. (2001). Functional imaging of neural responses to expectancy and experience of monetary gains and losses. *Neuron, 30*(2), 619–639.

Brems, E. (1996). The margin of appreciation doctrine in the case-law of the European Court of Human Rights. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 56*, 240–314.

Brewer, J. A., & Potenza, M. N. (2008). The neurobiology and genetics of impulse control disorders: Relationships to drug addictions. *Biochemical Pharmacology, 75*(1), 63–75.

Broda, A., LaPlante, D. A., Nelson, S. E., et al. (2008). Virtual harm reduction efforts for internet gambling: Effects of deposit limits on actual internet sports gambling behavior. *Harm Reduction Journal, 5*(27).

Brownell, K. D., Marlatt, G. A., Lichtenstein, E., et al. (1986). Understanding and preventing relapse. *American Psychologist, 41*(7), 765–782.

Buschle, D. (2003). Der Spieler – Schreckgespenst des Gemeinschaftsrechts. *European Law Reporter,* (12), 467–472.

Byun, S., Ruffini, C., Mills, J. E., et al. (2009). Internet addiction: Metasynthesis of 1996–2006 quantitative research. *CyberPsychology and Behavior, 12*(2), 203–207.

Caetano, R., Schafer, J., & Cunradi, C. B. (2001). Alcohol-related intimate partner violence among white, black, and Hispanic couples in the United States. *Alcohol Research and Health, 25*(1), 58–65.

Calabrese, E. J. (2004). Hormesis: A revolution in toxicology, risk assessment and medicine. *European Molecular Biology Organization Reports, 5* (special issue), S37–S40.

Callewaert, J. (1998). Is there a margin of appreciation in the application of articles 2, 3 and 4 of the Convention? *Human Rights Law Journal, 19*(6), 6–9.

Cantinotti, M., & Ladouceur, R. (2008). Harm reduction and electronic gambling machines: Does this pair make a happy couple or is divorce foreseen? *Journal of Gambling Studies, 24*(1), 39–54.

Cao, F., Su, L., Liu, T. Q., et al. (2007). The relationship between impulsivity and internet addiction in a sample of Chinese adolescents. *European Psychiatry, 27*(7), 466–471.

Cavedini, P., Riboldi, G., Keller, R., et al. (2002). Frontal lobe dysfunction in pathological gambling patients. *Biological Psychiatry, 51*(4), 334–341.

Çepik, A., Arikan, Z., Boratav, C., et al. (1995). Bulimia in a male alcoholic: A symptom substitution in alcoholism. *International Journal of Eating Disorders, 17*(2), 201–204.

Chambers, C., & Willox, C. (2009). Gambling on compliance with the new 2005 act: Do organisations fulfil new regulations? *International Review of Law, Computers & Technology, 23*(3), 203–215.

Christenson, G. A., Faber, R. J., de Zwaan, M., et al. (1994). Compulsive buying: Descriptive characteristics and psychiatric comorbidity. *Journal of Clinical Psychiatry, 55*(1), 5–11.

Christiansen, M., Vik, P. W., & Jarchow, A. (2002). College student heavy drinking in social contexts versus alone. *Addictive Behaviors, 27*(3), 393–404.

Compton, W. M., Conway, K. P., Stinson, F. S., et al. (2005). Prevalence, correlates, and comorbidity of DSM-IV antisocial personality syndromes and alcohol and specific drug use disorders in the United States: Results from the national epidemiologic survey on alcohol and related conditions. *Journal of Clinical Psychiatry, 66*(6), 677–685.

Conner, B. T., Stein, J. A., Longshore, D., et al. (1999). Associations between drug abuse treatment and cigarette use: Evidence of substance replacement. *Experimental and Clinical Psychopharmacology, 7*(1), 64–71.

Conway, K. P., Compton, W., Stinson, F. S., et al. (2006). Lifetime comorbidity of DSM-IV mood and anxiety disorders and specific drug use disorders: Results from the national epidemiologic survey on alcohol and related conditions. *Journal of Clinical Psychiatry, 67*(2), 247–257.

Cunningham-Williams, R. M., Cottler, L. B., Compton, W., et al. (1998). Taking chances: Problem gamblers and mental health disorders – Results from the St. Louis epidemiologic catchment area study. *American Journal of Public Health, 88*(7), 1093–1096.

Cunningham-Williams, R. M., Cottler, L. B., Compton, W., et al. (2000). Problem gambling and comorbid psychiatric and substance use disorders among drug users recruited from drug treatment and community settings. *Journal of Gambling Studies, 16*(4), 347–376.

Cuyvers, A. (2008). C-338/04, C-359/04 and C-360/04 (Joined Cases) Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) – Judgment of the grand chamber of 6 March 2007, ECR [2007] I-1891. *Common Market Law Review, 45*(2), 515–536.

Daigle, R. D., Clark, H. W., & Landry, M. J. (1988). A primer on neurotransmitters and cocaine. *Journal of Psychoactive Drugs, 20*(3), 283–295.

Dawes, A., & Struckmann, K. (2010). Rien ne va plus? Mutual recognition and the free movement of services in the gambling sector after the "Santa Casa" judgment. *European Law Review, 35*(2), 236–262.

de Burca, G. (1993). The principle of proportionality and its application in EC law. *Yearbook of European Law, 13*(1), 105–150.

del Moral, I. R. (2006). The increasingly marginal appreciation of the margin-of-appreciation doctrine. *German Law Journal, 7*(6), 611–624.

Derevensky, J., Sklar, A., Gupta, R., et al. (2010). An empirical study examining the impact of gambling advertisements on adolescent gambling attitudes and behaviors. *International Journal of Mental Health and Addiction, 8*(1), 21–34.

Devaney, M. (2009). Online gambling and international regulation: An outside bet. *Information & Communications Technology Law, 18*(3), 273–283.

Diaconu, M., & Veuthey, A. (2012). Poker – Game of chance, mind game or sport? *Causa Sport,* (1), 32–36.

Do, T. U., & Hatzopoulos, V. (2006). The case law of the ECJ concerning the free provision of services: 2000–2005. *Common Market Law Review, 43*(4), 923–991.

Doukas, D. (2011). In a bet there is a fool and a state monopoly: Are the odds stacked against cross-border gambling? *European Law Review, 36*(2), 243–263.

Doukas, D., & Anderson, J. (2008). Commercial Gambling without Frontiers: When the ECJ throws, the Dice is Loaded. *Yearbook of European Law, 27*(1), 237–276.

'Editors' (2006). Internet gambling increases dramatically. *The Computer & Internet Lawyer*, *23*(7), 22.

Eeckhout, P. (2002). The EU Charter of Fundamental Rights and the federal question. *Common Market Law Review, 39*(5), 945–994.

Egger, A. (2006). EU fundamental rights in the national legal order: The obligations of member states revisited. *Yearbook of European Law, 25*(1), 515–553.

Euchner, E.-M., Heichel, S., Nebel, K., et al. (2013). From morality policy to normal policy: Framing of drug consumption and gambling in Germany and the Netherlands and their regulatory consequences, in morality policies in Europe: Concepts, theories, and empirical evidence. *Journal of European Public Policy, 20*(3), 372–389. Special Issue: Morality Policies in Europe: Concepts, Theories, and Empirical Evidence (Knill, C. (guest editor)).

Evrigenis, D. (1982). Recent case-law of the European Court of Human Rights on articles 8 and 10 of the European Convention on Human Rights. *Human Rights Law Journal, 3*, 121–139.

Feigelman, W., Wallisch, L. S., & Lesieur, H. R. (1998). Problem gamblers, problem substance users, and dual-problem individuals: An epidemiological study. *American Journal of Public Health, 88*(3), 467–470.

Fineberg, N. A., Potenza, M. N., Chamberlain, S. R., et al. (2010). Probing compulsive and impulsive behaviors, from animal models to endophenotypes: A narrative review. *Neuropsychopharmacology, 35*(3), 591–604.

Fink, M., & Rübenstahl, M. (2007). Placanica & Co. – "Rien ne va plus" – Das Ende der Anwendbarkeit von § 284 StGB und der Abschied vom Sportwettenmonopol? *European Law Reporter,* (7–8), pp. 275–290.

Frascella, J., Potenza, M. N., Brown, L. L., et al. (2010). Shared brain vulnerabilities open the way for nonsubstance addictions: Carving addiction at a new joint? *Annals of the New York Academy of Sciences, 1187*(1), 294–315.

Fredriksen, H. H. (2009). Er EFTA-domstolen mer katolsk enn paven? – Noen betraktninger om EFTA-domstolens dynamiske utvikling av EØS-retten og streben etter dialog med EF-domstolen. *Tidsskrift for Rettsvitenskap, 122*(4–5), 507–576.

