

Chapter 9

Proportionality Review in EU Gambling Law

Chapter 8 looked into the use of the margin of appreciation and noted a general tendency of the Court of Justice of leaving wide discretion to national authorities in the field of gambling. The previous chapter also showed that the doctrine of the margin of appreciation is supposed to go hand in hand with judicial review. Accordingly, Chap. 9 examines to which extent the granted discretion was accompanied by an effective proportionality review. Apart from this legal analysis, it also assesses the Court's review practice from an empirical perspective. It inquires to which extent the Court's views on gambling addiction are supported by empirical evidence on this mental disorder (Sect. 9.2). The Court's approach to games of chance is subsequently compared to cases involving similar consumer protection concerns (Sect. 9.3.1). Finally, the causes (Sect. 9.3.2) and consequences (Sect. 9.3.3) of the Court's diverging approach are examined. In view of inquiring the aforementioned aspects, Chap. 9 must start with an introduction to the *nature and mechanisms of gambling addiction* according to the current state of research (Sect. 9.1).

9.1 Gambling Addiction: An Introduction into Nature and Mechanisms

This section opens with a few remarks on the alleged peculiar nature of gambling addiction, followed by an introduction to the notion of gambling addiction and the global epidemiology of this mental disorder. Subsequently, the commonalities between gambling addiction and other forms of addiction are outlined. Finally, the different stages of the development of the disorder are explained.

9.1.1 A Peculiar Nature?

Among the justification grounds pleaded in the gambling cases, the protection of consumers from gambling-related harm is an important, if not the central concern. There can be no doubt that protecting consumers from gambling addiction is a *highly legitimate motive* that can justify restrictions to cross-border trade in gambling services. Until recently, the pan-European discussion in the legislative branch was very limited, and the Internal Market Courts consequently became the main ‘fora of discussion’ of gambling issues. In line with the adversarial setting of court proceedings and the financial consequences that are at stake,¹ private operators and public monopolies have usually continued their quarrel outside the courtroom immediately after the release of a new ruling. The aim has been to gain the high ground regarding the ‘correct interpretation’ of the judgment and to highlight alleged points of victory.²

According to prevalent views, gambling and gambling addiction appear to be fundamentally different from other risks and therefore need a different, separate regulatory approach. Both the EU legislator and EU judiciary have repeatedly emphasised a peculiar or special nature of gambling. The Services Directive states “[g]ambling activities [...] should be excluded from the scope of this Directive in view of the specific nature of these activities.”³ Counsels of governments have repeatedly argued this specific nature, be it in court hearings or public presentations.⁴ This could for instance be observed in *Anomar* where the Portuguese government pointed at the ‘special nature’ of gaming.⁵ Similarly, from the beginning the Court of Justice accepted the idea of gambling being a special case, referring in its first gambling case to “the peculiar nature of lotteries, which has been stressed by many Member States.”⁶ The following observations shall

¹The Gross Gaming Revenues (i.e., stakes less prizes but including bonuses) during 2008 were estimated to be around 75.9 billion Euros in the EU. The online gambling services accounted for 6.16 billion Euros, i.e., 8 % of the overall gambling market. In Malta, the gambling revenues amounted to 8 % of the national Gross Domestic Product (GDP). For many Member States, the gambling revenues amounted to around 1 % of the GDP. This seemingly small part is taxed at a much higher level (licensees) than other goods and services or is directly provided by an exclusive right holder: Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 8–9.

²For obvious procedural reasons, these post-judgment quarrels can be noted in particular in cases that follow the preliminary ruling procedure as the case is referred back to the national court to decide on the merits: Planzer, S. (2009). “Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning”, *European Law Reporter*, 11, 368–374, at 370.

³Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (‘Services Directive’), Preamble, para. 25.

⁴*Ex multis*, Vlaeminck, and Hubert, *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at gambling conference), at 1 and 17.

⁵C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 78.

⁶C-275/92 Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

inter alia serve to establish whether gambling addiction is peculiar in comparison to other mental health disorders.⁷

9.1.2 Notion and Epidemiology

9.1.2.1 Gambling Disorder

There are many notions that describe gambling addiction or related states,⁸ with ‘problem gambling’ arguably being the most prominent term.⁹ A commonly accepted definition of the disorder can only be found in the two leading medical manuals, which refer to ‘*pathological gambling*’ (old term) or ‘*gambling disorder*’ (new term). Until the next revision of the manual, the term pathological gambling will continue to be used in the International Statistical Classification of Diseases and Related Health Problems (ICD); this term was also used in the Diagnostic and Statistical Manual of Mental Disorders (DSM) until the latter’s most recent revision.

The ICD classifies diseases and medical conditions and is published by the World Health Organization (WHO).¹⁰ The currently applicable ICD-10 (version 2010), which is under revision,¹¹ lists pathological gambling as a ‘mental and behavioural disorder’ consisting of “frequent, repeated episodes of gambling that dominate the

⁷ Verbeke correctly noted that much gambling legislation was based on assumptions regarding the nature of gambling addiction: Verbeke, “Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy”, at 257.

⁸ Gambling addiction, problem gambling, disordered gambling, compulsive gambling, excessive gambling, intemperate gambling, in-transition gambling, at-risk gambling, *et cetera*.

⁹ *Ex multis*, cf. the website of the US National Council of Problem Gambling, at “FAQs – Problem Gamblers”, available at <http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=3315> (accessed 1 June 2012).

¹⁰ The ICD is updated by comprehensive as well as partial reviews with ICD-10 (10th revision, version 2010) being the currently applicable version. Simple updates are approved annually, but comprehensive revisions take many years. The first edition was known as the ‘International List of Causes of Death’, which was adopted by the International Statistical Institute in 1893. WHO took over the responsibility for the ICD in 1948 with the Sixth Revision. The current version, ICD-10, was endorsed in May 1990. ICD-11 is due to be released in 2015. The revisions of DSM and ICD are closely coordinated between the two task forces. The classification of disorders in DSM-5 for instance has been harmonised with the ICD coding system. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, preface, at xli; World Health Organization, “Classifications – International Classification of Diseases (ICD)”, available at <http://www.who.int/classifications/icd/en/> (accessed 1 June 2012); World Health Organization, “Classifications – The International Classification of Diseases 11th Revision is due by 2015”, available at <http://www.who.int/classifications/icd/revision/en/index.html> (accessed 1 June 2012).

¹¹ 10th revision, version 2010: “International Statistical Classification of Diseases and Related Health Problems 10th Revision”, available at <http://apps.who.int/classifications/icd10/browse/2010/en> (accessed 1 June 2012).

patient's life to the detriment of social, occupational, material, and family values and commitments."¹²

As opposed to the ICD, the *DSM offers diagnostic criteria*. This manual is the standard classification of mental disorders in the US¹³ and is used globally by mental health professionals. Its most recent revision, *DSM-5*, incorporated important changes and will also shape the forthcoming ICD-11.

DSM-IV used to classify 'pathological gambling' as an 'impulse-control disorder not elsewhere classified', next to disorders like kleptomania or pyromania for too little was known about pathological gambling at the time of its initial classification. DSM-5 reclassified the disorder and renamed it to '*gambling disorder*'. This term is very likely to be used by ICD-11 as well. Therefore, it is the most frequently used term in this chapter, except where other terms seem to be more appropriate.¹⁴ DSM-5 offers *nine diagnostic criteria* in relation to the diagnosis 'gambling disorder':¹⁵

- A. Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:
 1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement.
 2. Is restless or irritable when attempting to cut down or stop gambling.
 3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
 4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble).
 5. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
 6. After losing money gambling, often returns another day to get even ("chasing" one's losses).
 7. Lies to conceal the extent of involvement with gambling.
 8. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
 9. Relies on others to provide money to relieve desperate financial situations caused by gambling.
- B. The gambling behavior is not better explained by a manic episode.¹⁶

¹²ICD-10, Sect. F63.0, as reproduced on: "International Statistical Classification of Diseases and Related Health Problems 10th Revision: Pathological gambling", available at <http://apps.who.int/classifications/icd10/browse/2010/en#/F63.0> (accessed 1 June 2012). F63.0 further states that this category excludes: 'excessive gambling by manic patients (F30.-) gambling and betting NOS (Z72.6) gambling in dissociative personality disorder (F60.2)'.

¹³<http://www.psychiatry.org/practice/dsm> (accessed 1 June 2012).

¹⁴In relation to the *persons affected* by the disorder the still commonly recognised term 'pathological gamblers' is used since 'gamblers with gambling disorder' is linguistically unsuitable.

¹⁵*Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 585. The notion 'gambling disorder' is preferable to the initially suggested term 'disordered gambling' since 'disordered gambling' has been used by scholarship to include sub-clinical forms of disordered gambling behaviour. Cf. below.

¹⁶*Ibid.*, at 585.

Apart from removing one diagnostic criterion and minor linguistic adjustments, the revision to DSM-5 did not significantly alter the diagnosis. The past year (12 months) is now expressly mentioned as the relevant diagnostic period.¹⁷ The initial classification as impulse-control disorder, used until DSM-IV-TR, was criticised by many experts.¹⁸ DSM-5 *reclassified* gambling disorder under the heading ‘*substance-related and addictive disorders*’, categorising it together with substance use disorders. This new categorisation is based on solid empirical evidence. Other *behavioural* addictive disorders such as sex addiction, exercise addiction or shopping addiction will in the future be considered as potential additions to this category. However, at the time of the DSM-5 revision, there was insufficient peer-reviewed evidence to define diagnostic criteria and course descriptions for these disorders.¹⁹ For the moment, only ‘Internet gaming disorder’ was provisionally included in DSM-5 under the heading ‘conditions for further study’.²⁰

The definition of ‘gambling disorder’ only catches those persons who fulfil *four (or more) out of nine diagnostic criteria*.²¹ The dominating view in scholarship and treatment is that harm caused by disordered behaviour exists on a *continuum* from no gambling problems to severe problems.²² Shaffer et al. proposed to additionally use the terms ‘problem gambling’ and ‘disordered gambling’.²³ A Level 2 Gambler

¹⁷The removed criterion was “has committed illegal acts such as forgery, fraud theft, or embezzlement to finance gambling”. The diagnostic cut was changed to 4 out of 9 criteria (formerly 5 out of 10): BehaveNet, “Glossaries – Pathological Gambling”, available at <http://www.behavenet.com/pathological-gambling#301> (accessed 1 June 2012).

¹⁸*Ex multis*, for the discussion of categorising pathological gambling as addiction versus impulse-control disorder, cf. Petry, N.M., and Madden, G.J., “Discounting and Pathological Gambling” in *Impulsivity: The Behavioral and Neurological Science of Discounting*, Madden, G.J., and Bickel, W.K. (Eds.), Washington DC: American Psychological Association, 2010, pp. 273–294, at 276, and the therein cited literature regarding overlapping aspects of impulsivity. Cf. also Fineberg, N.A., Potenza, M.N., Chamberlain, S.R. et al. (2010). “Probing Compulsive and Impulsive Behaviors, from Animal Models to Endophenotypes: A Narrative Review.”, *Neuropsychopharmacology*, 35(3), 591–604; Brewer, J.A., and Potenza, M.N. (2008). “The Neurobiology and Genetics of Impulse Control Disorders: Relationships to Drug Addictions”, *Biochemical Pharmacology*, 75(1), 63–75.

¹⁹*Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 481. Professor Charles O’Brian, Chairman of the Substance-Related Disorders Work Group, at the annual NCRG conference in Las Vegas in November 2010.

²⁰*Ibid.*, at 795.

²¹Under DSM-IV-TR the diagnostic cut was 5 out of 10 criteria.

²²Whelan, J., Steenbergh, T., and Meyers, A., *Problem and Pathological Gambling*, Cambridge, MA, 2007, at 2; Shaffer, H.J., Hall, M.N., and Vander Bilt, J., *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, Cambridge, MA: Harvard Medical School, 1997.

²³Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, at table 2. This approach has been widely adopted in scholarship; cf. e.g. National Research Council, *Pathological Gambling: A Critical Review*, Washington DC: National Academy Press 1999.

(in-transition gambler, problem gambler) experiences some sub-clinical signs or symptoms and rarely shows up for treatment.²⁴ A Level 3 Gambler (pathological gambler) represents the most severe and stable form. The term ‘*disordered gambler*’ serves as overarching term. Scholars regularly use this tripartite terminology.²⁵

For reasons of consistency, the present book uses these terms according to the aforementioned definitions.²⁶ Gambling addiction is used as a popular synonym for gambling disorder (formerly: pathological gambling).

9.1.2.2 Epidemiology

Epidemiology is the field of research that attempts to determine the prevalence of a disorder (namely, what proportion of the population has the disorder) as well as the incidence (that is, the number of new cases that appear in a given time period). While an individual can receive the diagnosis ‘pathological gambler’, epidemiological screens (questionnaires) can only find the *probable spread* of a disorder in a given population.²⁷ The first step in understanding a disorder is to measure how widespread it is and to determine who is affected by it, either life-time or past-year.²⁸ The first team to study the prevalence of disordered gambling also developed the first epidemiological screen at the end of the 1970s.²⁹ Many others have been composed,³⁰ but their results should not be confused with clinical

²⁴ Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, table 2; Petry, N.M., *Pathological Gambling: Etiology, Comorbidity, and Treatment*, Washington DC: American Psychological Association, 2005, at 11.

²⁵ Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*, table 2. The percentage figures refer to the past year prevalence in the general population. They are the result of a meta-analysis of 120 prevalence studies. Petry, N.M., “Impulsivity and Its Association With Treatment Development for Pathological Gambling and Substance Use Disorders” in *What Is Addiction?*, Ross, D., Kincaid, H., Spurrett, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 335–347, at 335.

²⁶ American Psychological Association (Ed.), “DSM-5 Development – R 37 Gambling Disorder”, available at <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210> (accessed 1 June 2012).

²⁷ Cunningham-Williams, R.M., Cottler, L.B., and Womack, S.B., “Epidemiology” in *Pathological Gambling – A Clinical Guide to Treatment*, Grant, J.E., and Potenza, M.N. (Eds.), American Psychiatric Publishing, Inc., 2004, pp. 25–36, at 33.

²⁸ *Ibid.*, at 25.

²⁹ Kallick, M., Suits, D., Dielman, T. et al., *A Survey of American Gambling Attitudes and Behavior*, Research Report Series, Survey Research Center, Institute for Social Research, Ann Arbor, MI: University of Michigan Press, 1979; Shaffer, H.J., and Korn, D.A. (2002). “Gambling and Related Mental Disorders: A Public Health Analysis”, *Annual Review of Public Health*, 23, 171–212, at 181.

³⁰ For an overview, cf. Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*. A widely used screen has been the South Oaks Gambling Screen (SOGS); cf. Lesieur, H.R., and Blume, S.B. (1987). “The South Oaks Gambling Screen (SOGS): A New Instrument for the Identification of Pathological Gamblers”, *American Journal of Psychiatry*, 144(9), 1184–1188. The SOGS has been widely

accuracy.³¹ As these screens consist of different questions, they may lead to varying prevalence rates of gambling disorder.³²

While the data situation regarding the prevalence of gambling disorder is poor in most countries, it is well established in the US and Canada.³³ Studies conducted in various countries around the globe indicate similar prevalence rates as in North America.³⁴ The life-time prevalence rates of gambling disorder range from about 0.5 % to 2.0 % in the general population.³⁵ The range is largely due to differences in samples, instruments, methodology and the actual availability of gambling.³⁶ Petry found the estimates to be relatively consistent globally and concluded that prevalence rates of life-time Level 3 Gambling (gambling disorder) most often range from about 1 % to 2 % and life-time rates of Level 2 Gambling (problem gambling) from 2 % to 5 %. She also found past-year prevalence rates to be about 40–60 % lower than life-time rates,³⁷ that is, 0.25–1 % of the general population experienced gambling disorder within the past year. These findings were also confirmed by other studies. A review of over 100 prevalence studies spanning more than 20 years of research showed a gambling disorder rate of approximately 1 %.³⁸ Among the

criticised for producing inflated rates; cf. Ferris, J.A., and Wynne, H.J., *The Canadian Problem Gambling Index: Final Report*, Canadian Centre on Substance Abuse 2001, cited in Weinstock, J., Ledgerwood, D.M., Modesto-Lowe, V. et al. (2008). “Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment”, *Revista Brasileira de Psiquiatria*, 30(1), 3–10. Further instruments include the DSM-IV Screen for Gambling Problems (NODS) or the Canadian Problem Gambling Index. Shortly after 2000, already more than 27 such screens were known: cf. Shaffer, and Korn, “Gambling and Related Mental Disorders: A Public Health Analysis”, at 181.

³¹ Szasz, T. (1991). “Diagnoses Are Not Diseases”, *The Lancet*, 338(8782), 1574–1576.

³² For a detailed discussion of screens, cf. Chap. 14: ‘Screening and Assessment Instruments’, in Grant, J.E., and Potenza, M.N., *Pathological Gambling – A Clinical Guide to Treatment*, American Psychiatric Publishing, Inc., 2004.

³³ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16.

³⁴ *Ibid.*, at 16.

³⁵ Weinstock, Ledgerwood, Modesto-Lowe et al., “Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment”, and the cited prevalence studies; Bland, R.C., Newman, S.C., Orn, H. et al. (1993). “Epidemiology of Pathological Gambling in Edmonton”, *The Canadian Journal of Psychiatry/La Revue canadienne de psychiatrie*, 38(2), 108–112; Petry, N.M., Stinson, F.S., and Grant, B.F. (2005). “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”, *Journal of Clinical Psychiatry*, 66(5), 564–574; Volberg, R.A., Abbott, M.W., Rönning, S. et al. (2001). “Prevalence and Risks of Pathological Gambling in Sweden”, *Acta Psychiatrica Scandinavica*, 104(4), 250–256; Welte, J., Barnes, G., Wiczorek, W. et al. (2001). “Alcohol and Gambling Pathology among U.S. Adults: Prevalence, Demographic Patterns and Comorbidity”, *Journal of Studies on Alcohol*, 62(5), 706–712.

³⁶ Weinstock, Ledgerwood, Modesto-Lowe et al., “Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment”, at 4–5.

³⁷ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 20.

³⁸ Wiebe, J., and Volberg, R.A., *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, 2007, available at http://www.canadiangaming.ca/images/stories/media_releases/problem_gambling_prevalence_research_a_critical_overview.pdf, at 13. The report only took into account ‘severe problem gambling’: in other words high levels

jurisdictions included, only the rates in Hong Kong, Macao and Singapore were substantially higher with approximately 2 %.³⁹

In North America, several studies of high quality and large sample sizes have addressed the prevalence in the general population nationally.⁴⁰ The first national prevalence study was already published in 1979 by Kallick et al., one year before ‘pathological gambling’ (now: ‘gambling disorder’) was included in DSM-III. The study had been commissioned in view of the increasing appearance of new forms of legalised gambling,⁴¹ which mainly concerned the booming casino industry in Nevada, in particular along ‘the strip’ in Las Vegas. Kallick et al. indicated life-time rates of 0.7 % for ‘probable compulsive gambling’, which comes closest to ‘gambling disorder’, and 2.3 % for the less severe form of ‘potential compulsive gambling’. About 61 % of the people had gambled within the last year and 68 % at least once in their life.⁴²

The next estimate was delivered by Shaffer et al.⁴³ who conducted a meta-analysis of all prevalence studies in Canada and the US between 1975 and 1997 that met minimum requirements regarding methodology and data samples. According to the 120 identified studies, 4 % qualified as life-time and 2.8 % as past-year Level 2 Gamblers (problem gambling), and 1.5 % as life-time and 1.1 % as past-year Level 3 Gamblers (gambling disorder). A committee of the National Research Council reanalysed these findings and found very similar rates.⁴⁴

The third national study was conducted by Gerstein et al. and commissioned by the National Gambling Impact Study Commission.⁴⁵ Its results are seen as being of limited utility due to methodological and data sample reasons.⁴⁶ Only a few years later, Welte et al. found a rate of 2.0 % for life-time gambling disorder and 1.35 % for past-year gambling disorder.⁴⁷ The study thus confirmed the findings from the

such as probable pathological (SOGS), pathological (NODS), severe problem gambling (PGSI) and compulsive gambling (GA-20), regardless of the instrument used. Arguably, ‘severe’ in this study comes close to the clinical term ‘pathological gambling’ but is not identical. The report focused on past year prevalence rates exclusively.

³⁹ *Ibid.*, at 13.

⁴⁰ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 14.

⁴¹ *Ibid.*, at 14–15.

⁴² Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

⁴³ Shaffer, Hall, and Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behaviour in the United States and Canada: A Meta-Analysis*.

⁴⁴ National Research Council, *Pathological Gambling: A Critical Review*, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

⁴⁵ Gerstein, D., Murphy, S., and Toce, M., *Gambling Impact and Behavior Study: Final Report to the National Gambling Impact Study Commission*, University of Chicago National Opinion Research Center 1999, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

⁴⁶ Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 26; Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16.

⁴⁷ Welte, J.B., Barnes, G.M., Wieczorek, W.F. et al. (2002). “Gambling Participation in the U.S. – Results from a National Survey”, *Journal of Gambling Studies*, 18(4), 313–337, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

meta-analysis by Shaffer et al.⁴⁸ In sum, these studies showed a trend of increasing prevalence rates.

Where researchers used well-developed instruments in Canada, they found rates similar to those reported in most US surveys.⁴⁹ Several studies on gambling disorder indicated life-time rates of Level 3 Gambling from 0.8 % to 1.7 %.⁵⁰ Older prevalence rates used to be over 1 % (prior to 1997), with more recent Canadian studies reporting past year prevalence as low as 0.5 %.⁵¹

The North American epidemiological data situation is the most solid globally and shows a highly interesting and relevant phenomenon. Until the beginning of the new millennium, a trend could be identified. The participation in some form of gambling had clearly increased over time and so had the prevalence rates of gambling disorder. The rates from the first US national study in 1979 (0.7 % for life-time ‘compulsive gambling’, 2.3 % for ‘probable compulsive gambling’, 1979) had more than doubled to reach those in 2002 (2.0 % for life-time gambling disorder). However, subsequent studies with large samples found significantly lower rates. Petry et al.’s analysis of a large sample from the National Epidemiological Survey on Alcohol and Related Conditions (NESARC) found a life-time prevalence rate for gambling disorder of only 0.4 % and a life-time prevalence rate for problem gambling of 0.9 %.⁵² Kessler et al. analysed data from the National Comorbidity Survey Replication (NCS-R) and found a life-time prevalence rate for gambling disorder of 0.6 % and life-time problem gambling rate of 2.3 %.⁵³

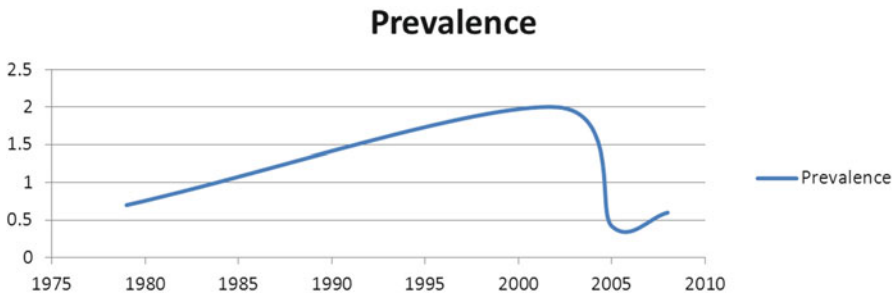


Fig. 9.1 Life-time prevalence of gambling disorder in the US

⁴⁸Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16.

⁴⁹*Ibid.*, at 16.

⁵⁰*Ibid.*, at 16.

⁵¹Derevensky, J., Gupta, R., and Csiernik, R., “Problem Gambling: Current Knowledge and Clinical Perspectives” in *Responding to the Oppression of Addiction – Canadian Social Work Perspectives*; Csiernik, R., and Rowe, W. (Eds.), 2nd ed., Toronto: Canadian Scholars Press, 2003, pp. 359–378, at 360.

⁵²Petry, Stinson, and Grant, “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”, at 564.

⁵³Kessler, R.C., Hwang, I., LaBrie, R.A. et al. (2008). “DSM-IV Pathological Gambling in the National Comorbidity Survey Replication”, *Psychological Medicine*, 38(9), 1351–1360.

In other words, the prevalence rates from most recent years are similar to those found at the end of the 1970s. At first sight, this must be surprising since gambling offers at that time were far less prevalent and limited to a few states. Scholarship has explained this phenomenon with the capacity of populations to adapt to the exposure to environmental factors (see Sect. 9.2.5.2).

The epidemiological data situation in Europe is quite poor, with many countries featuring either one or even no study.⁵⁴ Petry found that many studies suffer from methodological deficits.⁵⁵ A study comparing rates from both North America and Europe found them to be remarkably similar, given the range of methods and measures.⁵⁶ A recent research project, which collected the available prevalence rates from 1997 to 2010 of all EU and EFTA countries, found a mean past-year prevalence of 0.57 % (weighted for sample size: 0.44 %).⁵⁷ These results are reminiscent of the aforementioned global prevalence rates (0.25–1 %).

Another remarkable fact is that some European countries, similar to the development in North America, have seen their rates stabilising over time, with some of them even showing decreased levels.⁵⁸ The UK serves as an example. Within one decade, the prevalence rates of gambling disorder have remained quite stable in spite of increased exposure to games of chance.⁵⁹ The last few years have brought a substantial liberalisation of the gambling market, including licensing of online operators and relaxation of advertising rules.⁶⁰

⁵⁴ Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Meyer, G., Hayer, T., and Griffiths, M., *Problem Gambling in Europe: Challenges, Prevention, and Interventions*, New York: Springer, 2009.

⁵⁵ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 20.

⁵⁶ Shaffer, H.J., LaBrie, R.A., LaPlante, D.A. et al. (2004a). “The Road Less Traveled: Moving from Distribution to Determinants in the Study of Gambling Epidemiology”, *Canadian Journal of Psychiatry*, 49(8), 504–516, at 509.

