

# 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](#)).<sup>1</sup>

According to the Study of Gambling Services, the objectives that the Court sanctioned in its gambling jurisprudence include<sup>2</sup>:

- Maintenance of public order<sup>3</sup>
- Prevention of fraud and other criminal activities<sup>4</sup>
- Limitation of the exploitation of the human passion for gambling<sup>5</sup>

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<sup>1</sup>Chalmers, Davies, and Monti, *European Union Law: Text and Materials*, at 70–75.

<sup>2</sup>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.

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

<sup>4</sup>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 Kihlakunnansyöttäjä (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.

<sup>5</sup>C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (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.

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

The Court further accepted the following objectives:

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

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<sup>6</sup>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.

<sup>7</sup>C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (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.

<sup>8</sup>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 Kihlakunnansyöttäjä (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.

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

<sup>10</sup>*Ibid.*, para. 57.

<sup>11</sup>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.

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

<sup>13</sup>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 Automaten-Service 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.

<sup>14</sup>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.

<sup>15</sup>*Ibid.*, para. 43.

- Protection from the substantial impairment of the interests of the state<sup>16</sup>
- Protection of the interests of local residents<sup>17</sup>
- Fighting addiction to gambling<sup>18</sup>

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

- The financing of social activities.<sup>19</sup>

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

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.<sup>24</sup> 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

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

<sup>17</sup>Ibid., para. 40.

<sup>18</sup>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 Automaten-service 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.

<sup>19</sup>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.

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

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

<sup>22</sup>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.

<sup>23</sup>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 Automaten-service 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.

<sup>24</sup>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.<sup>25</sup>

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.<sup>26</sup> It is necessary to ensure that the consumer is ‘treated honestly’.<sup>27</sup> 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.<sup>28</sup>

The second term ‘*public order*’ is more elusive. The Court of Justice has mostly used the term ‘maintenance of order in society’<sup>29</sup> or then ‘the general need to preserve public order’.<sup>30</sup> 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

<sup>25</sup>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.

<sup>26</sup>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 Lääriä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (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.

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

<sup>28</sup>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.

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

<sup>30</sup>C-64/08 *Criminal Proceedings against Ernst Engelmann* [2010] ECR I-8219, para. 29, *if*.

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

## 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](#)).<sup>35</sup> This is an interesting aspect since gambling services are normally accompanied by economic interests.<sup>36</sup> 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.<sup>37</sup> Certainly, due to religious views, games of chance were banned in many parts of Europe in the post-antique world.<sup>38</sup> Historians argue that gambling bans were increasingly lifted when public authorities realised that the operation of games of chance served as a

<sup>31</sup> 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 Kihlakunnansyöttäjä (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.

<sup>32</sup> 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.

<sup>33</sup> Unger, B., & Ferwerda, J. *Money Laundering in the Real Estate Sector: Suspicious Properties*, Cheltenham: Edward Elgar, 2011.

<sup>34</sup> Young, and Todd, *Online Gambling – Focusing on Integrity and a Code of Conduct for Gambling*, at 2.

<sup>35</sup> Chalmers, Davies, and Monti, *European Union Law: Text and Materials*, at 70–75.

<sup>36</sup> 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).

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

<sup>38</sup> *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.<sup>39</sup> Public authorities and occasionally even religious institutions therefore developed a ‘pragmatic’ moral view on games of chance.<sup>40</sup>

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.<sup>41</sup>

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

<sup>39</sup> Buland, “Die Kultur des Spiels – Einige Aspekte zur Einführung”, at 11–12.

<sup>40</sup> 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](http://infochair.casinos.at/infochair/presse/gb09_low.pdf) and <http://www.schelhammer.at/kirche>.

<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup>

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'.<sup>46</sup> The greed of private operators is contrasted with the good deeds of the state and charities.<sup>47</sup> The notion 'epidemic' has been used in relation to the spread

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

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

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

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

<sup>46</sup>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.

<sup>47</sup>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.<sup>48</sup> This moral perspective on games of chance comes with a problem that Advocate General La Pergola described in *Läärä* as the ‘*venial sin*’.<sup>49</sup> 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 appellants [*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.<sup>50</sup>

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.<sup>51</sup>

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

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<sup>48</sup>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.

<sup>49</sup>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.

<sup>50</sup>Opinion of Advocate General La Pergola in *ibid.*, para. 35.

<sup>51</sup>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.<sup>52</sup> 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<sup>53</sup> or support for rural development.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup>

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

<sup>52</sup>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.

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

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

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

<sup>56</sup>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.<sup>57</sup>

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.<sup>58</sup>

Traditionally, the Court had given the impression that only private operators, aiming at increasing their profits, suffered from a conflict of interest.<sup>59</sup> Only recently, the Court of Justice adjusted its view on private versus public income. Private operators, charities and the public purse have an interest in hearing their cash registers ring.<sup>60</sup> 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

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

<sup>58</sup>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 Automaten-service 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.

<sup>59</sup>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.