Frenz, W. (2011). "Annäherung von europäischen Grundrechten und Grundfreiheiten". *Neue Zeitschrift für Verwaltungsrecht, 30*(16), 961–964.

Friend, K. B., & Ladd, G. T. (2009). Youth gambling advertising: A review of the lessons learned from tobacco control. *Drugs: Education, Prevention, and Policy, 16*(4), 283–297.

Gasser, U. (2006a). Regulating search engines: Taking stock and looking ahead. *Yale Journal of Law & Technology, 9*, 201–234.

Gasser, U. (2006b). Legal frameworks and technological protection of digital content: Moving forward towards a best practice model. *Fordham Intellectual Property, Media & Entertainment Law Journal, 17*, 39–113.

Goldner, E., Hsu, L., Waraich, P., et al. (2002). Prevalence and incidence studies of schizophrenic disorders: A systematic review of the literature. *Canadian Journal of Psychiatry, 47*(9), 833–843.

Goldstein, A. L., Stewart, S. H., Hoaken, P. N. S., et al. (2013). Mood, motives, and gambling in young adults: An examination of within- and between-person variations using experience sampling. *Psychology of Addictive Behaviors*, Advance online publication 17 June 2013.

Gostin, L. O. (2000). Public health law in a new century. Part III: Public health regulation: A systematic evaluation. *Journal of the American Medical Association, 283*(23), 3118–3122.

Goudriaan, A. E., Oosterlaan, J., De Beurs, E., et al. (2006). Neurocognitive functions in pathological gambling: A comparison with alcohol dependence, Tourette syndrome and normal controls. *Addiction, 101*(4), 534–547.

Grant, J. E., & Kim, S. W. (2001). Demographic and clinical features of 131 adult pathological gamblers. *Journal of Clinical Psychiatry, 62*(12), 957–962.

Greer, S., & Williams, A. (2009). Human rights in the Council of Europe and the EU: Towards 'individual', 'constitutional' or 'institutional' justice? *European Law Journal, 15*(4), 462–481.

Griffiths, M. D., & Parke, J. (2002). The social impact of internet gambling. *Social Science Computer Review, 20*(3), 312–320.
Grüsser, S. M., Thalemann, R., & Griffiths, M. D. (2006). Excessive computer game playing: Evidence for addiction and aggression? *CyberPsychology and Behavior, 10*(2), 290–292.
Hall, G. W., Carriero, N. J., Takushi, R. Y., et al. (2000). Pathological gambling among cocaine-dependent outpatients. *American Journal of Psychiatry, 157*(7), 1127–1133.
Hall, S. (1991). The European Convention on Human Rights and public policy exceptions to the free movement of workers under the EEC treaty. *European Law Review, 16*(6), 466–488.
Harford, R. J. (1978). Drug preferences of multiple drug abusers. *Journal of Consulting and Clinical Psychology, 46*(5), 908.
Hatzopoulos, V. (2013). The Court's approach to services (2006–2012): From case law to case load? *Common Market Law Review, 50*(2), 459–501.
Hayer, T., Berhart, C., & Meyer, G. (2006). Kinder von pathologischen Glücksspielern: Lebensbedingungen, Anforderungen und Belastungen. *Abhängigkeiten: Forschung und Praxis der Prävention und Behandlung, 12*(2), 60–77.
Hecker, M. (2007). Italien und das Glücksspiel – Zenatti, Gambelli, Placanica und kein Ende? *European Law Reporter, 10*, 357–360.
Howell, C. R. (1995–1996). The right to respect for family life in the European Court of Human Rights. *University of Louisville Journal of Family Law*, *34*.
Hser, Y. I., Anglin, M. D., & Powers, K. (1990). Longitudinal patterns of alcohol use by narcotics addicts. *Recent Developments in Alcoholism: An Official Publication of the American Medical Society on Alcoholism, the Research Society on Alcoholism, and the National Council on Alcoholism, 8*, 145–171.
Huber, P. M. (2008). The unitary effect of the community's fundamental rights: The ERT-doctrine needs to be reviewed. *European Public Law, 14*(3), 323–333.
Hudson, J. I., Hiripi, E., Pope, H. G., Jr., et al. (2007). The prevalence and correlates of eating disorders in the national comorbidity survey replication. *Biological Psychiatry, 61*(3), 348–358.
Hunt, W. A., Barnett, L. W., & Branch, L. G. (1971). Relapse rates in addiction programs. *Journal of Clinical Psychology, 27*(4), 455–456.
Hyman, S. E. (1994). Why does the brain prefer opium to broccoli? *Harvard Review of Psychiatry, 2*(1), 43–46.
Jans, J. (2000). Proportionality revisited. *Legal Issues of Economic Integration, 27*(3), 239–265.
Johansson, A., Grant, J. E., Kim, S. W., et al. (2009). Risk factors for problematic gambling: A critical literature review. *Journal of Gambling Studies, 25*(1), 67–92.
Karkowski, L. M., Prescott, C. A., & Kendler, K. S. (2000). Multivariate assessment of factors influencing illicit substance use in twins from female-female pairs. *American Journal of Medical Genetics, 96*(5), 665–670.
Kendler, K. S., Jacobson, K. C., Prescott, C. A., et al. (2003a). Specificity of genetic and environmental risk factors for use and abuse/dependence of cannabis, cocaine, hallucinogens, sedatives, stimulants, and opiates in male twins. *American Journal of Psychiatry, 160*(4), 687–695.
Kendler, K. S., Liu, X. Q., Gardner, C. O., et al. (2003b). Dimensions of religiosity and their relationship to lifetime psychiatric and substance use disorders. *American Journal of Psychiatry, 160*(3), 496–503.
Kessler, R. C., Crum, R. M., Warner, L. A., et al. (1997). Lifetime co-occurrence of DSM-III-R alcohol abuse and dependence with other psychiatric disorders in the national comorbidity survey. *Archives of General Psychiatry, 54*(4), 313–321.
Kessler, R. C., Berglund, P., Demler, O., et al. (2005). Lifetime prevalence and age-of-onset distributions of DSM-IV disorders in the national comorbidity survey replication. *Archives of Clinical Psychiatry, 62*(6), 593–602.
Kessler, R. C., Hwang, I., LaBrie, R. A., et al. (2008). DSM-IV pathological gambling in the national comorbidity survey replication. *Psychological Medicine, 38*(9), 1351–1360.

Kischel, U. (2000). Die Kontrolle der Verhältnismässigkeit durch den europäischen Gerichtshof. *Europarecht, 35*(3), 380–402.

Koenig, C. (2007a). Verspielen die Mitgliedstaaten ihr gemeinschaftsrechtliches Monopolglück? *Europäische Zeitschrift für Wirtschaftsrecht, 18*(2), 33–34.

Koenig, C. (2007b). Der EuGH als Glücksspielmonopolverderber. *Europäisches Wirtschafts- und Steuerrecht, 18*(4), 1.

Kombos, C. (2006). Fundamental rights and fundamental freedoms: A symbiosis on the basis of subsidiarity. *European Public Law, 12*(3), 433–460.

Kramer, T. (2007). Gambling and energy in the internal market. *ERA Forum, 8*(3), 1–8.

LaBrie, R. A., & Shaffer, H. J. (2003). Toward a science of gambling regulation: A concept statement. *AGA Responsible Gaming Lecture Series, 2*(2), 1–7.

LaBrie, R. A., & Shaffer, H. J. (2010). Identifying behavioral markers of disordered internet sports gambling. *Addiction Research & Theory, 19*(1), 1–10.

LaBrie, R. A., LaPlante, D. A., Nelson, S. E., et al. (2007). Assessing the playing field: A prospective longitudinal study of internet sports gambling behavior. *Journal of Gambling Studies, 23*(3), 347–362.

LaBrie, R. A., Nelson, S. E., LaPlante, D. A., et al. (2007). Missouri casino self-excluders: Distributions across time and space. *Journal of Gambling Studies, 23*(2), 231–243.

Ladouceur, R., Jacques, C., Ferland, F., et al. (1999). Prevalence of problem gambling: A replication study 7 years later. *Canadian Journal of Psychiatry, 44*(4), 802–804.

Ladouceur, R., Sylvain, C., & Gosselin, P. (2007). Self-exclusion program: A longitudinal evaluation study. *Journal of Gambling Studies, 23*(1), 85–94.

Lambert, C. (2000). Deep cravings: New research on the brain and behavior clarifies the mysteries of addiction. *Harvard Magazine, 102*(4), 60–68.

Lapham, S. C., Smith, E., C'De Baca, J., et al. (2001). Prevalence of psychiatric disorders among persons convicted of driving while impaired. *Archives of General Psychiatry, 58*(10), 943–949.

LaPlante, D. A., & Shaffer, H. J. (2007). Understanding the influence of gambling opportunities: Expanding exposure models to include adaptation. *American Journal of Orthopsychiatry, 77*(4), 616–623.