⁵⁷ Planzer, S., Gray, H., and Shaffer, H. (2014). “Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe”, *International Journal of Law and Psychiatry*, 37(2); for the prevalence rates, cf. Planzer (ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

⁵⁸ Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Wiebe, and Volberg, *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, at 13.

⁵⁹ Sproston, K., Erens, B., and Orford, J., *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999, 2000*. The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % (DSM-IV). Wardle, H., Sproston, K., Orford, J. et al., *British Gambling Prevalence Survey 2007*, National Centre for Social Research 2007. The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV). Wardle, H., Moody, A., Spence, S. et al., *British Gambling Prevalence Survey 2010*, National Centre for Social Research 2011.

⁶⁰ UK Gambling Act.

9.1.3 *Commonalities Between Gambling Disorder and Other Expressions of Addiction*

This section elaborates on the nature and mechanisms of gambling disorder and broadens the scope to the bigger concept of addiction. It first investigates whether substances cause addiction. It presents the manifold commonalities that exist between substance-related disorders and gambling disorder. The commonalities are illustrated by the diagnostic criteria of DSM-5 and an accumulation of empirical evidence.

9.1.3.1 Is the Object to Blame?

Most people have either tried alcohol in their lives or seen people drinking alcohol.⁶¹ Alcohol, such as wine, may enervate people's behaviour. This can be noticed in a social setting such as a reception or a dinner. It may lower inhibitions and increase the willingness to engage in conversations with other guests. Yet, the same substance is unlikely to result in an energising effect when consumed home alone: the same person may feel relaxed (positive), tired (neutral) or even melancholic or depressed (negative). If the two situations involve the very same person and the very same amount and kind of substance, why do they lead to different emotional experiences? Why do some people manage to handle their alcohol consumption while others do not? These considerations already show that alcohol, a substance associated both with recreational and addictive consumption, does not have the same effect on every person and in every situation.

In the 1970s, Zinberg showed that there was no direct causal link between drug consumption and drug addiction. He described case studies of heroin users who had managed over many years to use heroin in a stable and controlled manner. A necessary element of addiction is the *loss of control* over the consumption. Subjects of the study had not developed the characteristic symptoms associated with addiction.⁶² Zinberg's findings forced the research community to take a new angle towards addiction research. There had to be other factors that were capable of influencing people's experiences.⁶³

⁶¹ The following example is informed by a discussion with Professor Howard Shaffer of Harvard Medical School and serves as introduction into the topic.

⁶² Zinberg, N.E., and Jacobson, R.C. (1976). "The Natural History of "Chipping"", *American Journal of Psychiatry*, 133(1), 37–40.

⁶³ In the long history of addiction research, most attention has been paid to drugs (agent) and consumers (host). More recently, the relevance of the social setting has been increasingly recognised in the literature. While certain substances correlate more strongly with addiction than others, they do not determine the outcome. For the varying *potential* of addiction of different substances, cf. Linden, D.J., *The Compass of Pleasure: How Our Brains Make Fatty Foods, Orgasm, Exercise, Marijuana, Generosity, Vodka, Learning, and Gambling Feel So Good*, New York: Penguin Books, 2011, at 46–54.

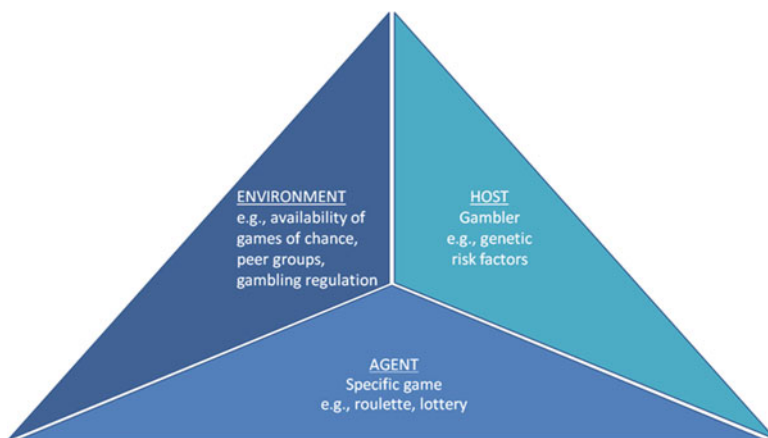


Fig. 9.2 Triad model of disease transmission

9.1.3.2 Triad Model of Disease Transmission: Agent, Host, Environment

Empirical evidence shows that the mental health disorder ‘addiction’ is not specific to a certain object or substance. Shaffer expressed the object non-specificity of addiction as follows:

If drug using were the necessary and sufficient cause of addiction, then addiction would occur every time drug using was present. Similarly, if drug using was the only cause of addiction, addictive behaviors would be absent every time drug using was missing.⁶⁴

Research over several decades has established that the focus on the object fails to explain the nature and mechanisms of addiction. Various factors have been identified that contribute to the development of addiction. These factors relate to the host (subject), the agent (object) and the environment and interrelate in complex ways. Empirical evidence on substance-related disorders is older than on gambling disorder. The findings from the former can provide valuable information in situations where gaps of research regarding gambling disorder occur.⁶⁵

The public health model of disease transmission illustrates the interplay of the various factors relating to host, agent and environment. In this model, gambling regulation can be seen as an environmental factor that impacts people’s behaviour (Fig. 9.2).⁶⁶

⁶⁴ Shaffer, H.J., “What is Addiction?: A Perspective”.

⁶⁵ During a presentation in Vienna in 2007, Professor Howard Shaffer estimated that about half of the research publications on gambling disorders dated from 1999 onwards.

⁶⁶ Planzer, S., and Wardle, H., *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, Report prepared for the Responsible Gambling Fund 2011.

9.1.3.3 Commonalities in DSM-5

Since its introduction in DSM-III in 1980, ‘pathological gambling’ (now: gambling disorder) was classified, in the absence of a better option and along with other disorders, as an impulse-control disorder.⁶⁷ *DSM-5 reclassified gambling disorder*: substance use disorders and gambling disorder are now listed under the *same category of ‘substance-related and addictive disorders’*. Even prior to the most recent revision towards DSM-5, the close relationship of substance-related addiction and gambling addiction was already evident from the diagnostic criteria.⁶⁸ Table 9.1 shows the striking similarity of the diagnostic criteria of gambling disorder and substance use disorders. In order to facilitate the comparison, the commonalities are highlighted in the table. Alcohol use disorder and tobacco use disorder are used as examples. It should be noted that any other substance-related disorder could be used as well (opioids, cannabis, inhalents, etc.) since the diagnostic criteria are largely identical.⁶⁹

As Table 9.1 illustrates, most diagnostic criteria of the substance use disorders find similar equivalents in the diagnostic criteria of gambling disorder. Notably, *only two (of eleven) criteria* must be fulfilled to meet the diagnosis for a mild alcohol or tobacco use disorder and *only four (of nine) criteria* to meet the diagnosis for a mild gambling disorder. As a result, in a situation where one patient is diagnosed for ‘alcohol use disorder’, another patient for ‘tobacco use disorder’ and yet another one for ‘gambling disorder’, *all three patients are likely to meet similar diagnostic criteria*. Even though the agents (objects of addiction) are different, the diagnosed signs and symptoms are very similar (Table 9.1).

The exact wording of the criteria of gambling and substance-related disorders slightly differs, which has obvious reasons.⁷⁰ In substance, however, their diagnostic

⁶⁷DSM-IV-TR defined ‘Impulse-Control Disorders’ as follows: “Individuals with these **mental disorders** suffer from recurrent failure to resist impulsive behaviors that may be harmful to themselves or others. These include: **Intermittent Explosive Disorder**, **Kleptomania**, **Pathological Gambling**, **Pyromania**, **Trichotillomania**.” BehaveNet, “Glossaries – Impulse-Control Disorders”, available at <http://www.behavenet.com/capsules/disorders/impulsecntrldis.htm> (accessed 1 June 2012).

⁶⁸Although the term ‘addiction’ is commonly used in many countries, DSM-5 still preferred to use the term ‘disorder’ for the various expressions of addictive disorders. This is to reflect the wide range of addictive disorders that exist in a continuum from mild forms to severe forms. DSM-IV-TR used to distinguish between ‘abuse’ (mild) and ‘dependence’ (severe); DSM-5 now specifies the severity as mild (2–3 symptoms for substance-related disorders; 4–5 symptoms for gambling disorder), moderate (4–5 symptoms; 6–7 symptoms) and severe (6 or more symptoms; 8–9 symptoms). ‘Addiction’ is commonly associated with severe problems in relation to substance-related or behavioural disorders. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 485.

⁶⁹Ibid., at 483–585.

⁷⁰Criterion 8 of alcohol and tobacco use disorder is not well suited for the gambling environment: gambling behaviour does generally not take place in physically hazardous situations. This may be different with certain remote channels (e.g., use of mobile devices behind the wheel). With regard

Table 9.1 Diagnostic criteria of alcohol use disorder, tobacco use disorder, and gambling disorder according to DSM-5

Alcohol use disorder	Tobacco use disorder	Gambling disorder
<p>A problematic pattern of alcohol use leading to clinically significant impairment of distress, as manifested by at least two of the following, occurring within a 12-month period:</p> <p>1. Alcohol is often taken in larger amount or over a longer period than was intended</p> <p>2. There is a persistent desire or unsuccessful efforts to cut down or control alcohol use</p> <p>3. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects</p> <p>4. Craving, or a strong desire or urge to use alcohol</p> <p>5. Recurrent alcohol use resulting in a failure to fulfil major role obligations at work, school, or home</p> <p>6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol</p>	<p>A problematic pattern of tobacco use leading to clinically significant impairment of distress, as manifested by at least two of the following, occurring within a 12-month period:</p> <p>1. Tobacco is often taken in larger amount or over a longer period than was intended</p> <p>2. There is a persistent desire or unsuccessful efforts to cut down or control tobacco use</p> <p>3. A great deal of time is spent in activities necessary to obtain or use tobacco</p> <p>4. Craving, or a strong desire or urge to use tobacco</p> <p>5. Recurrent tobacco use resulting in a failure to fulfil major role obligations at work, school, or home (e.g., interference with work)</p> <p>6. Continued tobacco use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of tobacco (e.g., arguments with others about tobacco use)</p>	<p>A. Persistent and recurrent problematic gambling behaviour leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:</p> <p>3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling</p> <p>3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling</p> <p>4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble) (<i>Feelings of craving and compulsion are not object-specific. They are characteristic of addictive consumption in general. The feeling of compulsion, in particular in situations of escape, is expressed in criterion 5.</i>)</p> <p>Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed) (<i>This criterion is similar to criterion 7 of alcohol and tobacco use disorder. The failure to fulfil the role ultimately leads to jeopardizing or losing a significant relationship, job or educational or career opportunity, confer criterion 8 of gambling disorder. The criterion is not object-specific, but characteristic of addictive consumption in general</i>) (<i>Continuation of consumption despite detrimental consequences is not object-specific. They are characteristic of addictive consumption in general</i>)</p>

7. Important **social, occupational, or recreational activities are given up or reduced** because of alcohol use
8. Recurrent alcohol use in situations in which it is physically hazardous
9. Alcohol use in continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol
10. **Tolerance**, as defined by either of the following:
- A need for **markedly increased amounts** of alcohol to achieve **intoxication or desired effect**
 - A markedly diminished effect with continued use of the same amount of alcohol
11. **Withdrawal**, as manifested by either of the following:
- The characteristic withdrawal syndrome for alcohol (refer to Criteria A and B of the criteria set for alcohol withdrawal, pp. 499–500)
 - Alcohol (or closely related substance, such as benzodiazepine) is taken to relieve or avoid withdrawal symptoms
7. Important **social, occupational, or recreational activities are given up or reduced** because tobacco use
8. Recurrent tobacco use in situations in which it is physically hazardous (e.g., smoking in bed)
9. Tobacco use in continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by tobacco
10. **Tolerance**, as defined by either of the following:
- A need for **markedly increased amounts** of tobacco to achieve **the desired effect**
 - A markedly diminished effect with continued use of the same amount of tobacco
11. **Withdrawal**, as manifested by either of the following:
- The characteristic withdrawal syndrome for tobacco (refer to Criteria A and B of the criteria set for tobacco withdrawal)
 - Tobacco (or closely related substance, such as nicotine) is taken to relieve or avoid withdrawal symptoms
8. Has **jeopardized or lost a significant relationship, job or educational or career opportunity** because of gambling
- (*Gambling generally takes place in a safe setting, in particular in casinos. Remote channels (e.g., mobile phones) may be more suited to involve physically hazardous situations (e.g., behind the wheel)*)
- (*Continuation of consumption despite knowledge of gambling as the source of problem is not object-specific. It is characteristic of addictive consumption in general*)
1. Needs to gamble with **increasing amounts** of money in order to **achieve the desired excitement**
2. Is **restless or irritable** when attempting to cut down or stop gambling

DSM-5, pp. 490, 571 and 585. Bold emphasis and comments with italic emphasis added.

criteria reflect loss of control, continued use in spite of negative consequences as well as craving or compulsion that are characteristic of addiction. Similar to substance-related disorders, impaired control (criteria 3–5 of gambling disorder), social impairment (criterion 8) and pharmacological criteria (criteria 1–2) can be observed among gambling addicts as well.⁷¹

Finally, the diagnostic criteria of alcohol and tobacco use disorder (4, 5, 6 and 9) that do not find direct equivalents in the wording of the criteria regarding gambling disorder are characteristic of addiction in general. They reflect situations of life where the *compulsive nature of the addictive consumption or behaviour* (criterion 4) results in *adverse consequences* (criteria 5, 6 and 9). The shared compulsiveness and adverse consequences among different addicts become obvious where a ‘severe’ severity level is diagnosed.⁷² Zinberg noted early on that the self-destructive addiction process makes different addicts look very similar.⁷³ They regularly share deviant behaviour, social drift and delinquency (see Sect. 9.1.3.5 *i.f.*).

9.1.3.4 Addiction Versus Dependence

Dependence and addiction are often used as interchangeable terms in popular literature but *their nature is significantly different*.

Addiction was traditionally associated with drugs. Yet, in its definition of ‘addict’ already DSM-IV-TR recognised that there may be addictive behavioural patterns beyond the in-take of drugs:

This term may refer to one who suffers from any **drug addiction** and sometimes to individuals with **other compulsive problem behaviors**.⁷⁴

Shaffer offers a *definition of addiction* that embeds both substances and behaviours. There are a few characteristic ‘C-aspects’ to addiction. Addiction is characterised by:

to the criteria for gambling disorder, there are criteria that specifically relate to the gambling setting:

6. After losing money gambling, often returns another day to get even (“chasing” one’s losses).
7. Lies to conceal the extent of involvement with gambling.
9. Relies on others to provide money to relieve desperate financial situations caused by gambling.

⁷¹ *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, pp. 483–484.

⁷² For this point, namely regarding severity and addiction, cf. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 484–485.

⁷³ Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use*.

⁷⁴ BehaveNet, “Glossaries – addict”, available at <http://www.behavenet.com/addict> (accessed 1 June 2012). Bold emphasis added.

- Behavior that is motivated by emotions ranging along the **Craving to Compulsion** spectrum
- **Continued** use in spite of adverse **consequences** and
- **Loss of Control**.⁷⁵

The intense urge to re-engage in the use of a substance or behaviour is characteristic of any form of addiction. Brain imaging is a particularly good way of documenting similar craving-related brain activity for different expressions of addiction. Investigations in the neural correlates of craving states in gambling disorder compared to those in cocaine-use disorder confirmed the general literature on gambling addiction and substance-related addiction.⁷⁶

Dependence differs significantly from the nature of addiction. Not every person who experiences signs and symptoms of dependence is addicted. Patients treated over a certain time with the pain killer methadone, a synthetic opioid that impacts the opioid receptors similar to heroin, may experience neuroadaptive phenomena like tolerance and withdrawal. In the case of *tolerance*, the same amount of methadone, over time, no longer produces the same positive effect as it initially did. In the case of *withdrawal*, the patient reacts restlessly and irritably when trying to reduce methadone intake. The tolerance and withdrawal symptoms in these situations are normal responses to prescribed medication and a mere expression of *physiological dependence*. These responses do not turn patients into methadone addicts. *The physiological dependence will fade over time*.⁷⁷

In stark contrast, an addict has to overcome addiction, that is, a mental health disorder that comes with massive mental and physical challenges as well as very high rates of relapse. Correctly, DSM-5 no longer counts tolerance and withdrawal for those taking medications under medical supervision.⁷⁸ The work group concluded that the confusion of dependence and addiction had resulted in withholding adequate doses of opioids from patients with severe pain because of *the fear of ‘producing addiction’*.⁷⁹

9.1.3.5 Commonalities in Empirical Research

The aforementioned reclassification of gambling disorder and reformed understanding of addiction is based on empirical evidence accumulated over several

⁷⁵ Shaffer, “What is Addiction?: A Perspective”.

⁷⁶ Potenza, M.N. (2008). “The Neurobiology of Pathological Gambling and Drug Addiction: An Overview and New Findings”, *Philosophical Transactions of the Royal Society London Biological Sciences*, 363(1507), 3181–3189, at 3186.

⁷⁷ *Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, Preface, at xlii.

⁷⁸ *Ibid.*, Preface, at xlii.

⁷⁹ American Psychological Association (Ed.), “DSM-5 Development – R 37 Gambling Disorder”, available at <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210> (accessed 1 June 2012). See also Sect. 9.1.3.5 ‘Comorbidity’.

decades.⁸⁰ That evidence shows manifold commonalities between *substance-related forms of addiction and behavioural addiction* like gambling disorder. These parallels show that public policy on gambling addiction must be considered in and informed by a greater policy on addiction. A *holistic perspective on addiction* dismisses an isolated view on gambling addiction.

Neurobiological Processes and Dopamine Reward System

Research has established that both substances and behaviour can stimulate neurobiological systems. This has been particularly shown in relation to the *dopamine* reward system.⁸¹ The neurotransmitter dopamine is largely seen as a key player in the development and maintenance of drug and behavioural addiction, and the neurobiological circuitry of the central nervous system as the common pathway for addiction.⁸² People suffering from different addictive disorders show a similar *pre-use thrill*. Different objects of addiction stimulate similar neurobiological pathways: the biochemical reactions in the brain are similar.⁸³ Research with magnetic resonance imaging (MRI) has demonstrated an anticipation or pre-use thrill for different objects. Pathological gamblers show the same kind of excitement when shown pictures of casino tables comparable to the effect on cannabis addicts when shown a joint. Former pathological gamblers who had not played for five years show only weak reactions.⁸⁴ This shows that the pre-use thrill experience is not chronic and that, *with successful recovery, neurobiological reactions fade out over time*. It was further shown that beauty and money can stimulate the dopamine reward system in similar ways as the anticipation of cocaine use in the case of cocaine users.⁸⁵ Our reward system is open to accommodate many different substances and behaviours that we may

⁸⁰ Section 9.1.3.5 and the therein cited literature are largely based on Shaffer, H.J., LaPlante, D.A., LaBrie, R.A. et al. (2004b). "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology", *Harvard Review of Psychiatry*, 12(6), 367–374.

⁸¹ Betz, C., Mihalic, D., Pinto, M.E. et al. (2000). "Could a Common Biochemical Mechanism Underlie Addictions?", *Journal of Clinical Pharmacy and Therapeutics*, 25(1), 11–20; Wise, R.A. (1996), "Addictive Drugs and Brain Stimulation Reward", *Annual Review of Neuroscience*, 19, 319–340; Hyman, S.E. (1994), "Why Does the Brain Prefer Opium to Broccoli?", *Harvard Review of Psychiatry*, 2(1), 43–46; Daigle, R.D., Clark, H.W., and Landry, M.J. (1988). "A Primer on Neurotransmitters and Cocaine", *Journal of Psychoactive Drugs*, 20(3), 283–295.

⁸² Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

⁸³ Potenza, M.N. (2001). "The Neurobiology of Pathological Gambling", *Seminars in Clinical Neuropsychiatry*, 6(3), 217–226.

⁸⁴ "Kaufen bis der Arzt kommt", NZZ am Sonntag, 22 April 2007.

⁸⁵ Breiter, H.C., Aharon, I., Kahneman, D. et al. (2001). "Functional Imaging of Neural Responses to Expectancy and Experience of Monetary Gains and Losses", *Neuron* 30(2), 619–639; Aharon, I., Etcoff, N., Ariely, D. et al. (2001). "Beautiful Faces Have Variable Reward Value: fMRI and Behavioral Evidence", *Neuron*, 32(3), 537–551.

experience in some positive way. Next to dopamine, various other neurochemical factors have been described.⁸⁶ Neurobiological research can serve to improve cognitive-behavioural treatments.⁸⁷

Comorbidity: Psychopathology and Addiction

It is important to note that gambling disorder and other addictive disorders are regularly *accompanied by additional disorders*. Prevalence rates of substance-related disorders in North American studies that are similar or higher than those of gambling disorder include opioid ‘dependence’⁸⁸ 1.4 %, cocaine dependence 2.8 %, and amphetamine dependence 2.0 %.⁹¹ Among those rates relating to psychopathology, one can find anti-social personality disorder 3.6 %, obsessive-compulsive disorder 1.6 %, schizophrenic disorders 0.6 %, anorexia nervosa 0.6%⁹⁵ and bulimia nervosa 1.0 %.⁹⁶

⁸⁶Bellegarde, J.D., and Potenza, M.N., “Neurobiology of Pathological Gambling” in *What is Addiction?*, Ross, D., Kincaid, H., Spurrett, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, 27–51, at 31–35.

⁸⁷Potenza, M.N., Balodis, I.M., Franco, C.A. et al., “Neurobiological Considerations in Understanding Behavioral Treatments for Pathological Gambling”, *Psychology of Addictive Behaviors*, Advance online publication: 2013, April 15.

⁸⁸Up to DSM-IV-TR, substance use disorder used to be categorised as substance ‘abuse’ (mild forms) and substance ‘dependence’ (more severe forms). DSM-5 uses the overarching term substance use disorder, with the severity ranging from mild to moderate and severe. The DSM-IV-TR severity level dependence corresponds to the DSM-5 levels moderate (4–5 diagnostic criteria) and severe (6 or diagnostic criteria). See also Sect. 9.1.3.4.

⁸⁹Conway, K.P., Compton, W., Stinson, F.S. et al. (2006). “Lifetime Comorbidity of DSM-IV Mood and Anxiety Disorders and Specific Drug Use Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”, *Journal of Clinical Psychiatry*, 67(2), 247–257.

⁹⁰Ibid.

⁹¹Compton, W.M., Conway, K.P., Stinson, F.S. et al. (2005). “Prevalence, Correlates, and Comorbidity of DSM-IV Antisocial Personality Syndromes and Alcohol and Specific Drug Use Disorders in the United States: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”, *Journal of Clinical Psychiatry*, 66(6), 677–685.

⁹²Ibid.

⁹³Kessler, R.C., Berglund, P., Demler, O. et al. (2005). “Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication”, *Archives of Clinical Psychiatry*, 62(6), 593–602.

⁹⁴Goldner, E., Hsu, L., Waraich, P. et al. (2002). “Prevalence and Incidence Studies of Schizophrenic Disorders: A Systematic Review of the Literature”, *Canadian Journal of Psychiatry*, 47(9), 833–843.

⁹⁵Hudson, J.I., Hiripi, E., Pope Jr., H.G. et al. (2007). “The Prevalence and Correlates of Eating Disorders in the National Comorbidity Survey Replication”, *Biological Psychiatry*, 61(3), 348–358.

⁹⁶Ibid.

European studies too confirm that gambling disorder is one mental disorder among many other mental disorders. As noted earlier, the past-year prevalence of gambling disorder varies in Europe between 0.25 % and 1 % (see Sect. 9.1.2.2 *if.*). Wittchen et al. measured the *size and burden of mental disorders in Europe*. They identified past-year prevalence rates for alcohol ‘dependence’⁹⁷ (3.4 %), cannabis dependence (1.05 %) and opioid dependence (0.25 %). Prevalence rates similar to those of gambling disorder related to Borderline Personality Disorder (0.7 %) and Eating Disorders (0.85 %). By far the most prevalent mental disorders were anxiety disorders (14 %) and major depression (6.9 %).⁹⁸

How do various mental disorders relate to each other? Scholarship has established the so-called phenomenon of *comorbidity*, that is, the occurrence of one or several disorders in addition to a primary disorder. High rates of comorbidity between psychiatric and substance use disorders have been found in studies relating to the general population⁹⁹ as well as to specific sub-groups.¹⁰⁰ People suffering from substance use disorders show increased levels of psychopathology, including the aforementioned highly prevalent depressions and anxiety disorders.¹⁰¹ Other studies

⁹⁷Up to DSM-IV-TR, substance use disorders used to be categorised as substance ‘abuse’ (mild forms) and substance ‘dependence’ (more severe forms). DSM-5 uses the overarching term substance use disorder, with the severity ranging from mild to moderate and severe. The DSM-IV-TR severity level dependence corresponds to the DSM-5 levels moderate (4 or more diagnostic criteria) and severe. See also Sect. 9.1.3.4.

⁹⁸Wittchen, H.U., Jacobi, F., Rehm, J. et al. (2011). “The Size and Burden of Mental Disorders and Other Disorders of the Brain in Europe”, *European Neuropsychopharmacology*, 21(9), 655–679.

⁹⁹Cunningham-Williams, R.M., Cottler, L.B., Compton, W.M.I. et al. (1998). “Taking Chances: Problem Gamblers and Mental Health Disorders – Results from the St. Louis Epidemiologic Catchment Area Study”, *American Journal of Public Health*, 88(7), 1093–1096, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 29.

