

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

¹For definitions and the factors chance and skill, cf. e.g. Kalt, K., *Zettel, Zahl und Zufall – Glück und Glücksspiel am Beispiel des Schweizer Zahlenlotos*, Zürcher Beiträge zur Alltagskultur, vol. 13, Zürich: Volkswissenschaftliches Seminar der Universität 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.

²Schwartz, 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.

⁴Maass, 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.

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

⁵Raikhel, 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.*

⁶Walker, M., Schellink, T., and Anjoul, F., “Explaining Why People Gamble” in *In the Pursuit of Winning – Problem Gambling Theory, Research and Treatment*, Zangeneh, M., Blaszczyński, 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.

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

⁸Buland, 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.

⁹Schädler, 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.

¹⁰Huizinga, 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 cardsharps 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 mediated 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*

²⁴Ibid.

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

²⁶Buland, "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.

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

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

²⁹In 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.

³⁰Cf. 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 Market³² 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).