LaPlante, D. A., Schumann, A., LaBrie, R. A., et al. (2008). Population trends in internet sports gambling. *Computers in Human Behavior, 24*(5), 2399–2414.

LaPlante, D. A., Kleschinsky, J. H., LaBrie, R. A., et al. (2009). Sitting at the virtual poker table: A prospective epidemiological study of actual internet poker gambling behavior. *Computers in Human Behavior, 25*(3), 711–717.

Lavranos, N. (2007). Gambling and EC Law. Rien ne va plus? In *European Current Law – Yearbook*, xi–xvi.

Lee, G., & McGuiggan, R. (2008). Differences between land-based and online gamblers. *Journal of Academy of Business and Economics, 8*(1), 72–85.

Lee, H. S., Lemanski, J. L., & Jun, J. W. (2008). Role of gambling media exposure in influencing trajectories among college students. *Journal of Gambling Studies, 24*(1), 25–37.

Lein, E. (2007). Quo vadis Luxemburg? Die europäische Rechtsprechung zum Glücksspielrecht. *ERA Forum, 8*(3), 373–403.

Lejoyeux, M., Ades, J., Tassain, V., et al. (1996). Phenomenology and psychopathology of uncontrolled buying. *American Journal of Psychiatry, 153*(12), 1524–1529.

Lenaerts, K. (2012). Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung. *Europarecht, 47*(1), 3–17.

Lenaerts, K., & Gutiérrez-Fons, J. A. (2010). The constitutional allocation of powers and general principles of EU law. *Common Market Law Review, 47*(6), 1629–1669.

Lesieur, H. R., & Blume, S. B. (1987). The South Oaks Gambling Screen (SOGS):A new instrument for the identification of pathological gamblers. *American Journal of Psychiatry, 144*(9), 1184–1188.

Lesieur, H. R., & Heineman, M. (1988). Pathological gambling among youthful multiple substance abusers in a therapeutic community. *British Journal of Addiction, 83*(7), 765–771.

Levi, M. (2009). E-gaming and money laundering risks: A European overview. *ERA Forum, 10*(4), 533–546.
Liddell, P., Jr., Watson, S., Eshee, W. D., Jr., et al. (2003). Internet gambling: On a roll? *Seton Hall Legislative Journal, 28*(2), 101–141.
Light, R. (2007). Gambling Act 2005: Regulatory containment and market control. *Modern Law Review, 70*(4), 626–653.
Littler, A. (2007). The regulation of gambling at European level: The balance to be found. *ERA Forum, 8*(3), 357–371.
Littler, A. (2011). Internet-based trade and the Court of Justice: Different sector, different attitude. *European Journal of Risk Regulation, 2*(1), 78–84.
Lutter, M. (2011). Konkurrenten auf dem Markt für Hoffnung. Religiöse Wurzeln der gesellschaftlichen Problematisierung von Glücksspielen. *Soziale Probleme, 22*(1), 28–55.
Mahoney, P. (1998). Marvellous richness of diversity or invidious cultural relativism? *Human Rights Law Journal, 19*, 1–5.
Mathisen, G. (2010). Consistency and coherence as conditions for justifications of member state measures restricting free movement. *Common Market Law Review, 47*(4), 1021–1048.
McMullan, J. L., & Miller, D. (2008). All in! The commercial advertising of offshore gambling on television. *Journal of Gambling Issues,* (22), 230–251.
McMullan, J. L., & Miller, D. (2010). Advertising the "new fun-tier": Selling casinos to consumers. *International Journal of Mental Health and Addiction, 8*(1), 35–50.
Merikangas, K. R., Mehta, R. L., Molnar, B. E., et al. (1998). Comorbidity of substance use disorders with mood and anxiety disorders: Results of the international consortium in psychiatric epidemiology. *Addictive Behaviors, 23*(6), 893–907.
Mertens, K. (2006). "Bet and lose" oder doch "betandwin"? – Zum anhaltenden Chaos im Recht der Sportwetten. *Deutsches Verwaltungsblatt, 121*(24), 1564–1570.
Monaghan, S. M., Derevensky, J., & Sklar, A. (2009). Impact of gambling advertisements and marketing on children and adolescents: Policy recommendations to minimise harm. *Journal of Gambling Issues,* (22), 252–274.
Narayanan, S., & Manchanda, P. (2011). *An empirical analysis of individual level casino gambling behavior* (Stanford University Graduate School of Business Research Paper No 2003). Available at http://gsbapps.stanford.edu/researchpapers/library/RP2003.pdf.
Nelson, S. E., LaPlante, D. A., Peller, A. J., et al. (2008). Real limits in the virtual world: Self-limiting behavior of internet gamblers. *Journal of Gambling Studies, 24*(4), 463–477.
Nelson, S. E., Kleschinsky, J. H., LaBrie, R. A., et al. (2010). One decade of self-exclusion: Missouri casino self-excluders four to ten years after enrollment. *Journal of Gambling Studies, 26*(1), 129–144.
Nestler, E. J., Barrot, M., & Self, D. W. (2001). FosB: A sustained molecular switch for addiction. *Proceedings of the National Academy of Sciences of the United States of America, 98*(20), 11042–11046.
Orford, J. (2005). Disabling the public interest: Gambling strategies and policies for Britain. *Addiction, 100*(9), 1219–1225.
Palfrey, J., & Gasser, U. (2011). Reclaiming an awkward term: What we might learn from "digital natives". *I/S: A Journal of Law and Policy for the Information Society, 7*(1), 33–55.
Peller, A. J., LaPlante, D. A., & Shaffer, H. J. (2008). Parameters for safer gambling behavior: Examining the empirical research. *Journal of Gambling Studies, 24*(4), 519–534.
Petry, N. M. (2002). How treatments for pathological gambling can be informed by treatments for substance use disorders. *Experimental and Clinical Psychopharmacology, 10*(3), 184–192.
Petry, N. M. (2010). Should the scope of addictive behaviors be broadened to include pathological gambling? *Addiction, 101*(Supplement 1), 152–160.
Petry, N. M., & Armentano, C. (1999). Prevalence, assessment, and treatment of pathological gambling: A review. *Psychiatric Services, 50*(8), 1021–1027.
Petry, N. M., & Tawfik, Z. (2001). Comparison of problem-gambling and non-problem-gambling youths seeking treatment for marijuana abuse. *Journal of the American Academy of Child and Adolescent Psychiatry, 40*(11), 1324–1331.

Petry, N. M., Stinson, F. S., & Grant, B. F. (2005). Comorbidity of DSM-IV pathological gambling and other psychiatric disorders: Results from the national epidemiologic survey on alcohol and related conditions. *Journal of Clinical Psychiatry, 66*(5), 564–574.

Picod, F. (2009). Condamnation d'une législation fiscale relative aux jeux de hasard. *La semaine juridique edition générale*, (43), 361.

Picod, F. (2010). La vente des lentilles de contact ne peut pas être réservée à des magasins spécialisés. *La semaine juridique edition générale*, (50), 2344.

Picod, F. (2012). Encadrement strict d'un appel d'offres de jeux de hasard. *La Semaine juridique edition generale*, *13*, 613.

Pietrzak, R. H., Ladd, G. T., & Petry, N. M. (2003). Disordered gambling in adolescents: Epidemiology, diagnosis, and treatment. *Pediatric Drugs, 5*(9), 583–595.

Planzer, S. (2007). Les jeux ne sont pas (encore) faits – Judgment of the EFTA Court in case E-1/06. *European Law Reporter,* (4), 126–131.

Planzer, S. (2009). Liga Portuguesa – The ECJ and its mysterious way of reasoning. *European Law Reporter,* (11), 368–374.

Planzer, S. (2010). The ECJ on gambling addiction – Absence of an evidence-oriented approach. *European Journal of Risk Regulation, 1*(3), 289–295.

Planzer, S., & Alemanno, A. (2010). Lifestyle risks: Conceptualising an emerging category of research. *European Journal of Risk Regulation, 1*(4), 335–337.

Planzer, S., Gray, H., & Shaffer, H. (2014). Associations between national gambling policies and disordered gambling prevalence rates within Europe. *International Journal of Law and Psychiatry, 37*(2) advance online publication 23 December 2013.

Potenza, M. N. (2001). The neurobiology of pathological gambling. *Seminars in Clinical Neuropsychiatry, 6*(3), 217–226.

Potenza, M. N. (2008). The neurobiology of pathological gambling and drug addiction: An overview and new findings. *Philosophical Transactions of the Royal Society London Biological Sciences, 363*(1507), 3181–3189.

Potenza, M. N., Balodis, I. M., Franco, C. A., et al. (2013). Neurobiological considerations in understanding behavioral treatments for pathological gambling. *Psychology of Addictive Behaviors, 27*(2), 380–392, advance online publication 15 April 2013.