¹⁰⁰Relating to adult drug users, in or out of treatment, cf. Cunningham-Williams, R.M., Cottler, L.B., Compton, W. et al. (2000). “Problem Gambling and Comorbid Psychiatric and Substance Use Disorders among Drug Users Recruited from Drug Treatment and Community Settings”, *Journal of Gambling Studies*, 16(4), 347–376; Hall, G.W., Carriero, N.J., Takushi, R.Y. et al. (2000). “Pathological Gambling Among Cocaine-Dependent Outpatients”, *American Journal of Psychiatry*, 157(7), 1127–1133; relating to homeless persons seeking treatment for substance use disorders, cf. Shaffer, H.J., Freed, C.R., and Healea, D. (2002). “Gambling Disorders among Homeless Persons with Substance Use Disorders Seeking Treatment at a Community Center”, *Psychiatric Services*, 53(9), 1112–1117, or adolescent outpatients: Petry, N.M., and Tawfik, Z. (2001). “Comparison of Problem-Gambling and Non-Problem-Gambling Youths Seeking Treatment for Marijuana Abuse”, *Journal of the American Academy of Child and Adolescent Psychiatry*, 40(11), 1324–1331, all cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 29.

¹⁰¹Lapham, S.C., Smith, E., C’De Baca, J. et al. (2001). “Prevalence of Psychiatric Disorders among Persons Convicted of Driving while Impaired”, *Archives of General Psychiatry*, 58(10), 943–949; Silk, A., and Shaffer, H. (1996). “Dysthymia, Depression, and a Treatment Dilemma in a Patient with Polysubstance Abuse”, *Harvard Review of Psychiatry*, 3(5), 279–284; Tomasson, K., and Vaglum, P. (1996). “Psychopathology and Alcohol Consumption among Treatment-Seeking Alcoholics: A Prospective Study”, *Addiction*, 91(7), 1019–1030; Kessler, R.C., Crum, R.M., Warner, L.A. et al. (1997). “Lifetime Co-occurrence of DSM-III-R Alcohol Abuse and Dependence With Other Psychiatric Disorders in the National Comorbidity Survey”, *Archives of General Psychiatry*, 54(4), 313–321.

have confirmed that people engaging in substance abuse¹⁰² have higher rates of psychopathological disorders such as anxiety and depression,¹⁰³ and vice versa.¹⁰⁴

Comorbidity was also demonstrated in relation to gambling disorder. Petry found in the national epidemiologic survey on alcohol and related conditions that *most pathological gamblers suffered from co-occurring disorders*. Of the pathological gamblers, 75 % had an alcohol use disorder, 60 % had nicotine use disorder and 38 % had a drug use disorder.¹⁰⁵ Other studies on gambling disorder have found clearly increased rates of substance use disorders too.¹⁰⁶ Similarly, people with psychoactive substance abuse as the primary disorder have clearly increased rates of gambling disorder.¹⁰⁷

¹⁰²Up to DSM-IV-TR, the term ‘abuse’ was used up to describe mild forms of substance-related disorders; severe forms were described as ‘dependence. DSM-5 uses the term ‘disorder’ with the possibility of specifying severity levels ranging from mild over moderate to severe. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 484–485.

¹⁰³Rado, S. (1933). “The Psychoanalysis of Pharmacothymia (Drug Addiction)”, *Psychoanalytic Quarterly*, 2(1), 1–23; Lapham, Smith, C’De Baca et al., “Prevalence of Psychiatric Disorders among Persons Convicted of Driving while Impaired”; Silk, and Shaffer, “Dysthymia, Depression, and a Treatment Dilemma in a Patient with Polysubstance Abuse”; Feigelman, W., Wallisch, L.S., and Lesieur, H.R. (1998). “Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study”, *American Journal of Public Health*, 88(3), 467–470; Kessler, Crum, Warner et al., “Lifetime Co-occurrence of DSM-III-R Alcohol Abuse and Dependence With Other Psychiatric Disorders in the National Comorbidity Survey”; Tomasson, and Vaglum, “Psychopathology and Alcohol Consumption among Treatment-Seeking Alcoholics: A Prospective Study”.

¹⁰⁴Merikangas, K.R., Mehta, R.L., Molnar, B.E. et al. (1998). “Comorbidity of Substance Use Disorders with Mood and Anxiety Disorders: Results of the International Consortium in Psychiatric Epidemiology”, *Addictive Behaviors*, 23(6), 893–907; Regier, D.A., Farmer, M.E., Rae, D.S. et al. (1990). “Comorbidity of Mental Disorders with Alcohol and Other Drug Abuse. Results from the Epidemiologic Catchment Area (ECA) Study”, *JAMA – The Journal of the American Medical Association*, 264(19), 2511–2518; Whalen, C.K., Jamner, L.D., Henker, B. et al. (2001). “Smoking and Moods in Adolescents with Depressive and Aggressive Dispositions: Evidence from Surveys and Electronic Diaries”, *Health Psychology*, 20(2), 99–111; Feigelman, Wallisch, and Lesieur, “Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study”.

¹⁰⁵Petry, Stinson, and Grant, “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”.

¹⁰⁶Black, W., and Moyer, T. (1998). “Clinical Features and Psychiatric Comorbidity of Subjects With Pathological Gambling Behavior”, *Psychiatric Services*, 49(11), 1434–1439; Shaffer, and Korn, “Gambling and Related Mental Disorders: A Public Health Analysis”; Feigelman, Wallisch, and Lesieur, “Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study”; Kessler, Hwang, LaBrie et al., “DSM-IV Pathological Gambling in the National Comorbidity Survey Replication”; Petry, Stinson, and Grant, “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”.

¹⁰⁷Lesieur, H.R., and Heineman, M. (1988). “Pathological Gambling Among Youthful Multiple Substance Abusers in a Therapeutic Community”, *British Journal of Addiction*, 83(7), 765–771; Shaffer, and Korn, “Gambling and Related Mental Disorders: A Public Health Analysis”; Feigelman, Wallisch, and Lesieur, “Problem Gamblers, Problem Substance Users, and Dual-Problem Individuals: An Epidemiological Study”.

Pathological gamblers also have increased levels of psychopathology. Petry found that around 61 % of the pathological gamblers experienced a personality disorder (for example, schizoid, antisocial), almost 50 % a mood disorder (for example, depression) and around 41 % an anxiety disorder (for example, social phobia).¹⁰⁸ Comorbidity was also present among compulsive shoppers where increased levels of substance disorders and psychiatric disorders were identified.¹⁰⁹ The conclusion is that people suffering from a substance-related or behavioural disorder are much more likely to exhibit (an) additional disorder(s).¹¹⁰ While the co-existence is well established, the chronological order between psychopathology, substance-related and behavioural disorders has only been partly discovered.¹¹¹

Comorbidity is a well-established phenomenon in relation to gambling disorder. The National Comorbidity Study Revised discovered important findings with regard to the order of gambling disorder and co-morbid diseases. In this study, participants reported in 75 % of cases that the ‘other’ disorder preceded gambling disorder. The study further showed that many people did seek and received treatment for their various disorders, except for their gambling problems for which no formal treatment was received.¹¹² This may attest to a low awareness of specialised programmes or to their limited existence.

Addiction Hopping

A phenomenon that somehow reminds of comorbidity is ‘addiction hopping’. It describes the fact that addicts may quit one form of addiction *simply to engage in another form*. They may also lower the level of consumption of the old form while

¹⁰⁸Petry, Stinson, and Grant, “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”.

¹⁰⁹Lejoyeux, M., Ades, J., Tassain, V. et al. (1996). “Phenomenology and Psychopathology of Uncontrolled Buying”, *American Journal of Psychiatry*, 153(12), 1524–1529; Baker, A., *Serious Shopping: Essays in Psychotherapy and Consumerism*, Free Association Books, 2000; Christenson, G.A., Faber, R.J., de Zwaan, M. et al. (1994). “Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity”, *Journal of Clinical Psychiatry*, 55(1), 5–11.

¹¹⁰Caetano, R., Schafer, J., and Cunradi, C.B. (2001). “Alcohol-Related Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States”, *Alcohol Research and Health*, 25(1), 58–65; Shaffer, H.J., and Hall, M.N. (2002). “The Natural History of Gambling and Drinking Problems among Casino Employees”, *The Journal of Social Psychology*, 142(4), 405–424; Shaffer, and Korn, “Gambling and Related Mental Disorders: A Public Health Analysis”.

¹¹¹For instance, it is suggested that anxiety is a significant predisposed factor for gambling and alcohol addiction: Premper, V., and Schulz, W. (2008). “Komorbidität bei Pathologischem Glücksspiel”, *SUCHT-Zeitschrift für Wissenschaft und Praxis/Journal of Addiction Research and Practice*, 54(3), 131–140; this publication is part of an earlier doctoral thesis: Premper, V., *Komorbide psychische Störungen bei pathologischen Glücksspielern – Krankheitsverlauf und Behandlungsergebnisse*, Lengerich: Pabst Science Publishers, 2006.

¹¹²Kessler, Hwang, LaBrie et al., “DSM-IV Pathological Gambling in the National Comorbidity Survey Replication”.

starting or increasing the consumption of a new form.¹¹³ Addiction hopping has been shown for gambling disorder and substance abuse¹¹⁴ as well as for various substances,¹¹⁵ like alcohol and narcotics.¹¹⁶ The availability of *some* objects of addiction in people's environment appears to be more decisive than personal preferences for certain objects of addiction.¹¹⁷

Vulnerability

The term 'vulnerability' describes the *likeliness of a person or population group to be affected by a certain disease. Risk factors and protective factors* can be found 'in' the host (for example, genes, neurobiological factors) and the environment (for example, psychosocial factors, availability). Some people have to learn to live with a higher vulnerability than others. While anybody can develop disordered gambling, studies show that its prevalence varies between population groups. Particularly vulnerable are:¹¹⁸ *adolescents, substance abusers, casino employees (to some extent), males, widowed, separated or divorced persons, and ethnic minorities, for instance African-Americans and Native Americans.*¹¹⁹ Higher prevalence rates can also be noted with people *who start gambling at a young age.*¹²⁰

¹¹³ Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

¹¹⁴ Blume, S.B. (1994). "Pathological Gambling and Switching Addictions: Report of a Case", *Journal of Gambling Studies*, 10(1), 87–96.

¹¹⁵ Çepik, A., Arıkan, Z., Boratav, C. et al. (1995). "Bulimia in a Male Alcoholic: A Symptom Substitution in Alcoholism", *International Journal of Eating Disorders*, 17(2), 201–204; Shaffer, H.J., and LaSalvia, T.A. (1992). "Patterns of Substance Use among Methadone Maintenance Patients. Indicators of outcome", *Journal of Substance Abuse Treatment*, 9(2), 143–147; Conner, B.T., Stein, J.A., Longshore, D. et al. (1999). "Associations Between Drug Abuse Treatment and Cigarette Use: Evidence of Substance Replacement", *Experimental and Clinical Psychopharmacology*, 7(1), 64–71.

¹¹⁶ Hser, Y.I., Anglin, M.D., and Powers, K. (1990). "Longitudinal Patterns of Alcohol Use by Narcotics Addicts", *Recent Developments in Alcoholism: An Official Publication of the American Medical Society on Alcoholism, the Research Society on Alcoholism, and the National Council on Alcoholism*, 8, 145–171.

¹¹⁷ Harford, R.J. (1978). "Drug Preferences of Multiple Drug Abusers", *Journal of Consulting and Clinical Psychology*, 46(5), 908.

¹¹⁸ For a general overview, cf. Whelan, Steenbergh, and Meyers, *Problem and Pathological Gambling*, at 7–11, and the therein cited literature.

¹¹⁹ Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions".

¹²⁰ Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication". Regarding adolescent gamblers, cf. in particular Derevensky, J.L., *Teen Gambling: Understanding a Growing Epidemic*, Lanham, MD: Rowman & Littlefield Publishers, 2012.

Socioeconomic factors play an important role,¹²¹ such as education and income.¹²² People who have committed illegal acts have also a higher probability for disordered gambling.¹²³ The financial constraints lead many disordered gamblers to engage in criminal activities. The self-help group Gamblers Anonymous¹²⁴ claims that more than half of all pathological gamblers eventually turn to some form of financial crime.¹²⁵

Immediate family members of pathological gamblers have a higher risk of developing the disorder themselves.¹²⁶ In particular, *parental gambling disorder* is known to be a risk factor: children of pathological gamblers have a higher probability to develop gambling disorder (trans-generational transmission).¹²⁷

Genetic Risks

Neurobiologists have noted that genetic contributions to gambling disorder seemed substantial.¹²⁸ Genetic factors, which increased the risk of abusing a certain substance among male twins, also increased the likelihood of abusing another substance.¹²⁹ Similarly, genetic and environmental factors were found to be significant for disordered substance use *in general* among female twins. No evidence was found for a heritability of problematic use of only one specific substance.¹³⁰ Shared genetic vulnerability has been expressly demonstrated between alcohol disorder and gambling disorder¹³¹ but also as widespread as the range from drug addiction to

¹²¹ Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 28–29.

¹²² Whelan, Steenbergh, and Meyers, *Problem and Pathological Gambling*, at 7–11, and the therein cited literature.

¹²³ Johansson, A., Grant, J.E., Kim, S.W. et al. (2009). “Risk Factors for Problematic Gambling: A Critical Literature Review”, *Journal of Gambling Studies*, 25(1), 67–92.

¹²⁴ “Gamblers Anonymous”, available at <http://www.gamblersanonymous.org>.

¹²⁵ Bulkeley, W.M., “Video Betting, Called ‘Crack of Gambling’, Is Spreading”, Wall Street Journal, 14 July 1992, cited in: Davidson, D.K., *Selling Sin: The Marketing of Socially Unacceptable Products*, 2nd ed., Westport, CT: Praeger Publishers, 2003.

¹²⁶ Black, D.W., Monahan, P.O., Temkit, M.H. et al. (2006). “A Family Study of Pathological Gambling”, *Psychiatry Research*, 141(3), 295–303.

¹²⁷ Hayer, T., Berhart, C., and Meyer, G. (2006). “Kinder von pathologischen Glücksspielern: Lebensbedingungen, Anforderungen und Belastungen”, *Abhängigkeiten: Forschung und Praxis der Prävention und Behandlung*, 12(2), 60–77.

¹²⁸ Williams, W.A., and Potenza, M.N. (2008). “The Neurobiology of Impulse Control Disorders”, *Revista Brasileira de Psiquiatria*, 30(1), Supplement, S24–S30.

¹²⁹ Kendler, K.S., Jacobson, K.C., Prescott, C.A. et al. (2003a). “Specificity of Genetic and Environmental Risk Factors for Use and Abuse/Dependence of Cannabis, Cocaine, Hallucinogens, Sedatives, Stimulants, and Opiates in Male Twins”, *American Journal of Psychiatry*, 160(4), 687–695.

¹³⁰ Karkowski, L.M., Prescott, C.A., and Kendler, K.S. (2000). “Multivariate Assessment of Factors Influencing Illicit Substance Use in Twins From Female Female Pairs”, *American Journal of Medical Genetics*, 96(5), 665–670.

¹³¹ Slutske, W.S., Eisen, S., True, W.R. et al. (2000). “Common Genetic Vulnerability for Pathological Gambling and Alcohol Dependence in Men”, *Archives of General Psychiatry*, 57(7), 666–674.

compulsive running.¹³² This suggests that the presence of a general addictive tendency in persons is not object-specific.¹³³ Genetic risk factors are therefore responsible for an *increased risk to develop some form of addiction*.¹³⁴ There is ample brain, behavioural and genetic evidence pointing to shared vulnerabilities that underlie the pathological pursuit of substance and non-substance rewards.¹³⁵

Risks Linked to the Environment

The environment has been shown to influence the probability of developing substance-related or behavioural disorders. Increased vulnerability has been demonstrated in relation to substance abuse for college students.¹³⁶ Many heroin *addicted Vietnam veterans* recovered surprisingly quickly once they found themselves in a different social setting.¹³⁷ Beside risk factors, the social environment too offers protective factors such as *social support and religiosity*.¹³⁸ There are also factors beyond social environmental ones. *Laws and other norms* may impact people's behaviour as well. An increasingly important function of law in the welfare state is the *regulation of risks*. Gambling regulation constitutes an environmental

¹³²Werme, M., Lindholm, S., Thorén, P. et al. (2002). "Running Increases Ethanol Preference", *Behavioural Brain Research*, 133(2), 301–308; Nestler, E.J., Barrot, M., and Self, D.W. (2001). "FosB: A Sustained Molecular Switch for Addiction", *Proceedings of the National Academy of Sciences of the United States of America*, 98(20), 11042–11046; Werme, M., Thorén, P., Olson, L. et al. (2000). "Running and Cocaine Both Upregulate Dynorphin mRNA in Medial Caudate Putamen", *European Journal of Neuroscience*, 12(8), 2967–2974.

¹³³Bierut, L.J., Dinwiddie, S.H., Begleiter, H. et al. (1998). "Familial Transmission of Substance Dependence: Alcohol, Marijuana, Cocaine, and Habitual Smoking", *Archives of General Psychiatry*, 55(11), 982–988.

¹³⁴Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

¹³⁵Frascella, J., Potenza, M.N., Brown, L.L. et al. (2010). "Shared Brain Vulnerabilities Open the Way For Nonsubstance Addictions: Carving Addiction At a New Joint?", *Annals of the New York Academy of Sciences*, 1187(1), 294–315.

¹³⁶Christiansen, M., Vik, P.W., and Jarchow, A. (2002). "College Student Heavy Drinking in Social Contexts Versus Alone", *Addictive Behaviors*, 27(3), 393–404; Wechsler, H., Davenport, A.E., Dowdall, G.W. et al. (1997). "Binge Drinking, Tobacco, and Illicit Drug Use and Involvement in College Athletics: A Survey of Students at 140 American Colleges", *Journal of American College Health*, 45(5), 195–200.

¹³⁷Robins, L.N. (1993). "The Sixth Thomas James Okey Memorial Lecture. Vietnam Veterans' Rapid Recovery from Heroin Addiction: A Fluke or Normal Expectation?", *Addiction*, 88(8), 1041–1054.

¹³⁸Bilt, J.V., Dodge, H.H., Pandav, R. et al. (2004). "Gambling Participation and Social Support among Older Adults: A Longitudinal Community Study", *Journal of Gambling Studies*, 20(4), 373–389; Kendler, K.S., Liu, X.Q., Gardner, C.O. et al. (2003b). "Dimensions of Religiosity and Their Relationship to Lifetime Psychiatric and Substance Use Disorders", *American Journal of Psychiatry*, 160(3), 496–503; Vance, T., Maes, H.H., and Kendler, K.S. (2010). "Genetic and Environmental Influences on Multiple Dimensions of Religiosity: A Twin Study", *The Journal of Nervous and Mental Disease*, 198(10), 755–761.

factor.¹³⁹ Yet, gambling regulation may not be *the* decisive environmental factor as often assumed in calls for regulation; at least, that is what the results of a pan-European study cautiously suggest.¹⁴⁰

Addicts Experience Neuroadaptation, Psychosocial Sequelae and Deviant Behaviour

Zinberg stated, “the experience of addiction diminishes personality differences and makes all compulsive users seem very much alike.”¹⁴¹ Addicts share similar experiences. Neuroadaptive processes (tolerance and withdrawal) have been shown for substance-related and behavioural addiction. Tolerance is the experience of the diminution of the sought after effect due to changes of biochemical brain processes. Besides many substance-related forms of addiction, this has been evidenced in the case of gambling disorder too.¹⁴² Pathological gamblers regularly show a need to gamble at increased frequency or dose (higher amounts), and the activity increasingly dominates their schedule.¹⁴³ Withdrawal is known in the context of a sudden abstinence from an addictive behavioural pattern. Pathological gamblers show similar withdrawal symptoms as people addicted to substances.¹⁴⁴

Addicts also share common *psychosocial sequelae*.¹⁴⁵ They experience negative feelings of guilt and shame or mood disorders like dysthymia. Such sequelae have been demonstrated for gambling disorder. Deviant behaviour, social drift and delinquency can regularly be found among addicts. The *compulsive nature of addiction* is the dominating element in their lives.¹⁴⁶ Delinquency is only a

¹³⁹ Planzer, S., and Alemanno, A. (2010). “Lifestyle Risks: Conceptualizing an Emerging Category of Research”, *European Journal of Risk Regulation* 4, 335–337.

¹⁴⁰ Planzer, Gray, and Shaffer, “Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe”.

¹⁴¹ Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use*.

¹⁴² Wray, I., and Dickerson, M.G. (1981). “Cessation of High Frequency Gambling and ‘Withdrawal’ Symptoms”, *British Journal of Addiction*, 76(4), 401–405.

¹⁴³ Cf. the diagnostic criteria in DSM-5:

“1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement. [...]”

4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble). [...]”

American Psychological Association (Ed.), “DSM-5 Development – R 37 Gambling Disorder”, available at <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=210> (accessed 1 June 2012).

¹⁴⁴ Wray, and Dickerson, “Cessation of High Frequency Gambling and ‘Withdrawal’ Symptoms”; cf. criteria DSM-5: “2. Is restless or irritable when attempting to cut down or stop gambling”.

¹⁴⁵ Sequela is a condition that results from another disease or injury.

¹⁴⁶ Vaillant, G.E., *The Natural History of Alcoholism: Causes, Patterns, and Paths to Recovery*, Cambridge, MA: Harvard University Press, 1983; Christenson, Faber, de Zwaan et al., “Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity”; Black, and Moyer, “Clinical Features and Psychiatric Comorbidity of Subjects With Pathological Gambling Behavior”; Shaffer, and Hall, “The Natural History of Gambling and Drinking Problems among Casino Employees”.

consequence of the addiction since the maintenance of many forms of addictive consumptions or behaviours demands financial means.

9.1.4 Shared Development of Addiction

9.1.4.1 The Positive Experience

There is a fundamental aspect to addiction that is all too often neglected. *No addict is seeking* addiction, but every addict is longing for *the positive experience* that he initially discovered.¹⁴⁷ Scholarship refers to this experience as the ‘desirable subjective shift’.¹⁴⁸ Each addict finds something in the addictive behavioural pattern that he engages in and is longing to re-experience this positive effect over and over again. He wishes to capture the bliss of the high that he initially experienced.¹⁴⁹

Khantzian and Albanese concluded that addiction can be described as a form of *self-medication*. Human distress and psychological suffering are at the root of addictive disorders. The interaction with objects of addiction can offer relief, sooth, calm and change distress. This emotional effect – not the object as such (sic!) – gives objects of addiction, in a given psychosocial environment, an enormous power to dominate a person’s life. Akin to substance use disorders, the authors see behavioural disorders as serving to offer relief from enduring painful feelings.¹⁵⁰

The *motives* of addicts are all too often neglected. They can be manifold: an adolescent suffering from social exclusion may by engaging in alcohol abuse to seek recognition by his peer group.¹⁵¹ Elder people may suffer from boredom, and by visiting gambling venues they may experience a decrease in loneliness. These strategies are of course not sustainable and based on the distorted perception that the chosen behaviour only produces positive effects. In this sense, *addiction is an undesired side effect of self-medication*.

The idea of self-medication also *rejects the moral condemnation* that addicts often experience. Many are inclined to condemn people who engage in disordered behaviour, such as alcoholics, nicotine or heroin addicts. Their addiction is seen as a failure of character. What makes it worse for people suffering from a behavioural

¹⁴⁷ Lambert, C. (2000). “Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction”, *Harvard Magazine*, 102(4), 60–68.

¹⁴⁸ Shaffer, LaPlante, LaBrie et al., “Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology”.

¹⁴⁹ Lambert, “Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction”.

¹⁵⁰ Khantzian, and Albanese, *Understanding Addiction as Self Medication: Finding Hope behind The Pain*.

¹⁵¹ Regarding the relevance of mood and motives among adolescents specifically, cf. Goldstein, A.L., Stewart, S.H., Hoaken, P.N.S. et al., “Mood, Motives, and Gambling in Young Adults: An Examination of Within- and Between-Person Variations Using Experience Sampling”, *Psychology of Addictive Behaviors*, Advance online publication: 2013, June 17.

addiction like gambling disorder is that there is no psychoactive substance that could be co-blamed for the addict's behaviour. This further encourages adopting a judgmental moral stance towards pathological gamblers.¹⁵²

9.1.4.2 Stage Changes

Vaillant observed that the 'addictive personality' did not exist, but addiction tended to distort personality.¹⁵³ Empirical evidence indeed supports a 'natural history of addiction': stage changes that addicts typically share.¹⁵⁴ In the early 1970s, a literature review evidenced similar relapse patterns for alcohol, tobacco and heroin, despite the substantial biochemical differences of these substances.¹⁵⁵ As early as in the 1980s, the theoretical basis for the stage change model was already established.¹⁵⁶

The stage changes of behavioural addictive disorders are similar to those of substance-related addiction.¹⁵⁷ Casino employees, who suffer from excessive gambling, drinking or both, largely show identical histories of relapse, improvement and remission.¹⁵⁸ While the sequence of stages is similar among all addicts, the intensity and duration of each stage varies from person to person.¹⁵⁹ Building on the aforementioned earlier findings on stage changes, Shaffer divided the course of addiction into six stage changes. His model also takes into account the transition phases between stages.¹⁶⁰

¹⁵² This paragraph profited from a discussion with Dr Richard LaBrie of Harvard Medical School.

¹⁵³ George Vaillant, interviewed in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

¹⁵⁴ Section 9.1.4.2 and the therein cited literature are largely based on Shaffer, H.J., "The Psychology of Stage Change: The Transition from Addiction to Recovery" in *Substance Abuse: A Comprehensive Textbook*, Lowinson, J.H., Ruiz, P., Millman, R.B., et al. (Eds.), 3rd sub-edition, Baltimore, MD: Lippincott Williams & Wilkins, 1997.