<sup>60</sup>Bogart, W.A., *Permit but Discourage - Regulating Excessive Consumption*, Oxford/ New York: Oxford University Press, 2001, at 355 *if*.

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.<sup>61</sup>

### 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.<sup>62</sup> 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.<sup>63</sup> Some governments went so far as to liken gambling to illegal products like drugs.<sup>64</sup> 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.<sup>65</sup> The true

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

<sup>62</sup> 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.

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

<sup>64</sup> *Ibid.*, para. 32.

<sup>65</sup> 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.<sup>66</sup>

Indeed, the Court of Justice relied on such ‘peculiar nature’ of gambling and found the morality of games of chance “at least questionable.”<sup>67</sup> While authors noted that the argument of a ‘peculiar nature’ of gambling played an essential role in the gambling case law,<sup>68</sup> *this argument has been uncritically accepted.*<sup>69</sup> 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<sup>70</sup>; even the mere “human pleasure in gambling” can be a problem.<sup>71</sup> Advocate General Gulmann referred to “gambling fever.”<sup>72</sup> 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.<sup>73</sup>

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<sup>66</sup>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.

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

<sup>68</sup>Doukas, and Anderson, “Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded”, at 240.

<sup>69</sup>*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.

<sup>70</sup>C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjät (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.

<sup>71</sup>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.

<sup>72</sup>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.

<sup>73</sup>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.”<sup>74</sup> 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.”<sup>75</sup>

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<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> Indeed, God and games of chance may be seen as competitors on the market for hope.<sup>79</sup> Books of devils categorised gambling

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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.

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

<sup>75</sup>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.

<sup>76</sup>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.

<sup>77</sup>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.

<sup>78</sup>Buland, “Die Kultur des Spiels – Einige Aspekte zur Einführung”, at 10.

<sup>79</sup>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.<sup>80</sup> Playing games was despised as idle and unproductive behaviour.<sup>81</sup> 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.<sup>82</sup>

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.”<sup>83</sup>

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*<sup>84</sup> and subsequent judgments of constitutional dimension. This consumer makes choices, enjoys rights and enforces them himself.<sup>85</sup> 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.<sup>86</sup> 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<sup>87</sup> and in the Charter.<sup>88</sup>

<sup>80</sup>Buland, “Die Kultur des Spiels – Einige Aspekte zur Einführung”, at 11. Cf. also Schumacher, “Des Teufels Spiel” – Glücksspiel in Mittelalter und früher Neuzeit”.

<sup>81</sup>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*.

<sup>82</sup>Potenza, “Gambling and Morality: A Neuropsychiatric Perspective”, at 176 and the therein cited literature.

<sup>83</sup>Sartre, J.-P., *L’existentialisme est un humanisme*, Paris: Nagel, (1946).

<sup>84</sup>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.”

<sup>85</sup>Cf. hereto the principle of direct effect as enshrined in *ibid.*, at II, B, 4th para.

<sup>86</sup>For the concept of ‘Verfassungspatriotismus’, cf. Sternberger, D., *Verfassungspatriotismus*, Frankfurt a.M.: Insel, 1990.

<sup>87</sup>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.”

<sup>88</sup>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.<sup>89</sup> 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.<sup>90</sup> 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*.<sup>91</sup> 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.<sup>92</sup> 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.”<sup>93</sup> 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.<sup>94</sup>

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.

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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.”

<sup>89</sup> Concurring: Verbeke who refers to the morality argument as hypocritical: Verbeke, “Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy”, at 257.

<sup>90</sup> 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.

<sup>91</sup> The next couple of paragraphs profited from a discussion with Professor Mathias Kumm of New York University.

<sup>92</sup> C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* 92004) ECR I-9609.

<sup>93</sup> *Ibid.*, para. 39.

<sup>94</sup> *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’.<sup>95</sup>

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*.<sup>96</sup> 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.<sup>97</sup>

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 Kincaid described:

Scientific knowledge tends to undermine dramatic purity.<sup>98</sup>

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

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<sup>95</sup>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–xi, at ix. Cf. also Collins, P., *Gambling and the Public Interest*, Westport, CT: Praeger Publishers, 2003.

<sup>96</sup>Collins, P., “Defining Addiction and Identifying the Public Interest in Liberal Democracies” in *What is Addiction?*, Ross, D., Kincaid, H., Spurrett, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 410–433, at 411.

<sup>97</sup>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.

<sup>98</sup>Ross, and Kincaid, “Introduction: What Is Addiction?”, at vii.

problems.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> 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.<sup>103</sup>

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<sup>99</sup>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.

<sup>100</sup>Ross, and Kincaid, “Introduction: What Is Addiction?”, at vii.

<sup>101</sup>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.

<sup>102</sup>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.

<sup>103</sup>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.<sup>104</sup> 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).<sup>105</sup>

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.<sup>106</sup>

## 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

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<sup>104</sup>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.”

<sup>105</sup>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.

<sup>106</sup>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*.