Premper, V., & Schulz, W. (2008). Komorbidität bei Pathologischem Glücksspiel. *SUCHT - Zeitschrift für Wissenschaft und Praxis/Journal of Addiction Research and Practice, 54*(3), 131–140.

Rado, S. (1933). The psychoanalysis of pharmacothymia (drug addiction). *Psychoanalytic Quarterly, 2*(1), 1–23.

Regier, D. A., Farmer, M. E., Rae, D. S., et al. (1990). Comorbidity of mental disorders with alcohol and other drug abuse - Results from the epidemiologic catchment area (ECA) study. *JAMA – The Journal of the American Medical Association, 264*(19), 2511–2518.

Robins, L. N. (1993). The Sixth Thomas James Okey Memorial Lecture. Vietnam veterans' rapid recovery from heroin addiction: A fluke or normal expectation? *Addiction, 88*(8), 1041–1054.

Rosas, A., & Kaila, H. (2011). L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice – Un premier bilan. *Il Diritto dell'Unione Europea, 16*(1), 1–28.

Rosenstock, L., & Lee, L. J. (2002). Attacks on science: The risks to evidence-based policy. *American Journal of Public Health, 92*(1), 14–18.

Seymour, D. (1992). The extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and risks. *Connecticut Journal of International Law, 8*(2), 243–261.

Shaffer, H. J. (2005). From disabling to enabling the public interest: Natural transitions from gambling exposure to adaptation and self-regulation. *Addiction, 100*(9), 1227–1230.

Shaffer, H. J., & Gambino, B. (1989). The epistemology of "addictive disease": Gambling as predicament. *Journal of Gambling Studies, 5*(3), 211–229.

Shaffer, H. J., & Hall, M. N. (2002). The natural history of gambling and drinking problems among casino employees. *The Journal of Social Psychology, 142*(4), 405–424.
Shaffer, H. J., & Korn, D. A. (2002). Gambling and related mental disorders: A public health analysis. *Annual Review of Public Health, 23*, 171–212.
Shaffer, H. J., & LaSalvia, T. A. (1992). Patterns of substance use among methadone maintenance patients: Indicators of outcome. *Journal of Substance Abuse Treatment, 9*(2), 143–147.
Shaffer, H. J., & Zinberg, N. E. (1985). The social psychology of intoxicant use: The natural history of social settings and social control. *Bulletin of the Society of Psychologists in the Addictive Behaviors, 4*(1), 49–55.
Shaffer, H. J., Freed, C. R., & Healea, D. (2002). Gambling disorders among homeless persons with substance use disorders seeking treatment at a community center. *Psychiatric Services, 53*(9), 1112–1117.
Shaffer, H. J., LaBrie, R. A., LaPlante, D. A., et al. (2004a). The road less traveled: Moving from distribution to determinants in the study of gambling epidemiology. *Canadian Journal of Psychiatry, 49*(8), 504–516.
Shaffer, H. J., LaPlante, D. A., LaBrie, R. A., et al. (2004b). Toward a syndrome model of addiction: Multiple expressions, common etiology. *Harvard Review of Psychiatry, 12*(6), 367–374.
Shaffer, H. J., LaBrie, R. A., & LaPlante, D. (2004c). Laying the foundation for quantifying regional exposure to social phenomena: Considering the case of legalized gambling as a public health toxin. *Psychology of Addictive Behaviors, 18*(1), 40–48.
Shaffer, H. J., Peller, A. J., LaPlante, D. A., et al. (2010). Toward a paradigm shift in internet gambling research: From opinion and self-report to actual behavior. *Addiction Research & Theory, 18*(3), 270–283.
Silk, A., & Shaffer, H. J. (1996). Dysthymia, depression, and a treatment dilemma in a patient with polysubstance abuse. *Harvard Review of Psychiatry, 3*(5), 279–284.
Slutske, W. S., Eisen, S., True, W. R., et al. (2000). Common genetic vulnerability for pathological gambling and alcohol dependence in men. *Archives of General Psychiatry, 57*(7), 666–674.
Stein, T. (1993). Glücksspiel im europäischen Binnenmarkt: Kein "Markt" wie jeder andere. *Recht der internationalen Wirtschaft, 39*(10), 838–845.
Strang, J., Babor, T., Caulkins, J., et al. (2012). Drug policy and the public good: Evidence for effective interventions. *Lancet, 379*(9810), 71–83.
Sun, D. L., Chen, Z. J., Ma, N., et al. (2009). Decision-making and prepotent response inhibition functions in excessive internet users. *CNS Spectrums, 14*(2), 75–81.
Svensson, P. (1994). The Danish yes to Maastricht and Edinburgh: The EC referendum of May 1993. *Scandinavian Political Studies, 17*(1), 69–82.
Sweeney, J. A. (2005). Margins of appreciation: Cultural relativity and the European Court of Human Rights in the post-Cold War era. *International & Comparative Law Quarterly, 54*(2), 459–474.
Sweeney, J. A. (2007). A 'Margin of Appreciation' in the internal market: Lessons from the European Court of Human Rights. *Legal Issues of Economic Integration, 34*(1), 27–52.
Szasz, T. (1991). Diagnoses are not diseases. *The Lancet, 338*(8782), 1574–1576.
Thompson, A. (1994). International protection of women's rights: An analysis of Open Door Counselling Ltd. and Dublin Well Women Centre v. Ireland. *Boston University International Law Journal, 12*(2), 371–406.
Tomasson, K., & Vaglum, P. (1996). Psychopathology and alcohol consumption among treatment-seeking alcoholics: A prospective study. *Addiction, 91*(7), 1019–1030.
Tremblay, N., Boutin, C., & Ladouceur, R. (2008). Improved self-exclusion program: Preliminary results. *Journal of Gambling Studies, 24*(4), 505–518.
Vance, T., Maes, H. H., & Kendler, K. S. (2010). Genetic and environmental influences on multiple dimensions of religiosity: A twin study. *The Journal of Nervous and Mental Disease, 198*(10), 755–761.

Van Den Bogaert, S., & Cuyvers, A. (2011). "Money for nothing": The case law of the EU Court of Justice on the regulation of gambling. *Common Market Law Review, 48*(4), 1175–1213.
van der Paardt, R. N. G. (2009). Taxation of internet gaming and gambling in the European Union. *ERA Forum, 10*(4), 525–531.
Vlaemminck, P. (2010). Towards a sustainable policy for gambling in the EU: Putting our common principles of state lotteries into practice. *NEWS - Magazine of the European Lotteries*, (33), 22–23.
Vogt, D. D., & Montagne, M. (1982). Absinthe: Behind the emerald mask. *Substance Use & Misuse, 17*(6), 1015–1029.
Volberg, R. A. (1994). The prevalence and demographics of pathological gamblers: Implications for public health. *American Journal of Public Health, 84*(2), 237–241.
Volberg, R. A. (1996). Prevalence studies of problem gambling in the United States. *Journal of Gambling Studies, 12*(2), 111–128.
Volberg, R. A. (2000). The future of gambling in the United Kingdom. *British Medical Journal, 320*(7249), 1556.
Volberg, R. A., Abbott, M. W., Rönnberg, S., et al. (2001). Prevalence and risks of pathological gambling in Sweden. *Acta Psychiatrica Scandinavica, 104*(4), 250–256.
von Danwitz, T. (2003). Der Grundsatz der Verhältnismässigkeit im Gemeinschaftsrecht. *Europäisches Wirtschafts- und Steuerrecht, 14*(9), 393–402.
Wechsler, H., Davenport, A. E., Dowdall, G. W., et al. (1997). Binge drinking, tobacco, and illicit drug use and involvement in college athletics: A survey of students at 140 American colleges. *Journal of American College Health, 45*(5), 195–200.
Weiler, J. H. H. (1996). *The selling of Europe: The discourse of European citizenship in the IGC 1996* (Jean Monnet working paper no 3/97). Available at http://centers.law.nyu.edu/jeanmonnet/papers/96/9603.html.
Weinstock, J., Ledgerwood, D. M., Modesto-Lowe, V., et al. (2008). Ludomania: Cross-cultural examinations of gambling and its treatment. *Revista Brasileira de Psiquiatria, 30*(1), 3–10.
Welte, J., Barnes, G., Wieczorek, W., et al. (2001). Alcohol and gambling pathology among U.S. adults: Prevalence, demographic patterns and comorbidity. *Journal of Studies on Alcohol, 62*(5), 706–712.
Welte, J. B., Barnes, G. M., Wieczorek, W. F., et al. (2002). Gambling participation in the U.S. – Results from a national survey. *Journal of Gambling Studies, 18*(4), 313–337.
Werme, M., Thorén, P., Olson, L., et al. (2000). Running and cocaine both upregulate dynorphin mRNA in medical caudate putamen. *European Journal of Neuroscience, 12*(8), 2967–2974.
Werme, M., Lindholm, S., Thorén, P., et al. (2002). Running increases ethanol preference. *Behavioural Brain Research, 133*(2), 301–308.
Whalen, C. K., Jamner, L. D., Henker, B., et al. (2001). Smoking and moods in adolescents with depressive and aggressive dispositions: Evidence from surveys and electronic diaries. *Health Psychology, 20*(2), 99–111.
Williams, W. A., & Potenza, M. N. (2008). The neurobiology of impulse control disorders. *Revista Brasileira de Psiquiatria, 30* (Supplement 1), S24–S30.
Wilson, M. (2003). Chips, bits, and the law: An economic geography of internet gambling. *Environment and Planning A, 35*(7), 1245–1260.
Wise, R. A. (1996). Addictive drugs and brain stimulation reward. *Annual Review of Neuroscience, 19*, 319–340.
Wittchen, H. U., Jacobi, F., Rehm, J., et al. (2011). The size and burden of mental disorders and other disorders of the brain in Europe. *European Neuropsychopharmacology, 21*(9), 655–679.
Wray, I., & Dickerson, M. G. (1981). Cessation of high frequency gambling and 'withdrawal' symptoms. *British Journal of Addiction, 76*(4), 401–405.
Xuan, Z., & Shaffer, H. J. (2009). How do gamblers end gambling: Longitudinal analysis of internet gambling behaviors prior to account closure due to gambling related problems. *Journal of Gambling Studies, 25*(2), 239–252.