¹⁵⁵ Hunt, W.A., Barnett, L.W., and Branch, L.G. (1971). "Relapse Rates in Addiction Programs", *Journal of Clinical Psychology*, 27(4), 455–456.

¹⁵⁶ For substantial contributions to this concept, cf. Prochaska, J.O., and DiClemente, C.C., "Common Processes of Self-Change in Smoking, Weight Control, and Psychological Distress" in *Coping and Substance Abuse: A Conceptual Framework*, Shiffman, S., and Wills, T. (Eds.), Academic Press, 1985; Vaillant, *The Natural History of Alcoholism: Causes, Patterns, and Paths to Recovery*; cf. also Vaillant, G.E., *The Natural History of Alcoholism Revisited*, Cambridge, MA: Harvard University Press, 1995; Shaffer, H.J., and Jones, S.B., *Quitting Cocaine: The Struggle against Impulse*, Cambridge, MA: Lexington Books 1989; Maisto, S.A., and Connors, G.J., "Assessment of Treatment Outcome" in *Assessment of Addictive Behaviours*, Donovan, D.M., and Marlatt, G.A. (Eds.), 1988, pp. 421–453.

¹⁵⁷ Shaffer, LaPlante, LaBrie et al., "Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology".

¹⁵⁸ Shaffer, and Hall, "The Natural History of Gambling and Drinking Problems among Casino Employees".

¹⁵⁹ Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

¹⁶⁰ (1) The initiation and emergence of addiction. (2) The realisation that the substance or behaviour produces positive experiences. (3) Over time, the adverse consequences emerge. (4) An increasing feeling of ambivalence: addiction serves while it destroys. The addict finally reaches the turning point and the evolution into quitting can begin. (5) The active quitting process, where the addict pursues behavioural changes and a reorganisation of his lifestyle. Finally, (6) relapse prevention. Cf. *ibid.*, at 100–106.

Initiation

The initiation of addiction necessarily involves a repeated interaction between host and agent. Without this interaction, the specific form of addiction cannot develop; however, this does not mean that no other form of addiction would be developed. Madras estimated that only about 5–10 % of those experimenting with a drug effectively become compulsive users.¹⁶¹ The large majority of those who try psychoactive substances do not proceed to problematic stages.¹⁶²

Subjective Shift: The Positive Experience

If the intake of a drug were not associated with some positive experience, it would not be continued to the extent that addicts pursue.¹⁶³ The same is true for other substances and behaviour. The subjective shift consists in the realisation of an initially positive experience. Khantzian and Albanese argued that the object of addiction serves as medication of at-risk persons who experience *relief from their psychological suffering*.¹⁶⁴ The power of objects of addiction lies not in a specific biochemical composition but in the positive effect that the at-risk persons *experience*.

Adverse Consequences Emerge

Over time, the positive experience is joined by adverse consequences. This is a crucial moment: the *majority of people now manage to restrict, regulate or modify their behaviour*. They either moderate or fully stop their behaviour.¹⁶⁵ Addicts, however, fail to adjust their behaviour.

At this point, the dual nature of addiction emerges. The addictive behaviour *serves while it destroys*. This dilemma is the characteristic predicament of addiction:¹⁶⁶ the object of addiction continues to produce (some) positive effects, but the negative effects become more and more dominant.¹⁶⁷ Denial is prevalent: the

¹⁶¹ Bertha Madras in Lambert, “Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction”.

¹⁶² Shaffer, H.J., and Gambino, B. (1989). “The Epistemology of “Addictive Disease”: Gambling as Predicament”, *Journal of Gambling Studies*, 5(3), 211–229; Shaffer, and Jones, *Quitting Cocaine: The Struggle against Impulse*.

¹⁶³ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 101.

¹⁶⁴ Khantzian, and Albanese, *Understanding Addiction as Self Medication: Finding Hope behind The Pain*.

¹⁶⁵ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 101.

¹⁶⁶ Shaffer, and Gambino, “The Epistemology of “Addictive Disease”: Gambling as Predicament”.

¹⁶⁷ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 100–105; Shaffer, H.J., “Denial, Ambivalence and Countertransference Hate” in *The Dynamics and Treatment of Alcoholism: Essential Papers*, Levin, J.D., and Weiss, R.H. (Eds.), Northdale, NJ: Jason Aronson Inc., 1994, pp. 421–437.

addict denies that the adverse consequences result from his detrimental behaviour.¹⁶⁸ Other people or circumstances are blamed as the source of the problems.¹⁶⁹ The uncontrolled and continued pursuit of the detrimental behaviour leads to a *vicious circle*: to minimise the increasingly adverse consequences the detrimental behaviour is continued and intensified.¹⁷⁰ The positive experience is increasingly fading due to *neuroadaptation (tolerance)*. For that reason, the dose or frequency is augmented.

Ambivalence and Turning Point

The addict reaches the awareness that his addictive behaviour is the sole cause for his problems.¹⁷¹ He leaves victimisation and denial behind and assumes personal responsibility for his negative life situation. However, this awareness is preceded by a central sub-stage: the characteristic feeling of ambivalence. The addict experiences a *simultaneous desire of both wanting and not wanting to change*.¹⁷² Addicts seem to badly want their substance or behaviour, despite the detrimental consequences.¹⁷³ There is an ambivalent aspect to the addict's 'rationality': what the addict desires (emotionally) is not what he actually wants (rationally). He wants to get rid of the detrimental effects of addiction but nevertheless desires the positive interaction with the substance or behaviour. In other words, he wants to keep the positive effects without having to cope with the negative consequences.

Over time, the addict realises two things: first, the adverse consequences of the addiction largely exceed the positive effects and secondly, he cannot get rid of the costs without losing the benefits too. It is often only after that painful realisation process that quitters reach out for assistance. This phase is accompanied by feelings of self-loathing or deterioration of personal values¹⁷⁴ as well as fears relating to a life without the object of addiction. A strong *motivational factor* to quit can be the fear of losing something important in life: a relationship, a child or a job. The experience of 'hitting rock bottom' can function as a wakeup call.¹⁷⁵ At which point in time hitting rock bottom is experienced depends also on environmental factors such as family support, economic and social status.

¹⁶⁸ Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

¹⁶⁹ Shaffer, H.J., and Robbins, M., "Psychotherapy for Addictive Behavior: A Stage-Change Approach to Meaning Making" in *Psychotherapy and Substance Abuse: A Practitioner's Handbook*, Washton, A. (Ed.), New York: The Guilford Press, 1995, pp. 103–123.

¹⁷⁰ Shaffer, "The Psychology of Stage Change: The Transition from Addiction to Recovery", at 101.

¹⁷¹ *Ibid.*, at 101.

¹⁷² *Ibid.*, at 102.

¹⁷³ Schroeder, T. "Irrational Action and Addiction" in *What Is Addiction?*, Ross, D., Kincaid, H., Spurrett, D., et al. (Eds.), Cambridge, MA: MIT Press, 2010, pp. 391–407, at 391.

¹⁷⁴ Shaffer, and Jones, *Quitting Cocaine: The Struggle against Impulse*.

¹⁷⁵ George Vaillant in Lambert, "Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction".

Active Quitting

Active quitting is characterised by subsequent observable action. Old behaviours become devalued, new ones become meaningful. There are two main approaches to quitting: ‘tapered’ and ‘cold turkey’. The majority of quitters fall into one approach or the other.¹⁷⁶ Environmental protective factors are crucial; people and institutions can offer support. The latter can be found in the family circle, religious circle or in a newly built or regained circle of friends who are not associated with the (former) addictive behavioural pattern. Forms of self-development such as sports, music or professional re-orientation can offer further support. The addict must have a clear strategy of how to overcome the urge to gamble.¹⁷⁷

Relapse and Recovery

Only few addicts manage to avoid relapse.¹⁷⁸ *High relapse rates* of up to 90 % are common.¹⁷⁹ A single slip of reengaging in the old addictive behaviour can lead to full relapse.¹⁸⁰ It is important for the recovering person to maintain the newly gained behavioural patterns. Their integration in daily routine is crucial for the prevention of a relapse.¹⁸¹ Quitters need to substitute old behavioural patterns with meaningful new ones as the *initial motives* are still present and want to be satisfied. The addict must identify an alternative to the former detrimental behaviour.¹⁸² Where research gaps on successful treatment still exist, treatment for gambling disorder can be informed by experiences from substance-related disorders.¹⁸³ Unsurprisingly, *addiction hopping* is a frequently observed phenomenon, and *co-morbidity* forms an adverse factor for relapse prevention. Some may also seek relief in *pharmacological products* as substitutes; a risky option that generally backfires.¹⁸⁴

¹⁷⁶ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 102.

¹⁷⁷ For successful strategies, cf. Strategies for Managing Your Gambling.

¹⁷⁸ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 102.

¹⁷⁹ Gene Heyman indicated estimates of 67–90 % for alcohol, opiate, cocaine and tobacco: Lambert, “Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction”.

¹⁸⁰ Marlatt, G.A., and Gordon, J.R., *Relapse Prevention: Maintenance Strategies in the Treatment of Addictive Behaviors*, New York: Guilford Press, 1985.

¹⁸¹ Brownell, K.D., Marlatt, G.A., Lichtenstein, E. et al. (1986). “Understanding and Preventing Relapse”, *American Psychologist*, 41(7), 765–782.

¹⁸² Gene Heyman in Lambert, “Deep Cravings: New Research on The Brain and Behavior Clarifies The Mysteries of Addiction”.

¹⁸³ Petry, N.M. (2002). “How Treatments for Pathological Gambling Can Be Informed by Treatments for Substance Use Disorders”, *Experimental and Clinical Psychopharmacology*, 10(3), 184–192.

¹⁸⁴ Shaffer, “The Psychology of Stage Change: The Transition from Addiction to Recovery”, at 102.

9.1.5 *Addiction as Syndrome*

Various models and theories on addiction were presented in the past.¹⁸⁵ While most scientists agree that addiction is multi-factorial, they disagree on how far any particular influence can explain key aspects of addiction.¹⁸⁶ This chapter has shown that *gambling addiction is not peculiar*; on the contrary, there are striking commonalities between different forms of addiction. After a review of the literature on addictive disorders, Shaffer et al. suggested the syndrome model of addiction.¹⁸⁷

Addiction is understood as a syndrome that shows *multiple opportunistic expressions* but has a common aetiology.¹⁸⁸ The notion syndrome stands for “a cluster of symptoms and signs related to an abnormal underlying condition.”¹⁸⁹ The addiction syndrome can develop into different expressions of addiction, behavioural or substance-related. They all feature *unique sequelae* (for instance, lung cancer in the case of tobacco addiction) as well as *shared manifestations* (for instance, neuroadaptation). The abnormal underlying condition is the same.

As syndrome models typically do, the addiction syndrome model describes major phenomena that can be observed; *characteristic signs and symptoms are put in association to each other*. Syndrome models are regularly used where the cause of the underlying condition is not yet known. The most well known syndrome arguably is AIDS: the Acquired Immune Deficiency Syndrome. A more recent example includes SARS (Severe Acute Respiratory Syndrome). The view of separate and independent ‘addictions’ is reminiscent of the view espoused in the early days of AIDS diagnosis. Only an increase of independent, separate diseases was initially noted (for instance, pneumonia and herpes).¹⁹⁰ AIDS was originally associated exclusively with homosexuals before it became known that the disease also affects heterosexuals. AIDS was described as a syndrome with characteristic signs and symptoms – and a yet unknown causality. It was only several years later that the aetiology of the syndrome became clear: the HIV (human immunodeficiency virus) caused the various opportunistic sequelae (Fig. 9.3).

¹⁸⁵ For a listing of various (and often out-dated) models and theories, cf. Aasved, M.J., *The Biology of Gambling*, The Gambling Theory and Research Series, Vol. III, Springfield, IL: Charles C Thomas Publisher Ltd., 2003.

¹⁸⁶ Ross, and Kincaid, “Introduction: What Is Addiction?”, at vi-vii.

¹⁸⁷ Section 9.1.5 is largely based on Shaffer, LaPlante, LaBrie et al., “Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology”.

¹⁸⁸ *Ibid.*, at 367–368.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

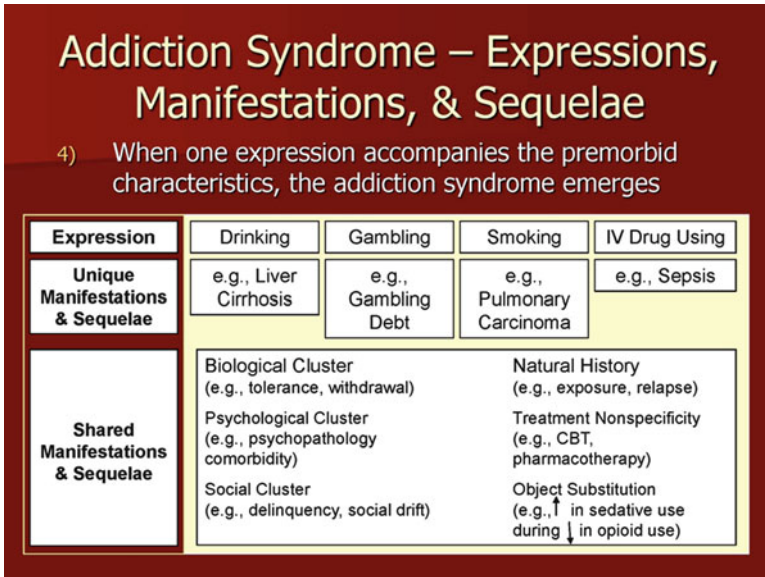


Fig. 9.3 Addiction syndrome (Reproduced from Shaffer et al. (2004b))

9.1.6 Results

Section 9.1 gave an introduction to the empirical evidence regarding the nature and mechanisms of gambling addiction. It had a two-fold purpose. First, it *laid the ground for* Sect. 9.2, which will analyse the proportionality review practice in the gambling cases through the prism of empirical evidence. Secondly, it addressed the question whether empirical evidence on gambling addiction justified a perception of gambling addiction as being of ‘*peculiar nature*’.

Gambling addiction is known in the leading medical manuals (DSM, ICD) as *gambling disorder (pathological gambling)*. DSM-5 describes gambling disorder as a “[p]ersistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress.” It offers nine diagnostic criteria; four must be fulfilled to meet the diagnosis. Sub-clinical problems (less than four criteria met) are often referred to as ‘problem gambling’; the term ‘disordered gambling’ is used as an overarching term (problem gambling and gambling disorder). *DSM-5 reclassified gambling disorder under ‘Substance-Related and Addictive Disorders’*, thus jointly with substance use disorders.

Next, the global epidemiology of gambling disorder was presented: many studies around the globe show that *0.5 to 2.0 % of the general population* experienced gambling disorder in their life. ‘Past-year’ rates are about 50 % lower. *North America* has the most solid epidemiological data situation. The first study in 1979 found a rate of life-time gambling disorder of 0.7 % and rates more than doubled until 2002. The most recent studies found only rates of 0.4 and 0.6 %. The rates are

therefore even slightly lower than in 1979 in spite that a bigger percentage of people gamble today, and the exposure to games of chance is much bigger. Similar observations have been made in Europe; researchers explain this phenomenon with *social adaptation* processes (see Sect. 9.2.5.2).

This section showed the *manifold commonalities* that exist between substance-related expressions of addiction and gambling disorder. The addiction to games of chance is not peculiar but very similar to other expressions of addiction. DSM-5 offers *very similar diagnostic criteria for substance use disorder and gambling disorder*. Somebody addicted to a substance is likely to meet similar diagnostic criteria as a pathological gambler.

Besides the criteria in DSM-5, the manifold commonalities between different forms of addiction were briefly presented. The numerous parallels include (a) similar *neurobiological* processes (people addicted to different objects show a similar pre-use thrill and similar processes of the dopamine reward system), (b) *comorbidity*: addictive disorders are regularly accompanied by other forms of addiction or psychopathological disorders like anxiety), (c) *addiction hopping* (addicts may quit one form of addiction simply to engage in another form of addiction), (d) *vulnerability and genetic risks* (some population groups are more likely to be affected by pathological gambling, genetic risk factors are responsible for an increased risk to develop *some* form of addiction, not just a specific form of addiction), (e) risks linked to the *environment*, (f) addicts experience *neuroadaptation, psychosocial sequelae and deviant behaviour* (people addicted to different objects experience tolerance and withdrawal symptoms as well as psychosocial sequelae like shame or mood disorders).

This section also demonstrated that people addicted to different objects go through similar stages. In chronological order: (a) *initiation* (repeated interaction between host and agent), (b) *subjective shift*: the positive experience (wish to re-experience the positive effect that was once discovered, generally the positive effect relates to a relief from psychological suffering), (c) *adverse consequences* emerge (while the majority of people at this stage restrict their behaviour, addicts fail to do so; vicious circle: to minimise the increasingly adverse consequences the detrimental behaviour is continued at increasing intervals or doses), (d) *ambivalence and turning point* (awareness that addictive behaviour is the sole cause for problems; addict wants to get rid of the detrimental sides of addiction but also does not want to lose the positive effects), (e) *active quitting* (the addict takes observable action and leaves old behavioural patterns behind), (f) *relapse and recovery* (the vast majority of quitters experience relapse; addiction hopping is common; co-morbidity makes quitting even harder).

Of all these characteristic traits of gambling addiction, empirical evidence does not support the view of gambling addiction showing a 'peculiar nature'. More recently, addiction was described as a *syndrome* that shows multiple opportunistic expressions but shares a common causality. The expressions can be different (e.g. alcoholism, nicotine, gambling) and each expression shows unique sequelae (e.g. lung cancer in the case of nicotine addiction) as well as shared manifestations (e.g. neuroadaptation). The underlying condition is the same.

9.2 Empirical Views on the Proportionality Review of the Court of Justice of the EU

After the general introduction to the nature and mechanisms of gambling addiction, Sect. 9.2 now analyses the proportionality review practice of the Court of Justice through the prism of empirical evidence on gambling addiction. It is inquired to which extent the Court of Justice combined the earlier noted wide margin of appreciation with a meaningful proportionality review. Since the Court of Justice has practised *different standards of review to different (gambling) topics*, this section discusses the Court's proportionality review practice by grouping it into different topics. Where these topics relate to gambling addiction, they are additionally analysed with findings from empirical evidence on gambling addiction.

9.2.1 Definition of Protection Level and Choice of Regulatory Model

In line with its general case law on fundamental freedoms, the Court of Justice has left it to the Member States to define the protection level, which they pursue (see Sects. 3.2 and 3.3). They can also choose the regulatory model that they find appropriate – as long as these choices do not discriminate on grounds of nationality. The corner stones were already set in *Schindler*:

Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and [...] to maintain order in society [...] [I]t is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.¹⁹¹

Until recently, the Court of Justice did not question the necessity of a regulatory model, including that of an exclusive right holder. It did not apply the criterion of the less or least restrictive measure that usually forms part of the necessity test as observed in Sect. 3.3. The presence of less restrictive regulatory models in other countries, which pursue a similar protection level, was irrelevant in the view of the Court of Justice:

However, the power to determine the extent of the protection to be afforded by a Member State on its territory [...] forms part of the national authorities' power of assessment [...]. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

¹⁹¹ C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 61.

In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.¹⁹²

The EFTA Court recognised this in similar terms:

The EEA Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought.¹⁹³

However, it will be shown that the latter court reviewed more closely whether the Member State pursued *in practice* a consistent and systematic policy. This includes in particular reviewing whether the protection level was indeed as high in practice as argued by the Member State.

9.2.2 *Exclusive Right Model versus Licensing Model*

9.2.2.1 Case Law

In principle, the Member States are *free to choose* between various regulatory models: total or partial prohibition, exclusive right holder (public or private monopolist), very limited or quite liberal licensing system or even no requirement of authorisation:

The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States.¹⁹⁴

The Court of Justice has regularly added that these choices had to be proportionate and could not discriminate on grounds of nationality. While it has reviewed the latter criterion,¹⁹⁵ its reference to the proportionality criterion until recently remained *rhetoric*. It barely reviewed whether the protection level was high in practice and whether an exclusive right system was necessary to reach the *practised* protection level. More recently, the Court significantly adjusted its stance; this development could be noted since *Carmen Media* where it found the monopoly in question no

¹⁹²C-124/97 Markku Juhani Lääri, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 35–36.

¹⁹³E-3/06 Ladbroke Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 42.

¹⁹⁴C-124/97 Markku Juhani Lääri, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 39.

¹⁹⁵Cf. C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519 where the Finnish tax legislation was found to discriminate on grounds of nationality.

longer suitable to achieve the objective.¹⁹⁶ In *Zeturf*, it further held that a monopoly could only be justified in order to ensure a particularly high level of protection. It asked the referring court to determine

whether the national authorities genuinely sought, at the material time, to ensure a particularly high level of protection and whether – having regard to the level of protection sought – the establishment of a monopoly could actually be considered necessary.¹⁹⁷

The Court of Justice also took a stance in regard to the effectiveness of monopolistic regulatory models in general. It found that an exclusive right holder was “given the risk of crime and fraud, [...] certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.”¹⁹⁸ This is not an isolated statement but reflects a general tendency of the Court to assume that a *monopolistic structure protects consumers more effectively*. This view has been reconfirmed in several judgments. In *Markus Stoss*, the Court highlighted that the Member States were

entitled to take the view, within the margin of discretion which they have in that respect, that granting exclusive rights to a public body whose management is subject to direct State supervision or to a private operator over whose activities the public authorities are able to exercise tight control is likely to enable them to tackle the risks connected with the gambling sector and pursue the legitimate objective of preventing incitement to squander money on gambling and combating addiction to gambling more effectively than would be the case with a system authorising the business of operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework.¹⁹⁹

With regard to the review of monopolistic gambling regimes, the Court of Justice has therefore applied far-reaching self-restraint.²⁰⁰ It is noteworthy that, according to the Court, it is not necessary that the monopoly is run or owned by public authorities. It may as well be a *private monopolist under strict control*.²⁰¹ In the aforementioned paragraph, the Court expressly recognised that authorities could tackle *gambling addiction* risks more effectively under a monopolistic structure.

¹⁹⁶C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, paras 68 and 71.

¹⁹⁷C-212/08 *Zeturf Ltd v Premier ministre* [2011] ECR I-5633, paras 46–47. The new approach was confirmed in C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, paras 53–54 and 71.

¹⁹⁸C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 41.

¹⁹⁹C-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. 81.

²⁰⁰Buschle, D. (2003). “Der Spieler – Schreckgespenst des Gemeinschaftsrechts”, *European Law Reporter*, 12, 467–472, at 472.

²⁰¹Cf. hereto the Dutch licensing model in C-203/08 *Sporting Exchange Ltd. Trading as ‘Betfair’, v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, as well as in C-258/08 *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR I-4757.

While the Court more recently started to question whether the protection level and controls were *in practice* truly as high as argued by the Member State, it has *abided by the assumption* that monopolistic operators protected consumers more effectively.²⁰²

The EFTA Court took a somehow different position than the Court of Justice. In *ESA v Norway*, it distinguished between crime concerns and gambling addiction concerns. The EFTA Court did not seem convinced of the necessity of a monopoly in relation to crime concerns. While it shared the view of the Court of Justice that a monopoly protects more effectively against gambling addiction, it argued the point differently. It started its argument by referring to the Court of Justice's opinion that public interest objectives had to be 'considered as a whole'²⁰³ and found that it was

reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than a commercial operator or organisations whose humanitarian or socially beneficial activities partly rely on revenues from gaming machines. Furthermore, it is plausible to assume that in principle the State can more easily control and direct a wholly State-owned operator than private operators. Through its ownership role, the State has additional ways of influencing the behaviour of the operator besides public law regulations and surveillance.²⁰⁴

The Court of Justice accepted it as a *reality of life* that a monopolistic structure serves consumer protection better. The EFTA Court openly declared that it was taking an *assumption*; it further emphasised that "the effectiveness of public control and enforcement of a genuinely restrictive approach to machine gaming are the focal point of the proportionality assessment in this case."²⁰⁵

The EFTA Court rightly held that – since the legislative reform had not yet taken effect – it could not assume that public control and policy enforcement would not satisfy these requirements. The EFTA Court left the door open in case the assumption should not prove accurate upon the implementation of the Norwegian legislation. In that sense, the ruling takes a *Solange* character.²⁰⁶

The *standard of review* defined by the EFTA Court in *ESA v Norway* has over all been significantly stricter than that applied by the Court of Justice. As seen earlier, the latter originally did not review – nor did it ask the referring court to review – the necessity of gambling monopolies. It only recently started to raise questions in this regard. The EFTA Court prominently underlined the *necessity test* and the *burden of proof*:

²⁰² Recently confirmed in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 49, as well as in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 30.

²⁰³ E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 51.

²⁰⁴ *Ibid.*, para. 51.

²⁰⁵ *Ibid.*, para. 51.

²⁰⁶ *Ibid.*; Planzer, S. (2007). "Les jeux ne sont pas (encore) faits, Judgment of the EFTA Court in case E-1/06", *European Law Reporter*, 4, 126–131.

the necessity test consists in an assessment of whether the monopoly option is functionally needed in order to reduce the problems to the level opted for, or whether this reduction could equally well be obtained through other, less restrictive means such as admitting private operators under a stricter licensing regime. The necessity of the contested legislation thus requires that the introduction of a monopoly leads to a more effective achievement of the aims set than other less restrictive measures [...] [T]he Defendant has failed to demonstrate that a licensing scheme allowing private operators, if necessary with more restrictive rules on who may qualify, will not be equally effective as an exclusive right for Norsk Tipping in preventing money-laundering and embezzlement.²⁰⁷

As noted, the EFTA Court ultimately approved the pending nationalisation of the gaming machines sector since it could not be assumed that the future implementation of the law would not be in conformity with EEA law. In the EFTA Court's view, the restrictions could be seen as *proportionate in relation to gambling addiction concerns* but not in relation to crime concerns.

