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.