Young, K. S. (1998). Internet addiction: The emergence of a new clinical disorder. *CyberPsychology and Behavior, 1*(3), 237–244.
Zinberg, N. E., & Jacobson, R. C. (1976). The natural history of "chipping". *American Journal of Psychiatry, 133*(1), 37–40.

Reports

Abbott, M., Binde, P., Hodgins, D., et al. (2013). *Conceptual framework of harmful gambling: An international collaboration*. Guelph: The Ontario Problem Gambling Research Centre (OPGRC).
Annual Report of Casinos Austria AG, *2009*. Available at http://infochair.casinos.at/infochair/presse/gb09_low.pdf and http://www.schelhammer.at/kirche.
State of the States: *The AGA Survey of Casino Entertainment*, 2006. Available at http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga-sos-2006.pdf.
Disley, E., Pollitt, A., May Culley, D., & Rubin, J. (2011). *Map the gap*: *A critical review of the literature on gambling-related harm*. Report prepared by RAND Europe for the Responsible Gambling Fund. Available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR1013.pdf.
Ferris, J. A., & Wynne, H. J. (2001). *The Canadian Problem Gambling Index: Final report*. Report prepared for the Canadian Centre on Substance Abuse (CCSA). Available at http://www.cclat.ca/2003%20and%20earlier%20CCSA%20Documents/ccsa-008805-2001.pdf.
GamblingCompliance (2009). *Market barriers*: *A European online gambling study*.
GamblingCompliance (2010). *Market barriers*: *US internet gaming*.
GamblingCompliance (2011). *ECJ special report*: *A mandate for German gambling reform*.
GamblingCompliance (2012). *Market barriers*: *A European online gambling study*.
Gerstein, D., Murphy, S., Toce, M. et al. (1999). *Gambling impact and behavior study*: *Final report to the National Gambling Impact Study Commission*. University of Chicago, National Opinion Research Center.
Planzer, S. *Mythen und Fakten zur Glücksspielsucht*: *Annahmen über die Regulierung des Glücksspiels im Lichte der Forschung*, forthcoming.
Planzer, S. (Ed.) (2011). *Regulating gambling in Europe – National approaches to gambling regulation and prevalence rates of pathological gambling 1997–2010*. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045073.
Planzer, S., & Wardle, H. (2011). *The comparative effectiveness of regulatory approaches and the impact of advertising on propensity for problem gambling*. Report prepared for the Responsible Gambling Fund. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045052.
Sparrow, M. (2009). *Can the internet be effectively regulated*? *Managing the risks.* Available at http://financialservices.house.gov/media/file/hearings/111/sparrow.pdf.
Sproston, K., Erens, B., & Orford, J. (2000). *Gambling behaviour in Britain*: *Results from the British gambling prevalence survey*, National Centre for Social Research, London. Available at http://www.gamblingcommission.gov.uk/pdf/Gambling%20behaviour%20in%20Britian%20results%20from%20the%20BGPS%202000%20-%20Jun%202007.pdf.
Swiss Institute of Comparative Law (2006). *Study of gambling services in the internal market of the European Union*. Report prepared for the European Commission. Available at http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf.
Volberg, R. A. (2002). *Gambling and problem gambling in Nevada*. Report prepared for the Nevada Department of Human Resources.
Wardle, H., Sproston, K., Orford, J., et al. (2007). *British gambling prevalence survey 2007*. National Centre for Social Research. Available at http://www.gamblingcommission.gov.uk/PDF/Britsh%20Gambling%20Prevalence%20Survey%202007%20-%20Sept%202007.pdf.

Wardle, H., Moody, A., Spence, S., et al. (2011). *British gambling prevalence survey 2010*. National Centre for Social Research. National Centre for Social Research. Available at http://www.gamblingcommission.gov.uk/PDF/British%20Gambling%20Prevalence%20Survey%202010.pdf.

Wiebe, J., & Lipton, M. (2008). *An overview of internet gambling regulations*, Report submitted to the Ontario Problem Gambling Research Centre. Available at http://www.nsgamingfoundation.org/articlesReports/An%20Overview%20of%20Internet%20Regulations.pdf.

Wiebe, J., & Volberg, R. A. (2007). *Problem gambling prevalence research*: *A critical overview. A report to the Canadian Gaming Association*. Available at http://www.canadiangaming.ca/images/stories/media_releases/problem_gambling_prevalence_research_a_critical_overview.pdf.

Williams, R. J., & Wood, R. T. (2007). *Internet gambling*: *A comprehensive review and synthesis of the literature*. Report Prepared for the Ontario Problem Gambling Research Centre. Available at https://www.uleth.ca/dspace/bitstream/handle/10133/432/2007-internetreview-opgrc.pdf?sequence=1.

Young, R., & Todd, J. (2008). *Online gambling – Focusing on integrity and a code of conduct for gambling*. Report prepared by Europe Economics for the European Parliament. Available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/408575/IPOL-IMCO_ET(2008)408575_EN.pdf.

Conference Papers

Nelson, S. E. (2011, April 14). *New modalities and special populations: Using advances in addiction science to understand gambling problems.* Paper presented at BC Gambling Workshop.

Planzer, S. (2010, October 13). *Assessing the impact of regulation*. Paper presented at Responsible Gaming Day, Brussels.

Vlaemminck, P. (2010, May 31). *The international perspective regarding the framework of gaming operations from an EU Perspective to a transatlantic solution*? Paper presented at Conference on 'The organization of the greek gaming market'.

Vlaemminck, P. & Hubert, A. (2009, June 15–16). *Is there room for a comprehensive EU gambling services policy?* Paper presented at ERA gambling conference, Prague.

Media

Barboza, D., *Macao surpasses Las Vegas as gambling center*. NY Times, 23 January 2007. Available at http://www.nytimes.com/2007/01/23/business/worldbusiness/23cnd-macao.html.

Bulkeley, W. M. *Video betting*, *called* '*crack of gambling*', *is spreading*. Wall Street Journal, 14 July 1992, Sect. B1.

Die Dänen und die Andern, Das Magazin, Vol. 48, 2009.

Faiola, A., *When escape seems just a mouse-click away*, The Washington Post, 27 May 2006.

GamblingCompliance. *EU opens state aid case against Denmark*, 16 December 2010. Available at http://www.gamblingcompliance.com/node/45467.

GamblingCompliance. *European scrutiny weighs on French and British racing*, 21 January 2011, Available at http://www.gamblingcompliance.com/node/45695.

GamblingCompliance. *French monopolies facing European scrutiny*, 9 December 2010. Available at http://www.gamblingcompliance.com/node/45414.

GamblingCompliance. *Loto-Quebec to pay $50m to addicted players*, 25 March 2010. Available at http://gamblingcompliance.com/node/41888.
GamblingCompliance. *Starting with France, EU competition watchdogs turn to gambling*, 24 January 2011. Available at http://www.gamblingcompliance.com/node/45721&fastlogin=notifications/kcKLMc&statmid=666051.
Germany's neighbors try to redeem their 1989 negativity, Deutsche Welle, 8 September 2009. Available at http://www.dw-world.de/dw/article/0,,4861759_page_2,00.html.
Kaufen bis der Arzt kommt, NZZ am Sonntag, 22 April 2007, p. 65.
Lycka, M. *What future for online gambling services in the EU*? worldonlinegamblinglawreport, Vol. 9, January 2010, pp. 8–9. Available at http://www.crowell.com/documents/The-new-gaming-act-freedom-of-services-restricted.pdf.
Planzer, S. *The arrogant judges in Luxembourg and what it is actually about*, euobserver, 20 September 2007. Available at http://euobserver.com/7/24694.
Seidl, C., & Staun, H.. *Legalität als letzter Ausweg*: *Machen wir Frieden mit den Drogen*. Frankfurter Allgemeine Sonntagszeitung, 29 April 2012.
Thatcher told Gorbachev Britain did not want German reunification, The Times, 11 September 2009. Available at http://www.timesonline.co.uk/tol/news/politics/article6829735.ece.