The EFTA Court further elaborated on the necessity test in its *EFTA-Ladbrokes* decision. In contrast to the Court of Justice, it expressly adhered to the *principle of the less restrictive measure*:

where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection.²⁰⁸

The EFTA Court encouraged the referring Norwegian court to *carefully review the level of protection*. In view of defining the *de facto* protection level, the restrictions on the exclusive right holder needed to be considered, such as opening hours, number of outlets, advertising and the development of new games. The Court seemed particularly alarmed by the *advertising practices* and asked the referring court to take into account the extent, effect, amount, form and content, namely whether marketing practices were informative rather than evocative in nature. It would also be for the national court to evaluate whether *effective control could and was in fact exercised* by Norwegian authorities over the state monopolist Norsk Tipping. Again, the EFTA Court underlined in this context the principle of the less restrictive measure as the referring court was asked to verify whether private operators under a licensing system could not be subject to the same kind of control.²⁰⁹

The Court of Justice originally chose not to review the necessity of monopolies. It was only since *Markus Stoss* that the Court of Justice *has reviewed the proportionality of a monopoly*. Without expressly quoting the EFTA Court, the Court of Justice held in line with its sister court that a monopoly could be justified only to ensure a *particularly high level of consumer protection*. The exclusive right system also needed to be accompanied by suitable regulation that ensured that a particularly high level of protection was pursued in a consistent and systematic

²⁰⁷ E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, paras 49–50.

²⁰⁸ E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 58.

²⁰⁹ *Ibid.*, para. 62.

manner. Hereto, the supply needed to be quantitatively measured and qualitatively planned and subject to strict control by public authorities.²¹⁰ The Court of Justice's new approach has been reconfirmed in subsequent decisions.²¹¹

9.2.2.2 Empirical Evidence

According to the Court of Justice, an *exclusive right holder is more effective* in pursuing the goal of combating gambling addiction. It remains to be assessed whether this assumption is supported by empirical evidence. A literature review in 2011 established the available empirical evidence regarding the *comparative effectiveness of regulatory approaches to gambling*. Upon an extent review of the literature relating to this question, the report concluded that there was currently no published empirical evidence available, which would directly address this issue. Consequently, the report also discussed literature that deals with this question only indirectly or that reflects opinions of scholars.²¹²

LaBrie and Shaffer for instance argued that effective regulatory approaches must include primary intervention such as public awareness programmes, advertising restrictions and similar preventive measures. They analysed regulation from eleven states in the US and found that only five states addressed primary intervention efforts, including the State of Nevada.²¹³ Chambers and Wilcox reviewed the level of compliance of online operators with the UK Gambling Act. They assessed the fifteen most popular UK licensed online gambling operators. All companies complied with the age restrictions and showed careful practices regarding the age limits of their users.²¹⁴ A Swiss study compared prevalence levels prior and posterior to the introduction of land-based casino gambling in Switzerland. The regulatory approach changed from an almost full prohibition of casino games to a system with a number of licensees. By this regulatory shift, Switzerland reached one of the

²¹⁰C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa AutomatenService Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 83. Cf. also C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 68 and 71, as well as C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 46.

²¹¹C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 46–47; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 71.

²¹²Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

²¹³LaBrie, R.A., and Shaffer, H.J. (2003). "Toward a Science of Gambling Regulation: A Concept Statement", *AGA Responsible Gaming Lecture Series*, 2(2), 1–7.

²¹⁴Chambers, C., and Wilcox, C. (2009). "Gambling on Compliance with the New 2005 Act: Do Organisations Fulfil New Regulations?", *International Review of Law, Computers & Technology*, 23(3), 203–215.

highest densities of casinos per capita in Europe. The prevalence rates remained stable upon the introduction of casinos.²¹⁵

In general, the discussion about monopolies versus licensing system has received *surprisingly little attention in the scientific literature on gambling addiction*. Empirical scholars have not delivered direct evidence regarding the effectiveness of monopolies or licensing systems. Some publications nevertheless argued approaches that emphasise either more ‘informed individual choice’ or more ‘restrictive state intervention’. It is noteworthy that the authors’ preferences *correlate with the authors’ views on gambling more broadly*. Adams, Orford and Light consider gambling as inherently dangerous, as an ‘addictive consumption industry’. They advocate a *strict limitation of gambling offers*. By contrast, Blaszczyński, Ladouceur, Shaffer and Korn do not perceive gambling as inherently addictive and observe that the majority of people do not develop disordered gambling. They advocate an *informed choice approach*.²¹⁶ The example illustrates that one should not confuse opinions of scholars with conclusive empirical evidence.

In any event, the available empirical research makes it *difficult to advocate the view that games of chance as such are addictive*. Section 9.1 explained that there are manifold object non-specific factors that impact the development of addiction. The idea of an ‘addictive agent’ is reductive and simplistic, even in relation to expressions of addiction that involve the intake of a drug. Prevalence studies consistently demonstrate that only a small minority of those who gamble experience gambling disorder. Section 9.1 showed that the global prevalence of past-year gambling disorder *mostly ranges from 0.25 to 1 %*. In recent years, the *prevalence rates in several countries were stable or decreasing* in spite of an increasing exposure to games of chance, including over the Internet. This is explained with social adaptation mechanisms. The example of the US, a country with a solid epidemiological data situation, further illustrated this point (see Sects. 9.1.2.2 and 9.2.5.2).

In legislative and judicial proceedings, the effectiveness of monopolies versus licensees will certainly remain a controversial issue.²¹⁷ As noted, such contrasting

²¹⁵ Bondolfi, G., Jermann, F., Ferrero, F. et al. (2008). “Prevalence of Pathological Gambling in Switzerland after the Opening of Casinos and the Introduction of New Preventive Legislation”, *Acta Psychiatrica Scandinavica*, 117(3), 236–239. Unfortunately, the samples of the study were rather small.

²¹⁶ Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37–38.

²¹⁷ This book considers empirical fields of study that cover the medical side of gambling addiction research. Scholars from other fields may have additional and different arguments to offer. Economists for instance may argue that it is generally accepted that state monopolies perform significantly worse than private operators (including private monopolies) with regard to output (quantity as well as quality, for instance innovation). In this logic, the legislator may wish to install a state monopoly system with the intention to cripple the gambling market. While an economic perspective falls outside the scope of this book, it can be noted that this logic rests at least on two assumptions: first, lower output of gambling offers leads to lower prevalence of gambling addiction, and second, less innovation regarding games of chance leads to lower prevalence of gambling addiction. For some answers from public health and epidemiological research, see Sects. 9.2.4.2

juxtaposition has received little attention among addiction scholars. One reason could be that, *from an empirical perspective, the relevant questions may actually relate to the concrete responsible gambling measures*, irrespective of the abstract regulatory model.

A recent pan-European study nevertheless attempted to shed some light on the effectiveness of different regulatory models. The research investigated *correlations between different regulatory gambling policies and prevalence rates of disordered gambling*. The collected data covered a time frame from 1997 until 2010 in 30 European jurisdictions. Beside other aspects, correlational analyses were run regarding different licensing models (prohibition, public monopoly, closed licensing system, open licensing system, no licence required). No statistically relevant correlations could be identified. In other words, the prevalence rates associated with public monopolies were similar to those associated with other regulatory models. As in other studies, there are limitations to be considered. For instance, sample size was rather small due to the fact that only 22 prevalence studies in twelve jurisdictions were available. The law on the books may not be properly enforced in practice (for instance, prohibition policies), and regulation is only one environmental factor among others that may impact people's behaviour. Most importantly, even if correlations can be found, that does not necessarily mean causation.²¹⁸

From an empirical perspective, *hardly any research* has directly addressed the question of the comparative effectiveness of exclusive right holders versus licensees with regard to gambling addiction. From a legal perspective, the burden of proof in the general law on the fundamental freedoms is with the Member States (see Sect. 3.3). However, in the absence of conclusive empirical evidence, the Court of Justice assumed that exclusive right holders were *per se* more effective in combating gambling addiction. Thus, the Court effectively shifted the burden of proof to the private operators.

9.2.3 Channelling: A Scientific Term?

The so-called channelling argument was introduced in the *Läärä* case. The UK authorities in *Schindler* had taken a prohibitive approach towards lottery services. The Finnish authorities in *Läärä* allowed offers of gaming machines, yet only

and 9.2.5.2. For an introduction to basic principles of economics, cf. e.g. Mankiw, N.G., *Principles of Economics*, 4th ed., South Western: Thomson, 2007, at Part 5: 'Firm Behavior and the Organization of Industry'. Finally, for a discussion whether demand for gambling services is elastic or inelastic, among players in general and disordered players in particular, cf. Forrest, D., "Online Gambling: An Economics Perspective" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 29–45, at 37–40.

²¹⁸ Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe".

provided by an exclusive right holder. Based on concerns in relation to black market offers, the Court of Justice approved of the channelling argument.

Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those [public interest] objectives.²¹⁹

The role that moral judgments have played in the perception of games of chance by the Court of Justice will be discussed in more detail in Sect. 9.3.2. At this point, the language can already be noted: What does a “need to confine the desire to gamble” suggest? Are people generally affected by a desire to gamble that is hard to keep under control?

Empirical evidence does not support an alarming stance. Section 9.1 looked at prevalence rates of gambling disorder. It was noted that around *0.25 to 1 % of the population experience past-year gambling disorder*. Many people choose not to gamble or gamble only occasionally. Among those who gamble regularly, the *large majority do not develop a disordered gambling behaviour*.

Eventually, the channelling argument evolved from “*channelling the human desire*” into the necessity of “*channelling gambling offers*.” In any event, the Court of Justice has adhered to the channelling argument also in recent decisions.²²⁰ While the argument has been regularly used and evolved regarding its shape, one question has never really been addressed in the rulings of the Court of Justice: What is channelling supposed to channel and what is it supposed to mean? Shall it channel the human desire to gamble or simply gambling offers? Does channelling mean to impose strict rules on operators? Does it mean to attract consumers to legal offers? Does it mean that gambling can only take place in certain venues (for example, casinos)? Does channelling necessarily involve an exclusive right holder?

If channelling were an empirically verified concept, it would be discussed in the scientific literature on gambling addiction, in particular where the literature discusses appropriate regulatory approaches. A vivid discussion on a channelling policy cannot be observed among researchers studying gambling disorder; the term is not prevalent in the scientific literature.²²¹ The recommendations that are argued by scientists regularly relate to *concrete aspects of regulation* (for example, restrictions of advertising or imposition of minimum age) *rather than an abstract notion of channelling*.

²¹⁹C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 37.

²²⁰C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, paras 56, 67–71; C-347/09 Criminal Proceedings against Jochen Dickingler and Franz Ömer [2011] ECR I-8185, paras 65 and 68; C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, para. 65; C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, para. 25.

²²¹Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

The notion ‘channelling’, if not closely reviewed, represents an *empty shell*, which remains undefined. Different meanings can be interpreted into it.²²² The Court of Justice has not reviewed the actual content of the channelling argument. In its jurisprudence, the argument has mainly been used to justify the regulatory model of an exclusive right holder as well as the expansion and advertising of gambling offers of this exclusive right-holder. The empty shell character of channelling can be illustrated by its *diverging use by the EFTA Court and in other jurisdictions*. In *EFTA-Ladbrokes*, the EFTA Court interpreted channelling broadly *as a way of exercising control over the gambling sector*.

If it turns out that the national authorities have opted for a rather low level of protection [...] it is more likely that less restrictive means, for instance in the form of a licensing system which would allow an operator such as the Plaintiff to enter the market, could suffice. In this context, it is also relevant to assess whether channelling, to the extent the national court deems this to be relevant, could equally well be achieved under a licensing system.²²³

The diverging use of the term between different bodies can also be seen in its use by other jurisdictions. Channelling or concentrating gambling is a term used in documents relating to the Swiss gambling sector. The governmental bill to the parliament referred to concentrating all forms of games of chance.²²⁴ The term does not refer to any of the aforementioned concepts. The objective of the legislation was to *channel all forms of gambling into casino venues*.²²⁵ This was a central motive for the Swiss Supreme Court to disallow poker tournaments outside of casinos.²²⁶ Casinos in Switzerland are run by various *commercial operators under a licensing system* (‘Konzessionen’);²²⁷ in other words, a regulatory approach that substantially differs from an exclusive right system while still referring to the same notion of channelling or concentrating.

9.2.4 Detrimental Nature of Competition

9.2.4.1 Case Law

It was noted that the Court of Justice adhered to the view that a state-run operator would *per se* protect consumers more effectively than private licensees. In recent

²²² The German term ‘Leerformel’ catches this phenomenon better.

²²³ E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 59.

²²⁴ Government Bill regarding the Federal Law on Games of Chance and Casinos of 26 February 1997 (‘Botschaft zum Bundesgesetz über das Glücksspiel und über die Spielbanken’ (Spielbankengesetz, SBG), 1997, Bundesblatt vol. 149, no III).

²²⁵ With the exception of lottery and sports betting since those games of chance fall within the ambit of cantonal (regional) powers.

²²⁶ ATF 136 II 291 *Schweizer Casino Verband gegen X. und Eidgenössische Spielbankenkommission* [2010].

²²⁷ The number of licences can be reconsidered by the federal government in the course of time.

years, Advocate General Bot went a step further, and the Court of Justice adopted his view: *competition in the field of gambling services had detrimental effects*. In the relevant Dutch case *Sporting Exchange*, it was the referring Council of State that had suggested this view. It had voiced that a system of an exclusive right holder simplified not only the supervision of that operator²²⁸ but also prevented strong competition between licensees. Such competition would result in an increase in gambling addiction. Advocate General Bot adopted this point in his opinion. The Court of Justice in turn quoted the Advocate General's position and did not reject it. The Court found it

important to distinguish the effects of competition in the market for games of chance, the detrimental nature of which may justify a restriction on the activity of economic operators, from the effects of a call for tenders for the award of the contract in question. The detrimental nature of competition in the market, that is to say, between several operators authorised to operate the same game of chance, arises from the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction.

The argument of the detrimental effect of competition is related to the aforementioned argument of *channelling* but takes a different quality. Whereas the channelling argument states that an exclusive right holder will protect consumers more effectively, the '*detrimental competition*' argument goes beyond this position. It argues a *chain of causality*, which follows the subsequent logic: When private operators compete in the same market, they attempt to make their respective offers more attractive. As a consequence, consumer expenditure increases and accordingly the risk of consumers to become addicted to the game.²²⁹

The belief that competition leads to detrimental consequences in the gambling sector goes all the way back to Advocate General Gulmann's opinion in *Schindler*. He discussed the detrimental nature of competition from a different angle. He asked the Court to consider the *practical consequences* that its ruling will have.

²²⁸ C-203/08 *Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, para. 31. The simplified supervision refers to the (lowered) administrative burden that public authorities carry. It should be noted that the CJEU did not reject this argument in *Sporting Exchange*. By contrast, this argument is almost irrelevant for the ECtHR: see Sect. 8.3.2.2 *if.* and Clayton, and Tomlinson, *Law of Human Rights*, at 834 and 932–933. It was only in *Zeturf* that the CJEU remembered its stricter standard that it usually applies (para. 48): "the mere fact that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than supervision of a single operator is irrelevant. [...] administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom." Cf. for further cases e.g. C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2006] ECR I-8203, para. 48; C-318/07 *Hein Persche v Finanzamt Lüdenscheid* [2009] ECR I-359, para. 55.

²²⁹ Recently confirmed in C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)* [2013] nyr, para. 45.

Competition would hurt the *interests of smaller lotteries* since bigger lotteries could offer bigger prizes, which in turn would render them more attractive to consumers.²³⁰

Both Advocates General used the argument that competition leads to detrimental effects. While Gulmann argued detrimental *financial effects for Member States*, Bot argued detrimental *health effects for consumers*.

9.2.4.2 Empirical Evidence

Does competition necessarily lead to increased levels of gambling addiction? The aforementioned literature review inquired the comparative effectiveness of regulatory approaches, including that of licensing systems where operators compete for market shares. At that time, no study had directly examined potential detrimental effects of competition in the gambling sector.²³¹ The results of a subsequent pan-European study could not find statistically relevant differences with regard to the prevalence of disordered gambling associated with state monopolies on the one hand and private licensees on the other.²³²

If the assumption regarding competition were accurate, every country with a gambling licensing system should clearly show higher prevalence rates of gambling disorder. The discussion of the epidemiology of gambling disorder in Sect. 9.1.2.2 noted that the data situation of prevalence studies in many European countries is poor. In many jurisdictions either no prevalence study or only one is available.²³³ The situation in the UK is better with three national surveys from 1999 to 2010, involving large samples. Globally, North America has the most solid epidemiological data situation to offer. Both the US²³⁴ and the UK²³⁵ have widespread gambling offers. While exclusive right holders operate some games of chance in these countries (mostly, lotteries), *competitive licensing systems are prevalent both in the UK and the US for the majority*

²³⁰Opinion of Advocate General Gulmann in C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 112.

²³¹Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 37.

²³²Planzer, Gray, and Shaffer, "Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe". Regarding some limitations of the study, see Sect. 9.2.2.2 *i.f.*

²³³Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*; cf. also Meyer, Hayer, and Griffiths, *Problem Gambling in Europe: Challenges, Prevention, and Interventions*.

²³⁴For a brief introduction to the US regulatory regime in the area of gambling, cf. Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 42 *et seq.*

²³⁵For a brief introduction to regulatory regime in the area of gambling, cf. *ibid.*, at 53 *et seq.*; Miers, D., "A View from the British Isles" in *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling*, Littler, A., Hoekx, N., Fijnaut, C., (Eds.), Leiden/Boston: Martinus Nijhoff Publishers, 2011, 119–152, at 158 *et seq.*

of games of chance.²³⁶ The most recent epidemiological data from these countries do not support the view that a competitive licensing system necessarily leads to increased prevalence of gambling disorder. Petry et al.'s analysis of a large sample from the National Epidemiological Survey on Alcohol and Related Conditions (NESARC) found a life-time prevalence rate for gambling disorder of only 0.4 %.²³⁷ Kessler et al.'s analysis found a life-time prevalence rate for gambling disorder of 0.6 %.²³⁸ Competition between operators for market shares and the number of States permitting gambling offers increased over time. Meanwhile, the data show that the prevalence of gambling disorder went down in the last decade (see Sects. 9.1.2.2 and 9.2.5.2).

The 2005 Gambling Act liberalised the gambling sector in Great Britain. This included *inter alia* the introduction of a competitive licensing system for online games.²³⁹ In the last decade, the prevalence rates of gambling disorder have remained quite stable in spite of a significantly increased exposure to games of chance.²⁴⁰ The most recent British survey found past-year prevalence rates for gambling disorder of 0.9 % (DSM-IV-based screen) and 0.7 % respectively (Problem Gambling Severity Index, PGSI). According to the authors, these rates are similar to those found in Germany and Norway,²⁴¹ who have organised their gambling sector largely by exclusive right systems. Similar to North America, many European countries have seen stabilising or even decreasing rates *in spite of the trend of an increase in gambling offers*.²⁴²

These figures can be compared to the global prevalence of gambling disorder as discussed in Sect. 9.1. Several researchers suggested that life-time prevalence rates of gambling disorder range globally from 0.5 % to 2 % in the general population.²⁴³ Petry concluded that prevalence rates of past-year gambling disorder

²³⁶ GamblingCompliance, *Market Barriers: A European Online Gambling Study*; Gambling Compliance, *Market Barriers: US Internet Gaming*, GamblingCompliance 2010.

²³⁷ Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

²³⁸ Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

²³⁹ UK Gambling Act.

²⁴⁰ Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*; Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*; Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

²⁴¹ Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

²⁴² Wiebe, and Volberg, *Problem Gambling Prevalence Research: A Critical Overview. A Report to the Canadian Gaming Association*, at 13.

²⁴³ Weinstock, Ledgerwood, Modesto-Lowe et al., "Ludomania: Cross-Cultural Examinations of Gambling and Its Treatment", and the therein cited prevalence studies; Bland, Newman, Orn et al., "Epidemiology of Pathological Gambling in Edmonton"; Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions"; Volberg, Abbott, Rönnerberg et al., "Prevalence and Risks of Pathological Gambling in Sweden"; Welte, Barnes, Wiczorek et al., "Alcohol and Gambling Pathology among U.S. Adults: Prevalence, Demographic Patterns and Comorbidity".

were about 40 to 60 % lower than life-time rates.²⁴⁴ This rough overview shows that the *most recent rates from the UK and the US are not higher than global rates*. In the case of the US, the recent rates even appear to be slightly lower.

These considerations show that the reality of epidemiology of disordered gambling is *more complex than a simple causality between competition and increased gambling addiction*. The assumption regarding the detrimental effect of competition resulting in (more) attractive games should be put in perspective with another element found in the jurisprudence. Whereas the competitive form of “making games more attractive” is seen as detrimental, making games attractive in another regulatory setting seems to have positive effects according to the jurisprudence. On several occasions, the Court of Justice has acknowledged that an exclusive right holder may need to offer and to *advertise a wide range of attractive games* to draw players away from the black market. In this context, the attractiveness of games is perceived as beneficial.²⁴⁵

9.2.5 Consistent and Systematic Policy: Controlled Expansion and Advertising

9.2.5.1 Case Law

As opposed to a prohibitive approach, an exclusive right system raises questions whether protectionist motives could also be behind the chosen regulation. Early on, Advocates General expressed their doubts, for instance Advocate General La Pergola in *Läärä*. Nevertheless, up to the *Gambelli* decision, the Court of Justice did not proceed to a proportionality review.

It was with the Italian cases in *Gambelli* and *Placanica* that it became almost impossible for the Court of Justice to ignore inconsistencies in the Italian gambling policy. This was even more the case since Advocate General Fennelly had already pointed out at inconsistencies in the earlier Italian case *Zenatti*.²⁴⁶

²⁴⁴ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 20.

²⁴⁵ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55: “in order to achieve that objective [of drawing players away from clandestine betting and gaming], authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.” Recently confirmed in C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 68.

²⁴⁶ Cf. the reference of the CJEU to Advocate General Fennelly’s criticism in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36: “as the Advocate General observes [...], such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.”

The Court of Justice started to review the proportionality of the Italian measures in the *Gambelli* case. It held that national restrictions had to be suitable for achieving the legitimate objectives, “inasmuch as they must serve to limit betting activities in a consistent and systematic manner.”²⁴⁷

In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.²⁴⁸

The decisions in *Gambelli* and *Zenatti* were significantly different in that the Court of Justice no longer expressly approved of the proportionality of the national measures. It *left it to the referring court* to decide whether the national measures were genuinely directed to realising the stated objectives and proportionate to these objectives.²⁴⁹

It was noted that one practice defended with the ‘*channelling*’ argument was the *expansion of and advertising for gambling services* of the exclusive right holder. The doubts in the Italian cases related to the policy of expanding the offer of games and their advertising.

In the *Placanica* case the Court of Justice approved of a controlled expansion of games and advertising. It found it

possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming [...] to activities which are authorised and regulated. [...] in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.²⁵⁰

The Italian gambling cases mainly regarded concerns relating to organised crime such as *fraud or money laundering*. The argument of ‘*controlled expansion and advertising*’ was first only used in relation to this justification ground. Later on, in *Ladbrokes*, the Court of Justice also approved this argument in relation to *gambling addiction*. The authorised operator had to represent an attractive alternative to the black market. Hereto, an extensive range of games, advertising and additional distribution techniques could be necessary to curb gambling addiction.²⁵¹

It is unclear whether this criterion has effectively supported national courts in assessing whether a national gambling policy was consistent and systematic. In any

²⁴⁷ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67.

²⁴⁸ *Ibid.*, para. 69.

²⁴⁹ C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, para. 37; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 75.

²⁵⁰ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

²⁵¹ C-258/08 *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR I-4757, paras 25–27.

event, a significant number of referred cases were lodged at the Court of Justice after the *Placanica* ruling. A close look at the relevant decisions reveals that the guidance offered by the Court of Justice was not as clear as it may seem at first sight. A comparison of the different statements on expansion and advertising demonstrates this point.

According to the *Gambelli* decision, national authorities were not allowed to “incite and encourage consumers to participate” in gambling offers.²⁵² In *Placanica*, however, the Court found that “a policy of controlled expansion [...] may be entirely consistent [...]. [An attractive offer] may [...] necessitate [...] advertising on a certain scale.”²⁵³ Finally in *Ladbroke’s*, the Court found that a Member State was not allowed to pursue a policy of “substantially expanding” gambling by “excessively inciting and encouraging consumers to participate” in these offers.²⁵⁴ The conclusion to be drawn from this is that a state can expand its gambling offers and advertise them (*Placanica*). It is not allowed to incite and encourage consumers (*Gambelli*). The exception established is if a State does ‘not excessively’ incite and encourage consumers (*Ladbroke’s*).²⁵⁵

The EFTA Court also reviewed advertising practices in its two gambling decisions, and demonstrated a significantly stricter review. It took a rather critical stance in *ESA v Norway* towards marketing efforts.

Restrictions based on legitimate grounds of overriding public interest must be consistent with similar measures already taken. [...] In accordance with this principle, a State must not take, facilitate or tolerate measures that would run counter to the achievement of the stated objectives of a given national measure. [...] the Defendant has chosen to fight gambling addiction through the reduction of gambling opportunities by subjecting the operation of gaming machines to a State-owned monopoly. In order to be consistent, the Defendant may not at the same time endorse or tolerate measures, such as extensive marketing, which could lead to an increase of gambling opportunities.²⁵⁶

In *EFTA-Ladbroke’s*, the EFTA Court appeared to be even less approving of extensive marketing practices and emphasised the *burden of proof*.²⁵⁷ It held that the national court had to consider

whether the State takes, facilitates or tolerates other measures which run counter to the objectives pursued [...]. Such inconsistencies may lead to the legislation at issue being unsuitable for achieving the intended objectives. It is for the State to demonstrate that its measures in the field of games of chance fulfil these requirements.²⁵⁸

²⁵² C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69.

²⁵³ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

²⁵⁴ C-258/08 Ladbroke’s Betting & Gaming Ltd, Ladbroke’s International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

²⁵⁵ Planzer, S. (2010). “The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach”, *European Journal of Risk Regulation*, 1(3), 289–295, at 294.

²⁵⁶ E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 43.

²⁵⁷ Lavranos, N., “Gambling and EC Law. Rien ne va plus?”, *European Current Law – Yearbook*, (2007), xi–xvi, at xvi.

²⁵⁸ E-3/06 Ladbroke’s Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 51.

The EFTA Court further addressed the relationship of suitability, advertising and gambling addiction. It found

the marketing activities and the development of new games by Norsk Tipping [...] relevant for the assessment of the consistency of the gaming policy. A system of exclusive rights can only be suitable as a means of fighting gambling addiction if it is required to operate in a way which serves to limit gaming activities in a consistent and systematic manner [...]. In this context, the development and marketing of addictive games by the monopoly provider are relevant. This may be at odds with the aim of fighting gambling addiction.²⁵⁹

In more recent decisions, the Court of Justice started to review the proportionality of advertising measures more closely. Its approach appears to be influenced by some of the aforementioned elements in the jurisprudence of the EFTA Court. The *ajustead* approach could be noted since *Markus Stoss* and *Carmen Media*. In these cases, the referring courts had raised doubts as to the consistency of the policy since the state monopolist on sports betting was engaging in intensive advertising campaigns.²⁶⁰ In *Markus Stoss*, the Court alluded to some of the statements of the EFTA Court and found it important that

any advertising issued by the holder of a public monopoly remain measured and strictly limited to what is necessary in order thus to channel consumers towards authorised gaming networks. Such advertising cannot, however, in particular, aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours.²⁶¹

According to the Court of Justice, if the national courts noted such developments, the public monopoly could no longer be justified with the objectives of preventing incitement to squander money on gambling and combating gambling addiction.²⁶² The incompatible national legislation, establishing the public monopoly, could not continue to apply during a transitional period.²⁶³ This stricter review was mostly

²⁵⁹ *Ibid.*, para. 54.

²⁶⁰ C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) *Markus Stoss* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis* and *Kulpa Automatenservice Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR I-8069, para. 100; C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein* and *Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 56.

²⁶¹ C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) *Markus Stoss* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis* and *Kulpa Automatenservice Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR I-8069, para. 103.

²⁶² *Ibid.*, para. 106.

²⁶³ C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR-8015, para. 69; confirmed in the opinion of Advocate General Mazák as well as in the case C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd* (C-186/11), *William Hill Organization Ltd*, *William Hill Plc*, and *Sportingbet Plc* (C-209/11) v *Ypourgos Oikonomias kai Oikonomikon*, *Ypourgos Politismou*, Intervener: *Organismos Prognostikon Agonon Podosfairou AE* (OPAP)

reconfirmed in subsequent decisions²⁶⁴ – but partly not²⁶⁵ – and somehow further intensified in *Dickinger & Ömer* where the referring court expressed doubts regarding the advertising policy of the Austrian lottery monopolist. There were allegations of a continual increase in the advertising expenditure directed to new targets, particularly of young people. The Court of Justice therefore asked the referring court to consider in its proportionality review in particular the scale of advertising and the creation of new games.²⁶⁶ Importantly, the Court drew a new distinction that should guide the assessment whether the monopolist was going beyond a mere (permitted) channelling of consumers:

In particular, a distinction should be drawn between strategies of the holder of a monopoly which are intended solely to inform potential customers of the existence of products and serve to ensure regular access to games of chance by channelling gamblers into controlled circuits, and those which invite and encourage active participation in such games. A distinction must therefore be drawn between a restrained commercial policy seeking only to capture or retain the existing market for the organisation with the monopoly, and an expansionist commercial policy whose aim is to expand the overall market for gaming activities.²⁶⁷

9.2.5.2 Empirical Evidence Regarding Controlled Expansion

Exposure

The Court of Justice accepts that a controlled expansion of gambling services may be in line with a consistent and systematic gambling policy. It must be assessed whether empirical evidence supports the view that an increased exposure to gambling does not necessarily lead to an increase in gambling addiction. At first sight, it may appear questionable that a government aims to confine the prevalence of gambling addiction while simultaneously expanding gambling offers. This is due to the

[2013] nyr, paras 66–73 (opinion) and paras 38–43 (judgment). In this case, Mazák also critically commented on the “dynamic and expansive policy”, the “scale of advertising” and the “creation of new games” of the Greek monopolist (paras 56–57).

²⁶⁴ C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 68; C-212/08 *Zeturf Ltd v Premier ministre* [2011] ECR I-5633, para. 71; C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, para. 68.

²⁶⁵ Whereas Advocate General Mazák in *Stanleybet* openly criticised the Greek monopoly’s “dynamic and expansive policy”, the “scale of advertising” and the “creation of new games” (paras 56–57), the CJEU refused to look into these issues, leaving them to the national court: C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)* [2013] nyr, para. 32.

²⁶⁶ C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, paras 59–65.

²⁶⁷ *Ibid.*, para. 69.

expectation that the higher the exposure to gambling, the higher the prevalence of gambling addiction must be in a population.

The effects of the exposure to certain substances, like germs and toxins, have been well identified. Already in the 1960s, it was suggested that social events could also represent a kind of equivalent to germs.²⁶⁸ Exposure and infection processes relating to activities such as gambling may take similar patterns as in relation to germs and toxins. According to this view, the exposure of a population to gambling offers has the potential to infect people and adversely affect their health. If exposure to gambling was inherently toxic, then increased exposure should lead inevitably to increased levels of morbidity, as would be the case for instance with radiation.²⁶⁹ In the *exposure model*, increased gambling exposure should therefore lead to proportionately increased levels of gambling disorder.²⁷⁰ This model would thus support the theory that an increase of gambling services necessarily leads to higher prevalence rates of gambling disorder.

Section 9.1.2.2 outlined the global epidemiology of gambling disorder. The early data from North America seemed to support the exposure model with steadily increasing prevalence rates. The prevalence of life-time gambling disorder in the adult population in the late 1970s was 0.7 %. At the time, ‘only’ 68 % had ever gambled in their life.²⁷¹ Almost two decades later, a meta-analysis found that 95 % of the population (in US and Canada) had ever gambled and that 1.5 % were life-time pathological gamblers (1.1 % past-year). A few years later, the pace of the increase had slowed down but was at 2.0 % for life-time gambling disorder (1.35 % past-year).²⁷² It was already mentioned that the rates found in Canada were very similar to those in the US.²⁷³

Until the beginning of the third millennium, the figures suggested two things. Higher exposure to gambling leads to higher participation and gambling disorder

²⁶⁸ McGuire, W., “Inducing Resistance to Persuasion” in *Advances in Experimental Social Psychology*, Berkowitz, L. (Ed.), vol. 1, New York: Academic Press Inc., 1964, pp. 191–229.

²⁶⁹ Shaffer, H.J. (2005). “From Disabling to Enabling The Public Interest: Natural Transitions from Gambling Exposure to Adaptation and Self-Regulation”, *Addiction*, 100(9), 1227–1230, at 1228.

²⁷⁰ Shaffer, H.J., LaBrie, R.A., and LaPlante, D. (2004c). “Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin”, *Psychology of Addictive Behaviors*, 18(1), 40–48, at 41. The following pages on exposure, adaptation and reasons for adaptation as well as the therein cited literature are largely based on the contribution: *ibid*.

²⁷¹ Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

²⁷² Welte, Barnes, Wieczorek et al., “Gambling Participation in the U.S. – Results from a National Survey”, cited in Cunningham-Williams, Cottler, and Womack, “Epidemiology”.

²⁷³ Petry, *Pathological Gambling: Etiology, Comorbidity, and Treatment*, at 16. As regards (mere) participation in gambling, it was for instance shown that the proportion of people engaging in gambling increased from 54 % to 63 % after casinos and video lottery terminals were introduced: Ladouceur, R., Jacques, C., Ferland, F. et al. (1999). “Prevalence of Problem Gambling: A Replication Study Seven Years Later”, *Canadian Journal of Psychiatry*, 44(4), 802–804.

rates. *The rates had increased.*²⁷⁴ The fast expansion of legalised gambling seemed to be accompanied by an increase in disordered gambling.²⁷⁵ Considering the *massive* increase of exposure to games of chance in the US, the increase of disordered gambling could however hardly be proportionate.

Studies at state level also seemed to support this view. In Kallick's 1979 study, the State of Nevada showed a higher rate of gambling disorder than the rest of the US.²⁷⁶ It should be noted that at the time of the study, Nevada was the only established casino State. New Jersey was second in line with the adoption of casino legislation in 1976 and the first casino opening in 1978. The nationwide spread of casinos only started in the early 1990s.²⁷⁷ With the spread of gambling offers all over the country, other States such as Iowa or Missouri experienced increased problems too.²⁷⁸

Adaptation

A changing trend became evident during the last decade. More recent prevalence rates refuted the direct and proportionate link between exposure and infection. This trend suggests that a *population adapts over time* to the exposure to games of chance.

Petry et al. identified a prevalence rate of life-time gambling disorder at 0.4%²⁷⁹ and Kessler et al. at a rate of 0.6 %. Despite an ever-increasing exposure, in particular as of the 1990s, life-time gambling participation had also dropped to 78 %.²⁸⁰ Around three decades after the first prevalence study conducted by Kallick et al., *the rates for gambling disorder were back down at the same level* or even slightly under them.²⁸¹

²⁷⁴ Volberg, R.A. (1994). "The Prevalence and Demographics of Pathological Gamblers: Implications for Public Health", *American Journal of Public Health*, 84(2), 237–241; Volberg, R.A. (1996). "Prevalence Studies of Problem Gambling in the United States", *Journal of Gambling Studies*, 12(2), 111–128.

²⁷⁵ Pietrzak, R.H., Ladd, G.T., and Petry, N.M. (2003). "Disordered Gambling in Adolescents: Epidemiology, Diagnosis, and Treatment", *Pediatric Drugs*, 5(9), 583–595.

²⁷⁶ Kallick, Suits, Dielman et al., *A Survey of American Gambling Attitudes and Behavior*.

²⁷⁷ Dunstan, R., *Gambling in California*, California Research Bureau, California State Library, 1997.

²⁷⁸ Shaffer, H.J., LaBrie, R.A., Caro, G. et al., *Disordered Gambling in Missouri: Regional Differences in the Need for Treatment*, Boston, MA: Harvard Medical School, Division on Addictions, 2004; Shaffer, H.J., LaBrie, R.A., LaPlante, D.A. et al., *Evaluating the Iowa Department of Public Health Gambling Treatment Program: Four Years of Evidence*, Boston, MA: Division on Addiction, Harvard Medical School, 2002.

²⁷⁹ Petry, Stinson, and Grant, "Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions", at 564.

²⁸⁰ Kessler, Hwang, LaBrie et al., "DSM-IV Pathological Gambling in the National Comorbidity Survey Replication".

²⁸¹ LaPlante, D.A., and Shaffer, H.J. (2007). "Understanding the Influence of Gambling Opportunities: Expanding Exposure Models to Include Adaptation", *American Journal of Orthopsychiatry*, 77(4), 616–623; Shaffer, and Korn, "Gambling and Related Mental Disorders: A Public Health Analysis".

Today, it appears that there are only two States left that do not allow legalised forms of gambling (Utah, Hawaii).²⁸² The nationwide spread of casinos starting in the 1990s and the (unlicensed) spread of Internet gambling in more recent years have led to much higher exposure to gambling offers. Kessler's and Petry's nationwide studies show prevalence rates similar to those of Kallick three decades ago when most US states still had anti-gambling legislation in place. The latter had been enacted during the early 1900s. Only in 1964, state lotteries were inaugurated. *The nationwide spread of casinos took place starting in the early 1990s*, with the State of Nevada (1931) and State of New Jersey (1976) being the exceptions. Already around 1999, casinos were operated in 27 states.²⁸³

The example of the UK is also instructive. It had been suggested that increased access to gambling offers in the UK would cause more disordered gamblers,²⁸⁴ however, the epidemiological studies do not support this prediction. The 2005 Gambling Act *liberalised the UK market* and significantly increased the exposure to gambling offers to UK residents. Additional land-based venues opened and private operators were licensed to offer their services via the Internet. *The prevalence rates of disordered gambling have remained quite stable.*²⁸⁵ The 1999 study found a rate of 0.7 % (average of two screens)²⁸⁶ and the 2007 study a rate of 0.55 (average of two screens).²⁸⁷ In 2010, a rate of 0.8 % (average of two screens) was found and the authors noted that this slight increase was at the margins of statistical significance.²⁸⁸

Another interesting case study is the *State of Nevada*. It is by far the most important gambling state in the US. Despite the fact that Macao surpassed Las Vegas in recent years, the latter is still referred to as the gambling capital of the world.²⁸⁹ *Nevada residents have a uniquely high exposure to gambling offers* within their close vicinity. Shaffer et al. designed the Regional Index of Gambling Exposure

²⁸² GamblingCompliance, *Market Barriers: US Internet Gaming*.

²⁸³ Petry, N.M., and Armentano, C. (1999). "Prevalence, Assessment, and Treatment of Pathological Gambling: A Review", *Psychiatric Services*, 50(8), 1021–1027.

²⁸⁴ Volberg, R.A. (2000). "The Future of Gambling in the United Kingdom", *British Medical Journal*, 320(7249).

²⁸⁵ The studies refer to 'problem gambling', but according to the aforementioned definitions, this equates to 'disordered gambling'. The three surveys used a threshold of 3 out of 10 DSM-IV criteria (instead of 5 of 10 criteria) or instruments that are similar to this threshold (SOGS). Moreover, their samples included people as of the age of 16 years. As disordered gambling is particularly high around adolescents, the inclusion of minors may impact the prevalence rates.

²⁸⁶ Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*. The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % DSM-IV.

²⁸⁷ Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*. The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV).

²⁸⁸ Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

²⁸⁹ Barboza, D., "Macao Surpasses Las Vegas as Gambling Center", *New York Times*, 23 January 2007.

(RIGE), a tool to measure the exposure to gambling for a population in a given region. It takes into account the dose (total number of gambling establishments and employees), potency (number of different types of games) and duration (length of time) of exposure.²⁹⁰ The exposure to gambling offers in Nevada is around eight times higher than in the second most exposed State of New Jersey.²⁹¹ According to the exposure model, Nevadans should have uniquely high prevalence rates of disordered gambling.

Reviews of prevalence rates showed that the State of Nevada does not have proportionately higher disordered gambling rates.²⁹² Studies conducted in Nevada further found that *people who had recently moved to Nevada showed higher rates of disordered gambling* than people who had been residing in Nevada for 10 years or more.²⁹³ Importantly, *Nevada youth did not gamble more nor did it gamble at an earlier age* than elsewhere in the nation.²⁹⁴

Studies on casino employees are also of high interest since that staff is exposed to gambling facilities on a daily basis. Staff that had been employed for a shorter period showed higher disordered gambling rates than staff that had been employed for a longer period.²⁹⁵

The aforementioned more recent national, regional and profession-related epidemiological results made it impossible to uphold the exposure model without adjustments. A recent literature review further confirmed this stance. Living close to gambling venues may increase likelihood to play games of chance, but a relationship with disordered gambling was not consistently found.²⁹⁶

Therefore, it was necessary to *complement the exposure model with a second model: the adaptation model*. The adaptation model integrates the aforementioned more recent empirical finding. People are capable of adjusting their behaviour over time.²⁹⁷ The empirical evidence is growing that the two models need to be read in conjunction (see Fig. 9.4 below). The combined exposure and adaptation models

²⁹⁰ Shaffer, LaBrie, and LaPlante, “Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin”.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.; Volberg, R.A., *Gambling and Problem Gambling in Nevada*, Report to the Nevada Department of Human Resources 2002.

²⁹⁴ Volberg, *Gambling and Problem Gambling in Nevada*.

²⁹⁵ Shaffer, LaBrie, and LaPlante, “Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin”; Shaffer, and Hall, “The Natural History of Gambling and Drinking Problems among Casino Employees”.

²⁹⁶ Disley, E.P., Alexandra, May Culley, D., and Rubin, J., *Map the Gap: A Critical Review of the Literature on Gambling-Related Harm*, Report prepared for the Responsible Gambling Fund 2011, at xv.

²⁹⁷ Shaffer, LaBrie, and LaPlante, “Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin”; Shaffer, H.J., and Zinberg, N.E. (1985). “The Social Psychology of Intoxicant Use: The Natural History of Social Settings and Social Control”, *Bulletin of the Society of Psychologists in the Addictive Behaviors*, 4(1), 49–55.

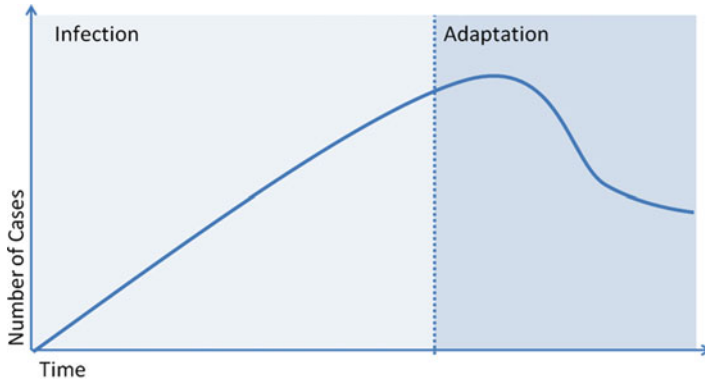


Fig. 9.4 Exposure and adaptation

suggest that an *initial infection* (by gambling offers) results in increased levels of disordered gambling. *Adaptation mechanisms* first slow down the increase of infections and subsequently stabilise and lower the prevalence of disordered gambling. Hence, populations unfamiliar with gambling offers (immature markets) may first experience a substantial infection before recovering from the exposure. By contrast, populations that are already familiar with gambling offers or certain types of gambling, may have eventually adapted to this environmental factor (Fig. 9.4).

These findings raise the question about the existence of *hormesis*. This is the phenomenon known in toxicology that low dose exposures to toxins create positive biochemical reactions in the body.²⁹⁸ In this view, *low dose exposure would be preferable to both zero exposure and exposure with high doses*. Hormesis effects have been shown for several substances, in particular in toxicology.²⁹⁹ Hormesis mechanisms are sought after in the field of immunology and are known under the term of *mithridatism*. In an attempt to make a subject immune against a toxin, he is exposed to small doses. Similarly, vaccinations are administered in order to create immunity to a disease. According to the aforementioned finding, the sudden exposure of a population unfamiliar with gambling to a great quantity of gambling offers may lead to an overwhelming infection of the population. Research on gambling disorder will need to examine these hormesis mechanisms more closely before conclusions can be made.

What remains unsolved is the question regarding the *reasons for the adaptation* process. Social learning may be a factor. When people are confronted with a new

²⁹⁸ Calabrese, E.J. (2004). "Hormesis: A Revolution in Toxicology, Risk Assessment and Medicine", *European Molecular Biology Organization Reports*, 5 (special issue), S37–S40.

²⁹⁹ For research into hormesis, cf. e.g. the journal 'Dose-Response', "Dose-Response", available at <http://www.dose-response.com/>, published by the International Dose-Response Society in Amherst (MA).

phenomenon of life, they can learn to adjust their behaviour. After a while, people also discover the negative aspects of a new phenomenon, for example, opportunity costs: the time somebody spends on gambling, he cannot spend on something else. Adolescents may learn that the time they spend gaming on computers could also be used for other activities.

Novelty effects may also play a role. New things in life are generally appealing. The experience of a society with new products or behaviours may change and consequently, its legal status or social acceptance. Examples include cigarette smoking, which has gone from being en vogue – one only needs to think of countless Hollywood films featuring permanently smoking main characters – to becoming socially banned or even illegal. Likewise, the societal perception of absinth altered from being a chic drink in nineteenth century France into a dangerous intoxicant that was eventually banned.³⁰⁰ To illustrate, the production of absinthe was also prohibited in Switzerland for several decades; the ban only added to the fascination of the consumption of absinthe. As of 2000, absinthe can again be legally produced.

The considerations show that there is growing empirical evidence for adaptation processes in populations that are exposed to gambling offers. The combination of the exposure and adaptation models suggests that the (abrupt) introduction of (new types of) games of chance may lead to an increased infection of the population with disordered gambling. Over time, the population manages to adapt to the exposure to gambling offers. Nevertheless, a certain percentage of the population will still experience gambling disorder.

As a consequence, the empirical evidence provides *support for a 'controlled expansion'* as argued by the Court of Justice. Importantly, the evidence is *not* limited to a specific regulatory model. The Court of Justice has argued controlled expansion in relation to exclusive right holders as part of a bigger 'channelling' policy. The epidemiological data from the US mainly relate to licensing models as the majority of games are run by private operators. Public operators mostly run lotteries.³⁰¹ From a scientific perspective, 'controlled expansion' has little to do with a particular regulatory model (for instance, monopoly, liberal or strict licensing system). There are no indications in the literature as to why adaptation processes would not occur under certain regulatory models.

A socially responsible 'controlled expansion' policy should in any case be scientifically accompanied. A series of continuous epidemiological studies allows analysing the development of disordered gambling subsequent to a change or continuation of gambling policies. It is also part of a responsible policy to allocate the necessary funds to enable an effective implementation of the policy goals, in

³⁰⁰ For the example of absinthe, cf. Vogt, D.D., and Montagne, M. (1982). "Absinthe: Behind the Emerald Mask", *Substance Use & Misuse*, 17(6), 1015–1029.

³⁰¹ Gambling Compliance, *Market Barriers: US Internet Gaming*.

particular through preventive measures.³⁰² While some EU/EEA Member States have taken such financial commitment, others have not.³⁰³

9.2.5.3 Empirical Evidence Regarding Advertising

General Considerations

According to the case law, operators can expand their gambling offers and advertise them but are not allowed to excessively incite and encourage consumers.³⁰⁴ An attractive offer may necessitate advertising on a certain scale.³⁰⁵ Similar to the ‘controlled expansion’ argument, the Court of Justice linked this argument to practices of national exclusive right holders and the already discussed ‘channelling’ approach. In order to draw players away from the black market, expansion and advertising may be necessary.

Experiences from other fields indicate that a legal offer of games of chance is preferable to total prohibition. Where demand is inelastic, it generally does not pay to install and enforce a prohibitive approach. This has been concluded (even) for products much more controversial than gambling.³⁰⁶ Where many people wish to consume a certain product, it will eventually be offered – legally or illegally – if financial gains are expected by the producers – or in the case of gambling – the operators.³⁰⁷ Prohibitive approaches are problematic as they regularly lead to undesired side effects that are hard to control due to the illegality of the product or activity.³⁰⁸ Zinberg observed already in the 1980s in relation to drug policy that public debates all too often ignored two related factors, which made the issue of permanent prohibition largely academic. Slightly provocative he stated that even

³⁰² Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

³⁰³ Planzer (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*.

³⁰⁴ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55; C-258/08 Ladbroke Betting & Gaming Ltd, Ladbroke International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

³⁰⁵ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

³⁰⁶ Becker, G.S., Grossman, M., and Murphy, K.M., “The Economic Theory of Illegal Goods: The Case of Drugs”, *National Bureau of Economic Research Working Paper*, working paper 10976 (2004), available at SSRN <http://ssrn.com/abstract=633635>.

³⁰⁷ For an introduction to the basic principles of economics, cf. e.g. Mankiw, *Principles of Economics*.

³⁰⁸ For a recent account on the war on drugs, cf. Seidl, C., and Staun, H., “*Legalität als letzter Ausweg: Machen wir Frieden mit den Drogen*”, *Frankfurter Allgemeine Sonntagszeitung*, 29 April 2012.

though drug use similar to pregnancy could be avoided by abstinence, it does not seem that mankind has opted for total continence in both cases. Furthermore, the prohibition of drug using in the US had not been any more effective than the earlier attempt to eliminate alcohol use in the 1920s.³⁰⁹

If a government decides to allow games of chance, the question arises *whether advertising should be allowed too*. Does advertising impact on the propensity of disordered gambling in society?

Within the earlier described public health model of disease transmission, games of chance and advertising for such games form *environmental factors* that have the potential to impact people's behaviour. A recent literature review assessed the empirical evidence regarding the *extent to which advertising impacts the propensity of gambling disorder*.³¹⁰ A discussion on this topic should start by acknowledging the *complexity* of measuring this relationship. There are classic problems such as measuring the counterfactual or the difference between self-assessment (questionnaire) and actual behaviour. In addition, the endeavour is further complicated by the fact that advertising may impact both conscious and sub-conscious levels. Bass noted in the 1960s, "there is no more difficult, complex, or controversial problem in marketing than measuring the influence of advertising on sales."³¹¹

While it is complex to show associations between advertising and sales, it is even more complex to show associations between advertising and *gambling disorder*. Binde accurately described these problems.³¹² Upon recognition of the complexity of the exercise, Binde concluded that there was no reliable evidence regarding the impact of gambling advertising on gambling disorder. He also concluded that the overall impact on the general population was likely to be rather small. He argued that a *differentiation between different markets* was necessary. In a competitive licensing market, advertising is likely to affect the size of market share of competitors. In a monopolistic market by contrast, advertising is likely to affect the total sales in that market. The impact of advertising in mature markets is likely to be different from young markets. In the latter, advertising efforts for games of chance may increase the overall participation rate of a population; by contrast, advertising effects in a mature market may fade out. It may mainly lead to shifts between different operators or products (substitution effect).³¹³

Recent prevalence data from the *UK* provide some support for this view. As a consequence of a liberalisation of the gambling sector by the 2005 Gambling Act, *gambling advertising has arguably expanded significantly* in recent years.