Miscellaneous

American Psychiatric Association. DSM-5 Development – R 37 gambling disorder. Available at http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210. Accessed 1 June 2012.
American Psychiatric Association. DSM-5 Development – Substance-related disorders. Available at http://www.dsm5.org/ProposedRevisions/Pages/Substance-RelatedDisorders.aspx. Accessed 1 June 2012.
BehaveNet. Glossaries – Addict. Available at http://www.behavenet.com/addict. Accessed 1 June 2012.
BehaveNet. Glossaries – Impulse-control disorders. Available at http://www.behavenet.com/capsules/disorders/impulsecntrldis.htm. Accessed 1 June 2012.
BehaveNet. Glossaries – Pathological gambling. Available at http://www.behavenet.com/pathological-gambling#301. Accessed 1 June 2012.
Birth of the Treaty of Maastricht on European Union. Available at http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm.
Community Charter of Fundamental Social Rights of Workers. Available at http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_en.htm.
Community Charter of the Fundamental Social Rights of Workers. Available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/Conventions%20internationales/Community_Charter_of_the_Fundamental_Social_Rights_of_Workers.pdf.
Council of Europe. Available at http://www.coe.int.
Council of Europe, Directorate of Communication, Press release 437(210) of 31 May 2010. Available at https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.
Council of Europe, Secretary General, Newsroom of 4 April 2013. Available at http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10.
Dose–response. Available at http://www.dose–response.com/.

European Social Charter (revised). Available at http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm.
Gamblers Anonymous. Available at http://www.gamblersanonymous.org.
Green Paper on the Review of the Consumer Acquis. Available at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#dir.
Harris Interactive. Video game addiction: Is it real? Available at http://www.harrisinteractive.com/news/allnewsbydate.asp?newsid=1196.
http://www.psychiatry.org/practice/dsm. Accessed 1 June 2012.
ICA Services. Signs & symptoms of computer & internet addiction. Available at http://www.icaservices.com/signs_symptoms.htm. Accessed 1 June 2012.
International Statistical Classification of Diseases and Related Health Problems 10th revision. Available at http://apps.who.int/classifications/icd10/browse/2010/en. Accessed 1 June 2012.
International Statistical Classification of Diseases and Related Health Problems 10th revision: Pathological gambling. Available at http://apps.who.int/classifications/icd10/browse/2010/en#/F63.0. Accessed 1 June 2012.
National Council on Problem Gambling. FAQs – Problem gamblers. Available at http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=3315. Accessed 1 June 2012.
Shaffer, H. J. What is addiction?: A perspective. Available at http://www.divisiononaddiction.org/html/whatisaddiction.htm.
The Charter of Fundamental Rights of the European Union – Annex: The Convention Responsible for Drafting the Charter of Fundamental Rights. Available at http://www.europarl.europa.eu/charter/composition_en.htm.
The European Social Charter. Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp.
Treaty on the Final Settlement with Respect to Germany. Available at http://usa.usembassy.de/etexts/2plusfour8994e.htm.
World Health Organization. Classifications – International Classification of Diseases (ICD). Available at http://www.who.int/classifications/icd/en/. Accessed 1 June 2012.
World Health Organization. Classifications – The International Classification of Diseases 11th revision is due by 2015. Available at http://www.who.int/classifications/icd/revision/en/index.html. Accessed 1 June 2012.

Case Law of the Court of Justice

In chronological order by case number

C-390/12 Robert Pfleger et al., nyd.
C-470/11 Garkalns SIA v Rigas dome [2012] nyr.
C-377/11 International Bingo Technology SA v Tribunal Económico-Administrativo Regional de Cataluña (TEARC) [2012] nyr.
C-213/11, C-214/11 and C-217/11 (Joined Cases) Fortuna sp. z o.o. (C-213/11), Grand sp. z o.o. (C-214/11), Forta sp. z o.o. (C-217/11) v Dyrektor Izby Celnej w Gdyni [2012] nyr.
C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2012] nyr.
C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr.
C-464/10 État belge v Pierre Henfling, Raphaël Davin and Koenraad Tanghe [2011] nyr.
C-259/10 and C-260/10 (Joined cases) Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc. [2011] ECR I-10947.
C-108/10 Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca [2011] nyr.

C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr.
C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] nyr.
C-108/09 Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete [2010] ECR I-12213.
C-58/09 Leo-Libera GmbH v Finanzamt Buchholz in der Nordheide [2010] ECR I-5189.
Opinion 1/09 on a European and Community Patents Court [2011] nyr.
C-562/08 Müller Fleisch GmbH v Land Baden-Württemberg [2010] ECR I-1391.
C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v 'Österreich'-Zeitungsverlag GmbH [2010] ECR I-10909.
C-382/08 Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen [2011] ECR I-139.
C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921.
C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH [2010] ECR I-217.
C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757.
C-212/08 Zeturf Ltd v Premier ministre [2011] nyr.
C-203/08 Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695.
C-153/08 Commission v Spain [2009] ECR I-9735.
C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219.
C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149.
C-318/07 Hein Persche v Finanzamt Lüdenscheid [2009] ECR I-359.
C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069.
C-231/07 and C-232/07 (Joined cases) Tiercé Ladbroke SA (C-231/07) and Derby SA (C-232/07) v Belgian State [2008] ECR I-73 (Order of the Court).
C-171/07 and C-172/07 (Joined Cases) Apothekerkammer des Saarlandes et alii (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales [2009] ECR I-4171.
C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633.
C-531/06 Commission v Italy [2009] ECR I-4103.
C-525/06 De Nationale Loterij NV v Customer Service Agency BVBA [2009] ECR I-2197 (Order of the Court).
C-524/06 Heinz Huber v Bundesrepublik Deutschland [2008] ECR I-9705.
C-409/06 Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim [2010] ECR-8015.
C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF) [2007] ECR I-8817.
C-11/06 and C-12/06 (Joined cases) Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06) [2007] ECR I-9161.
C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779.
C-374/05 Gintec International Import Export GmbH v Verband Sozialer Wettbewerb eV [2007] ECR I-9517.
C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767.
C-65/05 Commission v Greece [2006] ECR I-10341.
C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521.

C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171.
C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften [2006] ECR I-8203.
C-355/04 P Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council [2007] ECR I-1657.
C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.
C-260/04 Commission v Italy [2007] ECR I-7083.
C-170/04 Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren [2007] ECR I-4071.
C-540/03 Parliament v Council ('family reunification') [2006] ECR I-5769.
C-88/03 Portugal v Commission ('Azores islands') [2006] ECR I-7115.
C-453/02 and C-462/02 (Joined cases) Finanzamt Gladbeck v Edith Linneweber (C-453/02) and Finanzamt Herne-West v Savvas Akritidis (C-462/02) [2005] ECR I-1131.
C-71/02 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025.
C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519.
C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.
C-322/01 Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval [2003] ECR I-14887.
C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.
C-236/01 Monsanto Agricoltura Italia SpA et alii v Presidenza del Consiglio dei Ministri et alii [2003] ECR I-8105.
C-192/01 Commission v Denmark [2003] ECR I-9693.
C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621.
C-136/00 Rolf Dieter Danner [2002] ECR I-8147.
C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659.
C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.
C-498/99 Town & County Factors Ltd v Commissioners of Customs & Excise [2002] ECR I-7173.
C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) [2001] ECR I-1795.
C-173/99 The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) ECR I-4881.
C-54/99 Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister [2000] ECR I-1335.
C-352/98 P. Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission [2000] ECR I-5291.
C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289.
C-292/97 Kjell Karlsson et alii [2000] ECR I-2737.
C-240/97 Spain v Commission [1999] ECR I-6571.
C-162/97 Criminal Proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn [1998] ECR I-7477.
C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067.
C-180/96 UK v Commission [1998] ECR I-2265.
C-158/96 Raymond Kohll v Union des Caisses de Maladie [1998] ECR I-1931.
C-157/96 The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd. [1998] ECR I-2211.