³⁰⁹Zinberg, N.E., "Reflections on Social Policy and Drug Research" in *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use*, New Haven, CT: Yale University Press, 1984.

³¹⁰Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

³¹¹Bass, F.M. (1969). "A Simultaneous Equation Regression Study of Advertising and Sales of Cigarettes", *Journal of Marketing Research*, 6(3), 291–300.

³¹²Binde, P. (2007). "Selling Dreams – Causing Nightmares?", *Journal of Gambling Issues*, 20, 167–192.

³¹³Ibid.

If the impact of advertising upon gambling behaviour of the general population were indeed big, a significant increase in gambling participation should take place. If advertising led to increased levels of gambling disorder, a significant increase of those rates should also be noted. The participation rates in games of chance in 2010 were a return to those observed in 1999, and prevalence rates of gambling disorder remained quite stable over the last decade.³¹⁴ Binde noted more generally that countries with a sudden advertising increase or decrease did not report significant changes in disordered gambling rates.³¹⁵

Impact on Disordered Gamblers

While it is very complex to measure the impact of advertising on the propensity of disordered gambling in the general population, researchers are more likely to be able to show effects of advertising on *certain population groups*. Relevant are in particular those studies that involve vulnerable population groups, namely *adolescents* and *disordered gamblers*. As adolescents show higher prevalence rates of disordered gambling than adults, it is of interest how they react to advertising. Since disordered gamblers already experience problems to keep their gambling under control, their reactions to advertising are of particular interest too.

Even though the evidence-base is not solid, there are indications that advertising works as a *trigger to gamble* for *some* disordered gamblers (while this does not seem to be the case for others). Advertising seems to work as external *stimuli* that produce an impulse to gamble (trigger). Grant et al. performed a study with 131 pathological gamblers in treatment. About half of them stated that advertising on billboards, television or radio triggered them.³¹⁶ A study by Binde found similar results. For some pathological gamblers, advertising worked as a *trigger to re-engage in gambling*. Advertising appeared to have the biggest impact during *escalation and relapse*. Some pathological gamblers would gamble more (escalation) or they reengaged in gambling when they were trying to cut down or quit gambling (relapse).³¹⁷ It was also shown that addicts and non-addicts react differently to gambling marketing tools.³¹⁸

³¹⁴ Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 68.

³¹⁵ Binde, "Selling Dreams – Causing Nightmares?".

³¹⁶ Grant, J.E., and Kim, S.W. (2001). "Demographic and Clinical Features of 131 Adult Pathological Gamblers", *Journal of Clinical Psychiatry*, 62(12), 957–962.

³¹⁷ Binde, P. (2009). "Exploring the Impact of Gambling Advertising: An Interview Study of Problem Gamblers", *International Journal of Mental Health and Addiction*, 7(4), 541–554.

³¹⁸ Narayanan, S., and Manchanda, P. (2011). "An Empirical Analysis of Individual Level Casino Gambling Behavior", *Stanford University Graduate School of Business Research Paper No 2003*, available at <http://gsbapps.stanford.edu/researchpapers/library/RP2003.pdf>.

Impact on Adolescents

In relation to adolescents, there are indications that this population group is *particularly susceptible of messages* created by advertising and counter-advertising. Advertising may significantly impact their perception of games of chance.³¹⁹ Derevensky et al. found that male and older adolescents in particular seemed to be influenced by the overly positive image created by gambling advertising.³²⁰ Lee et al. studied the impact of gambling advertising on College students. They found that media gambling exposure led to positive attitudes towards gambling shows and gambling adverts. This furthered their intentions to gamble. It is also noteworthy that *anti-gambling media exposure* led to negative attitudes towards gambling advertisements and gambling shows. Both advertising and counter-advertising seem to influence adolescents.³²¹

In view of the paucity of empirical evidence on the effects of gambling advertising, *research from related fields* that also involve health risks, such as tobacco and alcohol, may grant some guidance.³²² Certainly, there are differences: From a public health perspective, the eradication of smoking can be welcomed; by contrast, gambling and alcohol consumed in moderate doses is not known to have harmful effects on health.³²³ Nevertheless, the experiences from this field regarding the effectiveness of advertising and counter-advertising can inform gambling policy. Friend et al. reviewed the empirical evidence on the effects of advertising and counter-advertising on *tobacco*. They found that tobacco advertising restrictions and counter-advertising impacted youth's attitudes and the smoking prevalence among minors. Pro-health messages in youth-oriented media appeared to be effective too.³²⁴

Content Analysis of Advertisement

Finally, content analysis studies show that gambling advertising (in some countries) may work with messages that contribute to *distorted perceptions* of games of chance (for example, the more you gamble, the better your chances of winning). Moneghan

³¹⁹ For the whole topic, cf. Derevensky, *Teen Gambling: Understanding a Growing Epidemic*.

³²⁰ Derevensky, J., Sklar, A., Gupta, R. et al. (2010). "An Empirical Study Examining the Impact of Gambling Advertisements on Adolescent Gambling Attitudes and Behaviors", *International Journal of Mental Health and Addiction*, 8(1), 21–34.

³²¹ Lee, H.S., Lemanski, J.L., and Jun, J.W. (2008). "Role of Gambling Media Exposure in Influencing Trajectories among College Students", *Journal of Gambling Studies*, 24(1), 25–37.

³²² For a contribution regarding risk regulation in these three fields of public income, cf. Cnossen, S., *Taxation and Regulation of Smoking, Drinking and Gambling in the European Union*, The Hague: CPB Netherlands Bureau for Economic Policy Analysis, 2009.

³²³ Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 60.

³²⁴ Friend, K.B., and Ladd, G.T. (2009). "Youth Gambling Advertising: A Review of the Lessons Learned from Tobacco Control", *Drugs: Education, Prevention, and Policy*, 16(4), 283–297.

et al. confirm that youth appears to be particularly vulnerable to the effects of advertising. Relying on the North American situation, they also argue that gambling is regularly portrayed and perceived by adolescents as a *harmless and credible activity and as an alternative to hard work*. Studies conducted in the 1990s found that a big share of the gambling advertising in the US and Canada was misleading.³²⁵ Further content analysis studies confirmed that gambling advertising in North America aired at times or in programmes attractive to youth. Messages often *inter alia* related to *taking shortcuts to success and quick fixes to problems* (escape). While responsible gambling messages often accompanied the adverts, they could only get marginal attention as they were often shown only in very small print.³²⁶ Distorted personal imagination can therefore be reinforced by deliberate deception.³²⁷

Results

The review of the literature on the empirical evidence relating to the effects of gambling advertising allows analysing the approach of the Court of Justice in light of empirical evidence. The Court noted that an attractive offer of an exclusive right holder might necessitate advertising on a certain scale;³²⁸ the advertising should not (excessively) incite and encourage consumers.³²⁹ In subsequent cases and similar to the approach of the EFTA Court, it started to review advertising practices more strictly. It considered the scale of advertising and – by way of quoting parties to the case – the (young) age of consumers targeted by the advertising. It differentiated between (restrained) informative versus (expansionist) encouraging advertising.³³⁰

The empirical evidence provides support for at least some of the Court of Justice's considerations. It was shown that *advertising* has a significant effect on

³²⁵ Monaghan, S.M., Derevensky, J., and Sklar, A. (2009). "Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendations to Minimise Harm", *Journal of Gambling Issues*, 22, 252–274.

³²⁶ McMullan, J.L., and Miller, D. (2010). "Advertising the "New Fun-Tier": Selling Casinos to Consumers", *International Journal of Mental Health and Addiction*, 8(1), 35–50; cf. also McMullan, J.L., and Miller, D. (2008). "All In! The Commercial Advertising of Offshore Gambling on Television", *Journal of Gambling Issues*, 22, 230–251.

³²⁷ For a discussion, cf. Binde, P., "You Could Become a Millionaire" – Truth, Deception, and Imagination in Gambling Advertising" in *Global Gambling: Cultural Perspectives on Gambling Organizations*, Kingma, S.F. (Ed.), New York: Routledge, 2010, pp. 171–194.

³²⁸ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55.

³²⁹ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 55; C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, paras 28–30.

³³⁰ C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 59–65 and 69.

certain population groups. It can create or reinforce distorted views on gambling among adolescents. Therefore, inciting advertising can have different effects than informative messaging on the perception of gambling among adolescents. Studies further suggest that advertising functions as a trigger to gamble that is hard to resist for *some* disordered gamblers. Overall, empirical evidence therefore grants support for the Court's approach.

It is essential to be precise with regard to the evidence relating to gambling advertising. Until recently, the Court of Justice focused on the encouragement/incitement component of advertising. Only in *Dickinger & Ömer* the Court started to contrast these forms with policies seeking to *inform* consumers. The available empirical evidence suggests that this aspect is central, namely that people exposed to advertising – particularly adolescents – get *informed about the chances and risks* of gambling. Advertising that invites people to gamble or the fact that people hold positive views towards gambling is not *per se* something that will necessarily lead to higher prevalence of gambling disorder. An advertising policy becomes detrimental where it fails to strengthen the awareness of harmful effects of gambling.³³¹ What seems to matter is the *overall perception of gambling*, namely whether consumers of a given jurisdiction receive a balanced picture of gambling. They must also be aware of the risks that gambling involves.³³² Regulators can opt for different ways to achieve effective information of consumers and specifically vulnerable groups on gambling-related risks: counter-advertising messages can be included in advertising, authorities may run public education programmes or advertising possibilities may be restricted or prohibited. In this author's view, it makes little sense to allow for *unrestricted advertising* in terms of volume and message content followed by an attempt to *counter-balance it with (costly) public education programmes*. Where the legislator allows the advertising of activities that involve significant risks for consumers, it also takes up a certain responsibility³³³ – irrespective of the actual regulatory model that it chooses (monopoly, limited or liberal licensing system).

9.2.6 Slot Machines

The cases before the Court of Justice and the EFTA Court show that parties have occasionally relied on the argument that certain types of games were more dangerous than others. More precisely, certain games were more addictive for

³³¹ Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, at 63.

³³² What is more, there is evidence from behavioural research that questions the information paradigm. Well informed consumers do not necessarily make sound decisions. For an overview, see R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, New Haven CT/London: Yale University Press 2008.

³³³ Planzer, and Alemanno, "Lifestyle Risks: Conceptualizing an Emerging Category of Research".

consumers. The legal relevance of this argument is two-fold. First, more addictive games may justify stricter limitations of fundamental freedoms. Government counsels would accordingly have an interest in pleading this point. Secondly, the criterion of a 'consistent and systematic' policy may require that the operation of addictive games is regulated more strictly than that of less or non-addictive games. Questions may arise where an addictive game is strongly advertised or substantially expanded, and at the same time, market access is also denied in relation to non-addictive games. Depending on the constellation, counsels for private operators may have an interest in making this point. While sports betting is also sometimes referred to as an addictive game, the issue of addictive games has been pleaded before the Internal Market Courts mainly in relation to slot machines and Internet gambling.

9.2.6.1 Case Law

In the early case law, the Court of Justice did not differentiate between different games. This was also in line with its general reluctance to review the proportionality of national measures. Due to the essentially unlimited margin of appreciation, government agents did not see a need to argue different addiction levels of games. In *Läärä*, the Court of Justice likened slot machines to lotteries because of similar economic elements.³³⁴ *Zenatti* serves as an example of this overall approach.

[B]ets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.³³⁵

On the EFTA side, two gambling cases were pending before the EFTA Court following the judgments in *Gambelli* and *Lindman*. In *Gambelli*, the Court of Justice had started to review the proportionality of national measures. Noting this shift of the review practice, the EFTA Court reviewed the Norwegian gambling regime closely. The direct action *ESA v Norway* concerned exclusively the sector of slot machines (gaming machines). The new legislation intended to nationalise the sector that was formerly run under a licensing system with charities. The agents for the Norwegian government pointed to gaming machines as the single most addictive game. The EFTA Court followed that argumentation and found gaming machines to be more addictive than other games.³³⁶ This conclusion was informed by studies presented to the Court by the Norwegian government.

³³⁴C-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. 17.

³³⁵C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, para. 18.

³³⁶E-1/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report 8, para. 45.

[S]tudies in the field of gambling presented to the Court point at gaming machines as the single most potentially addictive form of gambling. These studies refer, inter alia, to the structural characteristics of the machines, such as rapid event frequency, the near miss, and light and sound effects.³³⁷

According to the interpretation of these studies, gambling disorder had occurred in Norway simultaneously with the increase of gambling on gaming machines. The large majority of an addiction helpline had reported problems with gaming machines.³³⁸ These findings served to justify the nationalisation of the slot machine sector.

The second case before the EFTA Court, *EFTA-Ladbrokes*, raised the question of consistency. This case was about various forms of gambling, except for slot machines that were already dealt with in *ESA v Norway*. In *EFTA-Ladbrokes*, the EFTA Court voiced that the development and marketing of addictive games by the state-run exclusive right holder were to be taken into account since they could run counter the objective of fighting gambling addiction.³³⁹ According to the judgment, the Norwegian government had suggested that lotto posed no appreciable threat to cause gambling addiction whereas there were highly addictive games on the other end of the scale like gaming machines. The EFTA Court left the detailed assessment of this question to the national court.³⁴⁰

Early on in the case law, the Court of Justice had also expressed its concerns regarding slot machines. It had noted a “tendency amongst most of them [...] to play the game over and over again.”³⁴¹ Recently, it found that increased prizes on gaming machines would lead to a greater risk of gambling addiction.³⁴²

9.2.6.2 Empirical Evidence

It must be assessed what empirical evidence has to report regarding the mechanisms of gambling disorder and addiction in general and how this relates to gaming machines being more addictive. While old-style slot machines are no longer quite prevalent, newer generations of electronic gaming machines (EGM’s) have raised particular concerns. A recent lawsuit against Loto Québec was based on the

³³⁷ *Ibid.*, para. 45.

³³⁸ *Ibid.*, para. 45.

³³⁹ *E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 54.

³⁴⁰ *Ibid.*, para. 57.

³⁴¹ *C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjät (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para. 17.

³⁴² *C-213/11, C-214/11 and C-217/11 (Joined Cases) Fortuna sp. z o.o. (C-213/11), Grand sp. z o.o. (C-214/11), Forta sp. z o.o. (C-217/11) v Dyrektor Izby Celnej w Gdyni* [2012] nyr, para. 39.

argument that manufacturers and operators composed gaming machines in a way to make people addicted.³⁴³

Features like rapid visual and sound effects may indeed have a potential to entice and stimulate a continuation to play on the machine.³⁴⁴ It is also possible that many at-risk gamblers find more reward in EGM gaming than in other types of games. Several prevalence studies suggest that EGM's are amongst the preferred gambling activities of pathological gamblers.³⁴⁵ It should be noted that a high correlation was found where EGM's were located *outside* of casinos such as in bars.³⁴⁶ The *social environment*, including drinking habits, may significantly differ between bars and casinos and thus impact differently on people's behaviour. Recently, Disley et al. provided an extent literature review of research into structural features of gaming machines. The authors concluded that the available evidence was very limited; it was not clear whether electronic gaming machines contributed to the development and maintenance of disordered gambling.³⁴⁷

Section 9.1.3 described the interplay of different factors in the development of addiction. It showed that there is ample evidence for object non-specificity of addiction, that is, the role of the object is not as important as often assumed in the past. The aetiology of gambling addiction is indeed complex. The public health model of disease transmission in Sect. 9.1.3.2 illustrated that addiction develops in a complex interplay of host (gambler), agent (games) and environmental factors (for example, socio-economic factors). The EFTA Court alluded to this interplay of various factors in its ruling in *ESA v Norway*:

Whether and to which extent a given game can lead to gambling addiction must be evaluated by taking into account the specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader socio-cultural environment.³⁴⁸

The interplay of factors was also confirmed in the aforementioned case in Quebec. Leading experts on gambling addiction testified in court and rejected the concept of games that make people addicted. The final settlement stated that

³⁴³ GamblingCompliance, "*Loto-Quebec To Pay \$50 m To Addicted Players*", 25 March 2010.

³⁴⁴ Schüll, N.D., *Addiction by Design: Machine Gambling in Las Vegas*, Princeton, NJ: Princeton University Press, 2012.

³⁴⁵ Cantinotti, M., and Ladouceur, R. (2008). "Harm Reduction and Electronic Gambling Machines: Does This Pair Make a Happy Couple or Is Divorce Foreseen?", *Journal of Gambling Studies*, 24(1), 39–54, at 39–40, and the therein cited literature.

³⁴⁶ *Ibid.* at 39–40, and the therein cited literature.

³⁴⁷ Disley, May Culley, and Rubin, *Map the Gap: A Critical Review of the Literature on Gambling-Related Harm*, at xv, 69–70, and 80–81. Moreover, an international consortium of researchers recently composed a framework with 43 groups of factors to be considered as relevant in relation to gambling addiction. Only three factors relate to the agent, that is, games of chance (see Abbott, M., Binde, P., Hodgins, D., et al., *Conceptual Framework of Harmful Gambling: An International Collaboration*. The Ontario Problem Gambling Research Centre (OPGRC), Guelph, Ontario, Canada, (2003)).

³⁴⁸ E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 44.

the gaming machines did not cause the gambling disorder of players.³⁴⁹ Damages in this lawsuit were claimed based on the argument that the industry created and ran machines that made people addicted. The aetiology of addiction, however, is so complex that not even the leading experts of the field have final answers as to the causation in the emergence of addiction.³⁵⁰ Operators certainly have an economic interest in offering games that are attractive to gamblers. Very different, however, is the assumption that operators can create machines that make people addicted.

9.2.7 *Internet Gambling*

9.2.7.1 Case Law

Games of chance played over the Internet are the second category that parties to court proceedings have occasionally considered as particularly dangerous.³⁵¹ The Court of Justice held that this way of gambling combined

so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto.³⁵²

As opposed to land-based games of chance, the Court of Justice *did not further distinguish between the different types of games* that are played online (for example, betting, poker, lotteries). The fact that they are played over the Internet makes them more dangerous.³⁵³

The Court of Justice started relatively late to address Internet-specific issues in its case law. The Italian cases *Zenatti*, *Gambelli and Placanica* only related in the broad sense to remote betting because the Italian ‘information centres’ served as

³⁴⁹ Gambling Compliance, “Loto-Quebec To Pay \$50 m To Addicted Players”.

³⁵⁰ Shaffer, LaPlante, LaBrie et al., “Toward a Syndrome Model of Addiction: Multiple Expressions, Common Etiology”.

³⁵¹ For a general overview of legal issues regarding cross-border gambling services, cf. *Cross-Border Gambling on the Internet – Challenging National and International Law*, Publications of the Swiss Institute of Comparative Law, vol. 47, Swiss Institute of Comparative Law (Ed.), Zurich: Schulthess, 2004; Rose, N., and Owens, M., *Internet Gaming Law*, 2nd ed., New Rochelle, NY: Mary Ann Liebert Inc. Publishers, 2009. Cf. also the first edition with significantly different contents: Rose, N., and Owens, M., *Internet Gaming Law*, 1st ed., Larchmont, NY: Mary Ann Liebert Inc. Publishers, 2005.

³⁵² C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 103.

³⁵³ The term ‘online gambling’ is regularly used as a synonym for ‘Internet gambling’. By contrast, the term ‘remote gambling’ is broader and includes all forms of gambling in which players participate by the use of any kind of remote communication, including the Internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication. Cf. e.g. the definition in the UK Gambling Act.

agencies that collected bets and transferred them to the UK operator. The topic of Internet gambling was not expressly dealt with until *Liga Portuguesa*.³⁵⁴ In that case, the Court of Justice held that games of chance accessible via the Internet involved different and more substantial risks of fraud.³⁵⁵ The Court of Justice reaffirmed that statement in *Sporting Exchange*.³⁵⁶ It also applied a very lenient proportionality review in relation to questions concerning the Internet. In *Markus Stoss*, the Court added that difficulties in ensuring compliance with the strict limitations of a monopoly due to the transnational nature of the Internet could not as such call into question the conformity of measures with EU law.³⁵⁷

The statement that online gambling involves different and more substantial risks of fraud does not necessarily lead to the conclusion that this is also the case for risks of gambling disorder. It was in *Carmen Media* that the Court of Justice extended its critical opinion about the medium Internet also to health risks:

the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.³⁵⁸

Before the Court of Justice's decision in *Carmen Media*, the EFTA Court had expressed concerns in relation to online gambling in its judgment in *EFTA-Ladbrokes*. It had held that channelling measures could be suitable if they were envisaged to draw players away from addictive games via the Internet or other hard to suppress channels.³⁵⁹

³⁵⁴ Dissenting: Koenig, C. (2007b). "Der EuGH als Glücksspielmonopolverderber", *Europäisches Wirtschafts- und Steuerrecht*, 18(4), 1.

³⁵⁵ C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para. 70.

³⁵⁶ C-203/08 *Sporting Exchange Ltd. Trading as 'Betfair', v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, para. 34.

³⁵⁷ C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) *Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa 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. 86.

³⁵⁸ C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 103.

³⁵⁹ E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 54.

The Court of Justice left a very wide margin of appreciation to national authorities in relation to online games and did *de facto* not review the proportionality of the measures in this regard. The German ban on online gambling, even though with certain temporary exceptions, was found suitable to pursue the objective of combating gambling addiction and in particular of protecting young persons.³⁶⁰ Notably, the Court of Justice has not altered its view on Internet gambling in recent judgments.³⁶¹

Finally, it should be noted that the ECtHR adopted the Court of Justice's critical stance on Internet gambling. The ECtHR quoted from the case law regarding the compatibility of the State Treaty of the German Länder with EU law. After a lengthy quote from the *Carmen Media* judgment, the ECtHR almost literally adopted the wording in relation to the 'different and more substantial' dangers of Internet gambling.³⁶²

9.2.7.2 Epidemiology of Gambling Disorder

In many parts of the world, land-based forms of gambling have been around for decades and centuries. Internet gambling is a *recent phenomenon*, with the biggest growth only taking place in the last decade.³⁶³ In the early days of online gambling, most websites based their operations in Caribbean and Central American jurisdictions. Certain *autonomous tribal jurisdictions* became key players in the online gambling business: in 2007 for instance, the Kahnawake Mohawk Territory in Quebec hosted the highest number of online gambling websites (377 websites).³⁶⁴

This new phenomenon has raised significant concerns that Internet gambling will lead to sharply increased levels of gambling disorder. The fears are not surprising as a couple of factors explain their presence. First, games of chance over the Internet have only been professionally commercialised for slightly more than a *decade*. Empirical research is much younger than on land-based gambling, and their impact on the prevalence of disordered gambling still needs to be followed up in long-term studies. Second, though the online share of the gambling industry is still clearly smaller, it is *rapidly growing* and at much higher rates than land-based gambling. Third, online gambling ailments concerns in a double

³⁶⁰ C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 105.

³⁶¹ C-212/08 *Zeturf Ltd v Premier ministre* [2011] ECR I-5633, paras 79–80; C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, paras 96–99.

³⁶² The applicant had argued *inter alia* a violation of Art. 14 ECHR (discrimination) due to the fact that the State Treaty treated online operators differently than operators of other forms of games: *TIPP 24 AG v Germany*, Application no 21252/09 [2012], para. 44.

³⁶³ The first online casino supposedly opened in 1995: Liddell Jr, P., Watson, S., Eshee Jr, W.D. et al. (2003). "Internet Gambling: On a Roll?", *Seton Hall Legislative Journal*, 28(2), 101–141, at 315.

³⁶⁴ Williams, R.J., and Wood, R.T., *Internet Gambling: A Comprehensive Review and Synthesis of the Literature*, Report Prepared for the Ontario Problem Gambling Research Centre 2007, at 6–8.

manner: the services not only relate to gambling but *in addition to the medium Internet*. The latter in itself alimts disputes over the opportunities and risks of this new technology, in particular for youth.³⁶⁵ Popular media may report about ‘Internet addicts’ who spend several days in front of the Internet. The combination of those factors unsurprisingly nourishes fears about an uncontrollable spread of gambling addiction.

The Internet has not only brought new forms of gambling. Due to its cross-border nature and the ease of access, it has generally *increased the overall exposure of people to games of chance*. According to the earlier described exposure model, increased exposure to gambling offers should result in increased levels of disordered gambling. Until recently, there were no empirical results available from studies comparing the effectiveness of different regulatory approaches towards online gambling.³⁶⁶ Most recently, a study could not find statistically significant differences of prevalence rates between prohibitive and permissive regulatory approaches towards online gambling.³⁶⁷

In the absence of further studies that analyse the comparative effectiveness of regulatory approaches, a series of national prevalence rates from one country can also offer helpful indications. In the UK, the 2005 Gambling Act introduced an *open licensing system for online operators*. The Act also allows under certain conditions foreign operators to operate gambling offers to UK residents. While the effective exposure to online games has not been measured, many authors argued that exposure to games of chance increased in the UK with the liberalisation of the gambling market and predicted significantly increased levels of gambling disorder.³⁶⁸ Recent epidemiological research from the UK does not support such significant increase.³⁶⁹ In fact, the three prevalence studies from the UK³⁷⁰ show *quite stable prevalence rates of gambling disorder* over several years.

Sparrow analysed the situation of online gambling in the US where online games of chance were *prohibited in all States* at that time. In spite of this prohibition, it is

³⁶⁵ For a more optimistic view, cf. Palfrey, J., and Gasser, U. (2011). “Reclaiming and Awkward Term: What We Might Learn From “Digital Natives””, *I/S: A Journal of Law and Policy for the Information Society*, 7(1), 33–55.

³⁶⁶ Planzer, and Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*.

³⁶⁷ Planzer, Gray, and Shaffer, “Associations between National Gambling Policies and Disordered Gambling Prevalence Rates within Europe”. Regarding some limitations of the study, see also Sect. 9.2.2.2 *i.f.*

³⁶⁸ Light, “Gambling Act 2005: Regulatory Containment and Market Control”; Orford, “Disabling the Public Interest: Gambling Strategies and Policies for Britain”.