C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689.
C-299/95 Friedrich Kremzow v Republik Österreich [1997] ECR I-2629.
C-283/95 Karlheinz Fischer v Finanzamt Donaueschingen [1998] ECR I-3369.
C-189/95 Criminal proceedings against Harry Franzén [1997] ECR I-5909.
C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.
C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141.
C-38/93 H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst [1994] ECR I-1679.
C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039.
C-169/91 Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q Plc [1992] ECR I-6635.
C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et alii [1991] ECR I-4685.
C-76/90 Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221.
C-288/89 Stichting Collectieve Antennevoorziening Gouda et alii v Commissariaat voor de Media [1991] ECR I-4007.
C-260/89 Elliniki Radiophonia Tiléorassi AE (‘ERT’) and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et alii [1991] ECR I-2925.
C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd et alii [1990] ECR I-2433.
C-154/89 Commission v France [1991] ECR I-659.
C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et alii [1990] ECR I-4023.
C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609.
C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR 3967.
C-196/87 Udo Steymann v Staatssecretaris van Justitie [1988] ECR 6159.
C-186/87 Ian William Cowan v Trésor public [1989] ECR 195.
C-12/86 Meryem Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719.
C-234/85 Staatsanwaltschaft Freiburg v Franz Keller [1986] ECR 2897.
C-121/85 Conegate Limited v HM Customs & Excise [1986] ECR 1007.
C-178/84 Commission v Germany [1987] ECR 1227.
C-60/84 and C-61/84 (Joined Cases) Cinéthèque SA et alii v Fédération nationale des cinémas français [1985] ECR 2605.
C-240/83 Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU) [1985] ECR 531.
C-174/82 Criminal Proceedings against Sandoz BV [1983] ECR 2445.
C-261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 3961.
C-149/79 Commission v Belgium [1982] ECR 1845.
C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727.
C-230/78 SpA Eridania-Zuccherifici Nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali ECR-2749.
C-151/78 Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture [1979] ECR 1.
C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (‘Cassis de Dijon‘) [1979] ECR 649.
C-106/77 Amministrazione delle Finanze dello Stato Simmenthal SpA [1978] ECR 629.
C-30/77 Régina v Pierre Bouchereau [1977] ECR 1999.
C-104/75 Adriaan de Peijper, Managing Director of Centrafarm BV [1976] ECR 613.
C-36/75 Roland Rutili v Ministre de l'Intérieur [1975] ECR 1219.

C-41/74 Yvonne van Duyn v Home Office [1974] ECR 1337.
C-8/74 Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR 837.
C-4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491.
C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.
C-29/69 Erich Stauder v City of Ulm - Sozialamt [1969] ECR 419.
C-35/67 August Josef Van Eick v Commission [1968] ECR 329.
C-40/64 Marcello Sgarlata et alii v Commission [1965] ECR English Special Edition 215.
C-6/64 Flaminio Costa v E.N.E.L. [1964] ECR English special edition 585.
C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR English special edition 1.
C-8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community [1956] ECR English special edition 245.

Case Law of the General Court

In chronological order by case number

T-177/01 Jégo-Quéré & Cie SA v Commission [2002] ECR II-2365.
T-70/99 Alpharma Inc. v Council [2002] ECR II-3495.
T-13/99 Pfizer Animal Health SA v Council [2002] ECR II-3305.
T-199/96 Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission [1998] ECR II-2805.

Case Law of the EFTA Court

In chronological order by case number

E-4/11 Arnulf Clauder [2011] EFTA Court Report 216.
E-3/11 Pálmi Sigmarsson and the Central Bank of Iceland [2011] EFTA Court Report 430.
E-16/10 Philip Morris Norway AS v Norway EFTA Court Report [2011] EFTA Court Report 330.
E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] EFTA Court Report 246.
E-5/10 Dr Joachim Kottke and Präsidial Anstalt and Sweetyle Stiftung [2009–2010] EFTA Court Report 320.
E-11/07 and E-1/08 (Joined Cases) Olga Rindal and Therese Slinning, Represented by Legal Guardian Olav Slinning v Norway, Represented by the Board of Exemptions and Appeals for Treatment Abroad [2008] EFTA Court Report 320.
E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86.
E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8.
E-4/04 Pedicel AS v Sosial- og helsedirektoratet [2005] EFTA Court Report 1.
E-2/03 Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson [2003] EFTA Court Report 185.
E-2/02 Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA [2003] EFTA Court Report 52.
E-3/00 EFTA Surveillance Authority v Norway (‘Kellogg’s’) EFTA Court Report 2000–2001 73.
E-8/97 TV1000 Sverige AB v Norway [1998] EFTA Court Report 68.
E-1/97 Fridtjof Frank Gundersen v Oslo kommune, supported by the Government of the Kingdom of Norway [1997] EFTA Court Report 108.
E-6/96 Tore Wilhelmsen AS v Oslo kommune [1997] EFTA Court Report 53.
E-1/94 Ravintoloitsijain Liiton Kustannus Oy Restamark [1994–1995] EFTA Court Report 15.

Case Law of the European Court of Human Rights and the European Commission of Human Rights

In chronological order by application number

TIPP 24 AG v Germany, Application no 21252/09 [2012].
Liborio Garofolo v Switzerland, Application no 4380/09 [2013].
Haas v Switzerland, Application no 31322/07 [2011].
Sigma Radio Television Ltd. v Cyprus, Application no 32181/04 and 35122/05 [2011].
Ladbrokes Worldwide Betting v Sweden, Application no 27968/05 [2008].
Dickson v the UK, Application no 44362/04 [2007].
K.T. v Norway, Application no 26664/03 [2008].
Sanchez Cardenas v Norway, Application no 12148/03 [2007].
Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2; Merits and Just Satisfaction), Application no 32772/02 [2009].
Rakevich v Russia, Application no 58973/00 [2003].
Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland Application no 45036/98 [2005].
H.K. v Finland, Application no 36065/97 [2006].
Kingsley v the UK, Application no 35605/97 [2000].
Aerts v Belgium, Application no 61/1997/845/1051 [1998].
Nuutinen v Finland, Application no 32842/96 [2000].
Ignaccolo-Zenide v Romania, Application no 31679/96 [2000].
Keenan v UK, Application no 27229/95 [2001].
K. and T. v Finland, Application no 25702/94 [2001].
L. v Finland, Application no 25651/94 [2000].
Matthew v the UK, Application no 24833/94 [1999].
Söderbäck v Sweden, Application no 24484/94 [1998].
Ceylan v Turkey, Application no 23556/94 [1999].
Johnson v UK, Application no 22520/93 [1997].
M.S. v Sweden, Application no 20837/92 [1997].
Anne-Marie Andersson v Sweden, Application no 20022/92 [1997].
Vogt v Germany, Application no 17851/91 [1995].
Johansen v Norway, Application no 17383/90 [1996].
Vereniging Weekblad Bluf! v NL, Application no 16616/90 [1995].
Colm McKenna v Ireland, Application no 16221/90 [1991].
Vereinigung demokratischer Soldaten Österreichs and gubi v Austria, Application no 15153/89 [1994].
Murray v the UK, Application no 14310/88 [1994].
Kokkinakis v Greece, Application no 14307/88 [1993].
Open Door and Dublin Well Woman v Ireland, Application no 14234/88 and 14235/88 [1992].
Soering v the UK, Application no 14038/88 [1989].
Observer and Guardian v the UK, Application no 13585/88 [1991].
Otto-Preminger-Institut v Austria, Application no 13470/87 [1994].
Olsson v Sweden (no 2) Application no 13441/87 [1992].
Sunday Times v the UK (No 2), Application no 13166/87 [1991].
Margareta and Roger Andersson v Sweden, Application no 12963/87 [1992].
Hadjianastassiou v Greece, Application no 12945/87 [1992].
Autronic AG v Switzerland, Application no 12726/87 [1990].
Nyberg v Sweden, Application no 12574/86 [1990].
Rieme v Sweden, Application no 12366/86 [1992].
Castells v Spain, Application no 11798/85 [1992].
Linde v Sweden, file no 11628/85 [1986] (Commission Report).
Eriksson v Sweden, Application no 11373/85 [1989].
Brogan et alli v UK, Application no 11209/84, 11234/84, 11266/84, 11386/85 [1988].

Funke v France, Application no 10828/84 [1993].
Müller et alii v Switzerland, Application no 10737/84 [1988].
Herczegfalvy v Austria, Application no 10533/83 [1992].
Olsson v Sweden (no 1) Application no 10465/83 [1988].
W. v the UK, Application no 9749/82 [1987].
Leander v Sweden, Application no 9248/81 [1987].
Gillow v the UK, Application no 9063/80 [1986].
Ashingdane v the UK, Application no 8225/78 [1985].
Dudgeon v the UK, Application no 7525/76 [1981].
Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983].
Sunday Times v the UK, Application no 6538/74 [1979].
Winterwerp v the Netherlands, Application no 6301/73 [1979].
Handyside v the UK, Application no 5493/72 [1976].
Ireland v the UK, Application no 5310/71 [1978].
Klass et alii v Germany, Application no 5029/71 [1978].
Golder v the UK, Application no 4451/70 [1975].
'Greek case', Application no 3321/67, 3322/67, 3323/67, 3344/67 [1969].
Cases of De Wilde, Ooms and Versyp ("Vagrancy") v Belgium, Application no 2832/66, 2835/66, 2899/66 [1971].
Delcourt v Belgium, Application no 2689/65 [1970].
Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium, Application no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 [1968].
Wemhoff v Germany, Application no 2122/64 [1968].
Lawless v Ireland (No 3), Application no 332/57 [1961].
Lawless v Ireland, Application no 332/57 [1960–61].
Greece v the UK ('Cyprus case'), Application no 176/57 [1958–59] (Commission Report).

Case Law of National Courts

In chronological order by date of decision

Betfair v the Minister of Justice, case no 200700622/1/H3-A, judgment of 23 March 2011.
Opinion no 11-A-02 of 20 January 2011 regarding the sector of online games of chance, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/11a02.pdf.
BGE 136 II 291 Schweizer Casino Verband gegen X. und Eidgenössische Spielbankenkommission [2010].
Oslo Tingrett Ladbrokes Ltd. mot Kultur og Kirkedepartmentet, judgment of 3 October 2008.
Rt. 2007: 1003 (Spilleautomat).
BKartA, B 10 - 92713 -Kc- 148/05, judgment of 23 August 2006.
BVerfG, 1 BvR 1054/01, Verfassungsmässigkeit des deutschen Sportwetten-Monopols, judgment of 28 March 2006.
AB-2005-1 United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R.
Cass. SU Sent. 111/04 of 26 April 2004, Mario Gesualdi et alii, available at http://www.ictlex.net/?p=382.
Tvind [1999] Ugeskrift for Retsvæsen 1999.
AB-1997-4, EC measures concerning meat and meat products ('hormones'), WT/DS26/AB/R, WT/DS48/AB/R, decision of 16 January 1998.
Solange I BVerfGE 37, 271 ff., judgment of 29 Mai 1974.
Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948] 1KB 223, United Kingdom: Court of Appeal (England and Wales), judgment of 10 November 1947.

EU/EEA Primary Law

In chronological order

Consolidated Version of the Treaty on European Union, OJ C 83, 30.03.2010, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF.

Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 083, 30.03.2010, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.

Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF.

Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF.

Agreement on the European Economic Area, OJ L 001, 03.01.1994, available at http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice, OJ L 344, 31.01.1994, available at http://www.efta.int/media/documents/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols/Surveillance-and-Court-Agreement-consolidated.pdf.

Treaty on European Union, OJ C 191, 29.07.1992, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11992M/TXT:EN:HTML.

EU Secondary Law

In chronological order

Commission Decision of 19 June 2013 Regarding French Parafiscal Levy on Online Horse-Race Betting to Finance Horse-Racing Companies, case no SA.30753.

Proposal for a Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, COM/2013/045 final, 2013/0025 (COD).

State Aid No C 35/2010 Duties for Online Gaming in the Danish Gaming Duties Act, OJ C 22, 22.01.2011 and IP/19/1711.

Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services ('Audiovisual Media Services Directive'), OJ L 95, 15.04.2010, pp. 1–24.

State Aid No C 34/10 Taxe affectée au financement de la mission de service public d'amélioration de l'espèce équine et de promotion de l'élevage, déformation dans le secteur des courses et de l'élevage chevalin ainsi que de développement rural C(2010)7672 final, OJ C 10/4.

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector and Regulation (EC) No 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws, OJ L 337, 18.12.2009, pp. 11–36.

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive'), OJ L 376, 27.12.2006, pp. 36–68.

Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ('VAT-Directive'), OJ L 347, 11.12.2006, pp. 1–185.

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing ('Third Anti-Money Laundering Directive'), OJ L 309, 25.11.2005, pp. 15–36.

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.06.2005, pp. 22–39.

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 344, 28.12.2001, pp. 76–82.

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 in Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce' or 'e-commerce Directive'), OJ L 178, 17.07.2000, pp. 1–16.

Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying down A Procedure for the Provision of Information in the Field of Technical Standards and Regulations ('Information Society Directive'), OJ L 217, 05.08.1998, pp. 18–26.

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts ('Distance Selling Directive'), OJ L 144, 04.06.1997, pp. 19–27.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ('Data Protection Directive'), OJ L 281, 23.11.1995, pp. 31–50.

Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 166, 28.06.1991, pp. 77–83.

Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 298, 17.10.1989, pp. 23–30.

EU Soft Law

In chronological order

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee on the Regions: Towards a Comprehensive European Framework for Online Gambling, COM(2012) 596 final, SWD(2012) 345 final, available at http://ec.europa.eu/internal_market/services/docs/gambling/comm_121023_onlinegambling_en.pdf.

Green Paper on On-Line Gambling in the Internal Market, 24.03.2011, COM(2011) 128 final, SEC(2011) 321 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0128:FIN:EN:PDF.

Commission Staff Working Paper: Accompanying Document to the Green Paper on On-Line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, available at: http://ec.europa.eu/internal_market/consultations/docs/2011/online_gambling/sec2011_321_en.pdf.

Explanations Relating to the Charter of Fundamental Rights, OJ C 303/02, 14.12.2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

Recommendation REC(2004) 10 of the Committee of Ministers to Member States Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder, available at http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(2004)10_e.pdf.

Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2, 13.01.2004, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0002:FIN:EN:PDF.
Communication from the Commission on the Precautionary Principle, COM(2000) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:EN:PDF.
Conclusions of the Presidency at the Nice European Council, 07.-10.12.2000, available at http://www.europarl.europa.eu/summits/nice1_en.htm.
Conclusions of the Presidency at the Edinburgh European Council, 12.12.1992, available at http://www.europarl.europa.eu/summits/edinburgh/a2_en.pdf.
Conclusions of the Presidency at the Birmingham European Council, 16.10.1992, available at http://www.europarl.europa.eu/summits/birmingham/bi_en.pdf.
Conclusions of the Presidency at the Lisbon European Council, 26.-27.06.1992, available at http://www.europarl.europa.eu/summits/lisbon/li1_en.pdf.
Conclusions of the Presidency at the Rome 2 European Council, 14.-15.12.1990, available at http://www.europarl.europa.eu/summits/rome2/rd1_en.pdf.
Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 103, 27.04.1977, 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977Y0427(01):EN:HTML.

International and National Law & Materials

In chronological order

UK Gambling Act, 2005, 07.04.2005, available at http://www.legislation.gov.uk/ukpga/2005/19/contents/enacted.
Federal Constitution of the Swiss Confederation of 18 April 1999, 'Swiss Federal Constitution', SR 101, available at http://www.admin.ch/ch/e/rs/1/101.en.pdf.
Convention on Human Rights and Biomedicine (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine), 04.04.1997, available at http://conventions.coe.int/Treaty/en/Treaties/html/164.htm.
Government Bill regarding the Federal Law on Games of Chance and Casinos of 26 February 1997 ('Botschaft zum Bundesgesetz über das Glücksspiel und über die Spielbanken (Spielbankengesetz, SBG), 1997, Bundesblatt vol. 149, no III, available at http://www.esbk.admin.ch/content/dam/data/esbk/gesetzgebung/bot-sbg-d.pdf.
United Nations Convention on the Rights of the Child, 20.11.1989, available at http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.
Convention on the Elimination of all Forms of Discrimination against Women, 18.12.1979, available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.
International Covenant on Economic, Social and Cultural Rights, 16.12.1966, available at http://www.unhcr.org/refworld/docid/3ae6b36c0.html.
European Social Charter of the Council of Europe, 18.10.1961, available at http://www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp.
Universal Declaration of Human Rights, 10.12.1948, available at http://www.un.org/en/documents/udhr/.

About the Author

Dr Simon Planzer is Lecturer in Law at the University of St.Gallen and a practising attorney at law in Zurich, Switzerland. In his teaching, research and practice, he has been working on issues of European economic law, gambling, addiction and the regulation of lifestyle risks. Formerly, he worked for the EFTA Court in Luxembourg, the legal service of the EFTA Secretariat in Brussels and the Institute of European and International Business Law at the University of St.Gallen.

He holds a PhD in law from the University of St.Gallen, a postgraduate degree from the College of Europe, majoring in EU law, a master of law from the University of Fribourg and a diploma of the Academy of International Trade Law. He can be contacted at simon.planzer@unisg.ch and www.planzer-law.com.

The research for this book was largely conducted during research stays of the author at Harvard Law School, the Division on Addiction (Harvard Medical School and Cambridge Health Alliance) and the European University Institute.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9,

Index

S. Planzer, *Empirical Views on European Gambling Law and Addiction*, Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9,