³⁶⁹ Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

³⁷⁰ Sproston, Erens, and Orford, *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey 1999*: The prevalence of disordered gambling among people who had gambled past-year was 1.2 % (SOGS) and 0.8 % (DSM-IV). Wardle, Sproston, Orford et al., *British Gambling Prevalence Survey 2007*: The prevalence of disordered gambling among people who had gambled past-year was 0.8 % (PGSI) and 0.9 % (DSM-IV). Wardle, Moody, Spence et al., *British Gambling Prevalence Survey 2010*.

estimated that the global market share of US residents was one quarter to one third in 2008, corresponding to about \$5–6 billion. Moreover, the US is home to more online gambling websites than any other country. Only the domain ownership is American while the servers are generally located off-shore.³⁷¹ Sparrow even argued that the addition of US licensed operators would hardly alter the already present ubiquity of online games of chance and that regulation would bring clear advantages such as increased control.³⁷² In a survey conducted by the American Gaming Association, only 19 % indicated that they were aware that online gambling was currently illegal in the US.³⁷³

Even before the new millennium, it was predicted that Internet gambling would be impossible to stop by regulation.³⁷⁴ Upon analysing various regulatory approaches, other authors also concluded that regulating online gambling might be a more effective way than a prohibitionist approach.³⁷⁵ The *widespread popularity of online gambling in the US has not translated into an increase of rates of gambling disorder*. The development of the prevalence of gambling disorder in the US was described in Sect. 9.2.5.2. The most recent nation-wide epidemiological studies found decreasing levels of gambling disorder. Petry et al. found life-time gambling disorder at a rate of 0.4%³⁷⁶ and Kessler et al. at a level of 0.6 %.³⁷⁷ This was at a time when online gambling services had been available already for several years and the volume of offers rapidly growing.³⁷⁸

³⁷¹ Wilson, M. (2003). “Chips, Bits, and the Law: An Economic Geography of Internet Gambling”, *Environment and Planning A*, 35(7), 1245–1260, at 1250 and 1254. Choosing off-shore servers allows to circumvent legal requirements: Cabot, A.N., and Balestra, M., *Internet Gambling Report VIII: An Evolving Conflict between Technology & Law*, Missouri: River City Group, 2005.

³⁷² Sparrow, M., *Can the Internet Be Effectively Regulated? Managing the Risks*, 2009, available at <http://financialservices.house.gov/media/file/hearings/111/sparrow.pdf>, concurring: Andrie, J.D. (2006). “A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States”, *UNLV Gaming Research & Review Journal*, 10(1), 59–93.

³⁷³ 2006 *State of the States: The AGA Survey of Casino Entertainment*, 2006, at 26; cf. also the brief comment in ‘Editors’ (2006), “Internet Gambling Increases Dramatically”, *The Computer & Internet Lawyer*, 23(7), p. 22, at 22. For an account of online gambling regulation in the US, cf. Bernhard, B.J., and Montgomery, A., “The Only Thing Certain is Uncertainty? Internet Gambling in the United States, 1961–2011” in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, Robert T., Parke, Jonathan (Eds.), London/New York: Routledge, 2012, 300–315.

³⁷⁴ Bell, T.W. (1998). “Internet Gambling: Impossible to Stop, Wrong to Outlaw”, *Regulation*, 21(1), 16–17.

³⁷⁵ Wiebe, J., and Lipton, M., *An Overview of Internet Gambling Regulations*, Submitted to the Ontario Problem Gambling Research Centre 2008.

³⁷⁶ Petry, Stinson, and Grant, “Comorbidity of DSM-IV Pathological Gambling and Other Psychiatric Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions”, at 564.

³⁷⁷ Kessler, Hwang, LaBrie et al., “DSM-IV Pathological Gambling in the National Comorbidity Survey Replication”.

³⁷⁸ The first online casino supposedly opened in 1995: Liddell Jr, Watson, Eshee Jr et al., “Internet Gambling: On a Roll?”, at 315.

9.2.7.3 Internet Addiction

Fears of increased gambling addiction due to Internet gambling offers also relate to concerns about the Internet itself. The Internet has indeed brought an incredible increase of accessible information. Palfrey and Gasser noted that in the year 2007 alone, 161 billion gigabytes of digital information were created, stored and replicated, which corresponded to three million times the information of all books ever written.³⁷⁹ It is impossible to deal with such a *galactic amount of information*. Search engines take a key role in making the information overload somehow manageable. The regulation of search engines brings a series of challenges for policy-makers such as the need to synchronise legal evolution with technological innovation and the tension between the global scope (business activities) and the local scope (laws seeking to regulate the activity).³⁸⁰ Unsurprisingly, some people cope with the enormous information overload better than others.

The most severe form of disordered Internet behaviour is regularly described as ‘*internet addiction*’ or excessive Internet use or pathological internet use. *Caution* is needed. Popular media often refer to the term ‘addiction’ in relation to the Internet rather easily; anecdotal reports may leave the layperson with the impression that Internet addiction is a mass phenomenon. There have been efforts to define diagnostic criteria for Internet addiction.³⁸¹ Young suggested an eight-item screen whose diagnostic criteria were adapted from those of gambling disorder; Young sees gambling disorder as most akin to the pathological nature of Internet use.³⁸²

Popular media sometimes report figures on the prevalence of Internet and similar ‘addictions’.³⁸³ In the *absence of commonly accepted diagnostic criteria* these figures need to be dealt with very carefully. It is not surprising that many reports do not appear in peer-reviewed journals. *Different reports may measure different things*

³⁷⁹ Palfrey, J., and Gasser, U., *Born Digital: Understanding The First Generation of Digital Natives*, Basic Books, 2008, at 185.

³⁸⁰ Gasser, U. (2006a). “Regulating Search Engines: Taking Stock and Looking Ahead”, *Yale Journal of Law & Technology*, 9, 201–234.

³⁸¹ Beard, K.W., and Wolf, E.M. (2001). “Modification in the Proposed Diagnostic Criteria for Internet Addiction”, *CyberPsychology & Behavior*, 4(3), 377–383; Block, J.J. (2008). “Issues for DSM-V: Internet Addiction”, *American Journal of Psychiatry*, 165(3), 306–307; Young, K.S. (1998). “Internet Addiction: The Emergence of a New Clinical Disorder”, *CyberPsychology & Behavior*, 1(3), 237–244.

³⁸² Young, “Internet Addiction: The Emergence of a New Clinical Disorder”, at 237.

³⁸³ Faiola, A., “*When Escape Seems Just a Mouse-Click Away*”, *The Washington Post*, 27 May 2006, citing a survey funded by the South Korean government.

with some reports looking into addiction to computers,³⁸⁴ the Internet,³⁸⁵ video games³⁸⁶ or online games.³⁸⁷ What is more, certain publications simply include under the term Internet addiction online and offline computer usage.³⁸⁸ The term is unclear as it may refer to being addicted to the medium as such (generalised addictive use) or to certain content like pornography or gambling (specific addictive use).³⁸⁹ Other publications suggest a three-fold distinction into gaming, sexual preoccupations and e-mail/text messaging.³⁹⁰ Upon a review of the available literature, scholars have identified significant methodological deficits in many studies that intended to provide evidence for the harmfulness of the Internet. The deficits include for instance inconsistent criteria or inadequate recruiting methods of participants.³⁹¹

³⁸⁴ Cf. hereto e.g. suggested criteria that simply merge ‘computer and Internet addiction’ into one category:

- Increasing amounts of time spent on computer and internet activities
- Failed attempts to control behavior
- Heightened sense of euphoria while involved in computer and internet activities
- Craving more time on the computer and internet
- Neglecting friends and family
- Feeling restless when not engaged in the activity
- Being dishonest with others
- Computer use interfering with job/school performance
- Feeling guilty, ashamed, anxious, or depressed as a result of behavior
- Changes in sleep patterns
- Physical changes such as weight gain or loss, backaches, headaches, carpal tunnel syndrome
- Withdrawing from other pleasurable activities”.

ICA Services, “Signs & Symptoms of Computer & Internet Addiction”, available at http://www.icaservices.com/signs_symptoms.htm (accessed 1 June 2012).

³⁸⁵ Cao, F., Su, L., Liu, T.Q. et al. (2007). “The Relationship between Impulsivity and Internet Addiction in a Sample of Chinese Adolescents”, *European Psychiatry*, 27(7), 466–471; Sun, D.L., Chen, Z.J., Ma, N. et al. (2009). “Decision-Making and Prepotent Response Inhibition Functions in Excessive Internet Users”, *CNS Spectrums*, 14(2), 75–81.

³⁸⁶ Grüsser, S.M., Thalemann, R., and Griffiths, M.D. (2006). “Excessive Computer Game Playing: Evidence for Addiction and Aggression?”, *CyberPsychology & Behavior*, 10(2), 290–292; Harris Interactive, “Video Game Addiction: Is it Real?”, 2007, available at <http://www.harrisinteractive.com/news/allnewsbydate.asp?newsid=1196>.

³⁸⁷ Faiola, “When Escape Seems Just a Mouse-Click Away”.

³⁸⁸ Block, “Issues for DSM-V: Internet Addiction”, at 306; Services, “Signs & Symptoms of Computer & Internet Addiction”.

³⁸⁹ Palfrey, and Gasser, *Born Digital: Understanding The First Generation of Digital Natives*, at 188. For an overview of the different forms of ‘internet addiction’, cf. Young, K.S., and Nabuco de Abreu, C., *Internet Addiction: A Handbook and Guide to Evaluation and Treatment*, Hoboken, NJ: John Wiley & Sons, 2011.

³⁹⁰ Block, “Issues for DSM-V: Internet Addiction”, at 306.

³⁹¹ Byun S., Ruffini C., Mills J.E., Douglas A.C., Niang M., Stepchenkova S., Lee S.K., Loutfi J., Lee J.K., Atallah M., Blanton M. (2009). “Internet Addiction: Metasynthesis of 1996–2006 Quantitative Research”, *CyberPsychology and Behavior*, 12(2), 203–207; Linden, *The Compass of Pleasure: How Our Brains Make Fatty Foods, Orgasm, Exercise, Marijuana, Generosity, Vodka, Learning, and Gambling Feel So Good*.

Petry correctly observed that one must be cautious of where to draw the line between *mere excessive behavioural patterns* (described for instance for television, computer, gaming, internet, work, exercise, chocolate, shopping, sex) and a true psychiatric disorder. The fact that over two-thirds of Americans are overweight cannot lead to the conclusion that they are addicted to food.³⁹² Nevertheless, Petry and colleagues concluded that an addiction model of overeating could at least effectively inform prevention and treatment of obesity.³⁹³

At present, the sole behavioural addiction recognised in DSM-5 is gambling disorder. According to the work group on substance-related disorders, other behavioural forms of addiction will be considered for *integration in the DSM as research data accumulate*;³⁹⁴ the evidence is currently not considered solid enough.³⁹⁵ The DSM-5 task force decided, however, to include ‘Internet gaming disorder’ in the separate Section III among ‘conditions for further studies’. These conditions are not recognised mental health disorders and the provisionally suggested diagnostic criteria are not intended for clinical use. The purpose is to encourage further research and to provide a common language for researchers and clinicians.³⁹⁶ Unsurprisingly, the proposed diagnostic criteria for Internet gaming disorder are similar to the criteria of gambling disorder and substance use disorders:

Persistent and recurrent use of the Internet to engage in games, often with other players, leading to clinically significant impairment or distress as indicated by five (or more) of the following in a 12-month period:

1. Preoccupation with Internet games. (The individual thinks about previous gaming activity or anticipates playing the next game; Internet gaming becomes the dominant activity in daily life).
Note: This disorder is distinct from Internet gambling, which is included under gambling disorder.
2. Withdrawal symptoms when Internet is taken away. (These symptoms are typically described as irritability, anxiety, or sadness, but there are no physical signs of pharmacological withdrawal.)
3. Tolerance – the need to spend increasing amounts of time engaged in Internet games.
4. Unsuccessful attempts to control the participation in Internet games.
5. Loss of interests in previous hobbies and entertainment as a result of, and with the exception of, Internet games.
6. Continued excessive use of Internet games despite knowledge of psychosocial problems.

³⁹² Petry, N.M. (2010). “Should the Scope of Addictive Behaviors Be Broadened to Include Pathological Gambling?”, *Addiction*, 101(Supplement 1), 152–160, at 157.

³⁹³ Barry, D., Clarke, M., and Petry, N.M. (2009). “Obesity and Its Relationship to Addictions: Is Overeating a Form of Addictive Behavior?”, *The American Journal on Addictions*, 18(6), 439–451. The concept of ‘food addiction’ as yet another behavioural expression of addiction is gaining ground. For a recent publication see *Food and Addiction: A Comprehensive Handbook*, K. Brownell and M. Gold (Eds.), Oxford/New York: Oxford University Press (2012).

³⁹⁴ Explanations of the Substance-Related Disorders Work Group of DSM-5: Association, “DSM-5 Development – Substance-Related Disorders”.

³⁹⁵ Professor Charles O’Brian, Chairman of the Substance-Related Disorders Work Group, at the annual NCRG conference in Las Vegas in November 2010, as well as *ibid*.

³⁹⁶ *Diagnostic and Statistical Manual of Mental Disorders: DSM-5, Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, at 783.

7. Has deceived family members, therapists, or others regarding the amount of Internet gaming.
8. Use of the Internet games to escape or relieve a negative mood (e.g., feelings of helplessness, guilt, anxiety).
9. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of participation in Internet games.³⁹⁷

For the moment, the proposed disorder is limited to Internet games since non-Internet computerised games have been less well researched. Other expressions of excessive Internet use, such as relating to sex websites, are not included either. The proposed disorder typically involves individuals who devote eight to ten hours or more per day to Internet gaming and often go for long periods without food or sleep. Contrary to Internet gambling, no money is being wagered in relation to Internet gaming.³⁹⁸

In the absence of solid evidence on Internet-related disorders and the proposed Internet gaming disorder only being of provisional nature, it is advisable to resort to the *general knowledge that the scientific literature has gathered on addiction*. Section 9.1.5 showed that an extent review of the literature led scientists to describe addiction as a syndrome with some object-specific expressions, various shared manifestations and common aetiology. Studies regarding the behaviour of disordered Internet users seem to confirm shared manifestations. Sun et al. found that their ability of decision-making was diminished; the subjects experienced difficulties in balancing immediate rewards versus long-term detrimental consequences.³⁹⁹ This is reminiscent of pathological gamblers⁴⁰⁰ and people engaging in substance use disorders.⁴⁰¹ Research generally shows that the preference for a smaller-sooner over a larger-later reward is an important component of impulsivity. This phenomenon is called ‘discounting’: the value of the larger-later reward is subjectively discounted because there is a delay until its delivery.⁴⁰²

According to the syndrome model, disordered Internet use may be yet another expression of the same underlying pathological condition. However, the evidence base first needs to become more solid. Not every excessive Internet use should immediately be labelled ‘addiction’.

³⁹⁷ *Ibid.*, at 795. Bold emphasis in original.

³⁹⁸ *Ibid.*, at 796–797.

³⁹⁹ Sun, Chen, Ma et al., “Decision-Making and Prepotent Response Inhibition Functions in Excessive Internet Users”.

⁴⁰⁰ Cavedini, P., Riboldi, G., Keller, R. et al. (2002). “Frontal Lobe Dysfunction in Pathological Gambling Patients”, *Biological Psychiatry*, 51(4), 334–341; Goudriaan, A.E., Oosterlaan, J., De Beurs, E. et al. (2006). “Neurocognitive Functions in Pathological Gambling: A Comparison with Alcohol Dependence, Tourette Syndrome and Normal Controls”, *Addiction*, 101(4), 534–547.

⁴⁰¹ Bechara, A., Dolan, S., and Hindes, A. (2002). “Decision-Making and Addiction (Part II): Myopia for the Future or Hypersensitivity to Reward?”, *Neuropsychologia*, 40(10), 1690–1705; Bechara, A., and Damasio, H. (2002). “Decision-Making and Addiction (Part I): Impaired Activation of Somatic States in Substance Dependent Individuals when Pondering Decisions with Negative Future Consequences”, *Neuropsychologia*, 40(10), 1675–1689.

⁴⁰² Petry, and Madden, “Discounting and Pathological Gambling”.

9.2.7.4 Actual Online Gambling Behaviour

Following these considerations on ‘Internet addiction’, the focus of the inquiry can come back to online gambling and the risks of gambling disorder that it involves. The impact of online gambling can be studied in different approaches. One way is to analyse the *development of prevalence rates of disordered gambling*. The examples of the UK and the US were briefly discussed as both these countries offer a series of epidemiological studies. Another way is to study *actual online gambling behaviour of players*. It was argued in the literature that certain factors associated with online gambling would lead to a greater risk of developing gambling addiction: permanent and convenient ease of access, the interactivity of the game or the asocial component of online gambling, that is, the anonymity and isolation of the player.⁴⁰³

While the field of study of online gambling is still young, several publications have analysed actual gambling behaviour of consumers playing on online gambling websites. Cunningham et al. correctly noted that it was a challenge but also a necessity to determine the demographic characteristics of online gamblers without invading their privacy.⁴⁰⁴ Researchers at the Division on Addiction have studied large data samples of ten thousands of online players while respecting their privacy.⁴⁰⁵ These studies are a shift of paradigm in that analysis has moved from self-reporting to observing *actual gambling behaviour*.⁴⁰⁶ However, self-reporting may still be needed to establish the actual existence and extent of disordered gambling.⁴⁰⁷

According to these publications, the large majority of the studied online gamblers *played very moderately*, both in terms of wagered money and time spent gambling. A prospective longitudinal study of sports betting during 8 months analysed the betting behaviour of around 25,000 live-action bettors and 40,000 fixed-odds bettors.⁴⁰⁸ The median betting behaviour for the two types of betting was to place

⁴⁰³ Griffiths, M.D., and Parke, J. (2002). “The Social Impact of Internet Gambling”, *Social Science Computer Review*, 20(3), 312–320; Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 25.

⁴⁰⁴ Cunningham-Williams, Cottler, and Womack, “Epidemiology”, at 31.

⁴⁰⁵ The research samples allow to identify age, gender, country of residence and preferred language (to choose among 20 languages). Privacy is not breached as researchers cannot identify specific individuals via the aforementioned information: LaBrie, R.A., LaPlante, D.A., Nelson, S.E. et al. (2007). “Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior”, *Journal of Gambling Studies*, 23(3), 347–362.

⁴⁰⁶ Shaffer, H.J., Peller, A.J., LaPlante, D.A. et al. (2010). “Toward a Paradigm Shift in Internet Gambling Research: From Opinion and Self-Report to Actual Behavior”, *Addiction Research & Theory*, 18(3), 270–283.

⁴⁰⁷ Wood, R., T., Williams, R., J., and Parke, J., “The Relationship between Internet Gambling and Problem Gambling” in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 200–211, at 204.

⁴⁰⁸ Average age of cohort was 31 years and players were from 85 countries, mostly from Germany. The large majority were men. Interestingly, the gambling behaviour of women was very similar to that of men, but women tended to play during a shorter period of time but compensated by betting on more days during that time and by placing larger bets: LaBrie, LaPlante, Nelson et al., “Assessing the Playing Field: A Prospective Longitudinal Study of Internet Sports Gambling Behavior”, at 351–352.

2.5 bets (fixed-odds) and 2.8 bets respectively (live-action) of 4 Euros every fourth day.⁴⁰⁹ The authors concluded that the empirical data from this study did not support the speculation that gambling over the Internet had an inherent propensity to encourage excessive gambling.⁴¹⁰

The large sample further showed that only a small percentage demonstrated discontinuously high values regarding several measures. This was the case for *around 1 % of the players* in relation to the following measures: number of bets, bets per day, Euros per bet, total wagered and net loss. Interestingly, the top 1 % heavily involved of one measure were not necessarily among the top 1 % of another measure. In other words, somebody who may be among the top 1 % in terms of Euros per bet was not necessarily among the top 1 % of number of bets. This means that even among the heavily involved, players found strategies to moderate their behaviour.⁴¹¹

Subsequent studies on other types of games confirmed that even among the most heavily involved players, many moderated their gambling behaviour over time. For Internet poker, the heavily involved sub-group was 5 %. After a while, both the most involved and the rest of the sample reduced Euros per poker session as well as Euros wagered in total as losses increased.⁴¹² These facts show that even among the top 5 % poker players, moderation strategies were applied. Another study with sports bettors found a lesser developed capacity to moderate behaviour among the heavily involved bettors, in particular in relation to live-action bets.⁴¹³

While potential *online-specific risks* need to be addressed, the medium Internet can also be used to offer *safeguards*, which land-based gambling cannot provide to the same extent. As any new technology, the Internet brings both *challenges and opportunities*.⁴¹⁴ It is fairly normal that fears over challenges and risks are first being voiced before opportunities and safeguards are discovered. If the opportunities of the Internet are adequately implemented, they hold the potential to lead to true shifts

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid., at 358.

⁴¹¹ Ibid., at 355, 356, 359.

⁴¹² LaPlante, D.A., Kleschinsky, J.H., LaBrie, R.A. et al. (2009). "At the Virtual Poker Table: A Prospective Epidemiological Study of Actual Internet Poker Gambling Behavior", *Computers in Human Behavior*, 25(3), 711–717, at 715.

⁴¹³ LaPlante, D.A., Schumann, A., LaBrie, R.A. et al. (2008). "Population Trends in Internet Sports Gambling", *Computers in Human Behavior*, 24(5), 2399–2414.

⁴¹⁴ Cf. the recent publication, Cabot, A., and Pindell, N., *Regulating Internet Gaming: Challenges and Opportunities*, Las Vegas: UNLV Gaming Press, 2013; cf. also GamblingCompliance, *ECJ Special Report: A Mandate For German Gambling Reform*, GamblingCompliance 2011, at 43. In the case *Dickinger & Ömer*, the parties and the (intervening) Maltese Government argued that gambling activities on the Internet could be tracked and consequently controlled more effectively, making it easy to detect problematic or suspicious operations: C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 92.

of paradigm, including in the legal field.⁴¹⁵ If regulators rely on sound research, additional safeguards may soon be available.⁴¹⁶ Deposit limits or temporary account closures could prove to be effective social responsibility instruments.⁴¹⁷ If, in the future, such tools are combined with *early identifying behavioural markers* for disordered gambling, they could prove to be more effective.⁴¹⁸ Recent publications have identified such early markers;⁴¹⁹ they hold the potential to indicate how *self-limitations or account closures*⁴²⁰ may be most effectively used.⁴²¹

Online gamblers need to be further studied. They may differ from land-based gamblers in relation to their *motivation* to gamble. Considering the advantages and disadvantages, which the Internet brings, it is hardly surprising that online and land-based gamblers can be motivated by different aspects of the game. They can also have different socioeconomic backgrounds. In an Australian study, land-based gamblers and online gamblers indicated overall different motivations for gambling. Land-based gamblers were more likely to gamble for charity, the atmosphere and excitement. They indicated that it was their favourite activity or simply saw it as a social activity. They also showed greater belief in luck. By contrast, online gamblers were more likely to see online gambling as more exciting and convenient than

⁴¹⁵In the legal field for instance, online dispute resolution has significantly transformed alternative dispute resolution: Hörnle, *Cross-Border Internet Dispute Resolution*, at 74.

⁴¹⁶Palfrey, and Gasser, "Reclaiming and Awkward Term: What We Might Learn From "Digital Natives""", at 34, in relation to the use of technology by youth in general.

⁴¹⁷For studies on the effect of deposit-limits on the gambling behaviour, cf. Broda, A., LaPlante, D.A., Nelson, S.E. et al. (2008). "Virtual Harm Reduction Efforts for Internet Gambling: Effects of Deposit Limits on Actual Internet Sports Gambling Behavior", *Harm Reduction Journal*, 5(27); Nelson, S.E., LaPlante, D.A., Peller, A.J. et al. (2008). "Real Limits in the Virtual World: Self-Limiting Behavior of Internet Gamblers", *Journal of Gambling Studies*, 24(4), 463–477. For the evaluation of land-based self-limitation programmes, cf. Ladouceur, R., Sylvain, C., and Gosselin, P. (2007). "Self-Exclusion Program: A Longitudinal Evaluation Study", *Journal of Gambling Studies*, 23(1), 85–94; Tremblay, N., Boutin, C., and Ladouceur, R. (2008). "Improved Self-Exclusion Program: Preliminary Results", *Journal of Gambling Studies*, 24(4), 505–518.

⁴¹⁸For an industry research collaborative aiming at identifying patterns of disordered gambling, cf. LaPlante, D.A., Nelson, S.E., LaBrie, R.A. et al., "The bwin.party Division on Addiction Research Collaborative: Challenges for the 'Normal Science' of Internet Gambling" in *Routledge International Handbook of Internet Gambling*, Williams, R.J., Wood, R.T., and Parke, J. (Eds.), London/New York: Routledge, 2012, 29–45.

⁴¹⁹For studies on behavioural markers, cf. LaBrie, R., and Shaffer, H.J. (2010). "Identifying Behavioral Markers of Disordered Internet Sports Gambling", *Addiction Research & Theory*, 19(1), 1–10; Braverman, J., and Shaffer, H.J. (2012). "How Do Gamblers Start Gambling: Identifying Behavioural Markers for High-Risk Internet Gambling", *The European Journal of Public Health*, 22(2), 273–278; Braverman, J., LaPlante, D.A., Nelson, S.E. et al. (2013), "Using Cross-Game Behavioral Markers for Early Identification of High-Risk Internet Gamblers", *Psychology of Addictive Behaviors*.

⁴²⁰For a study on account closure, cf. Xuan, Z., and Shaffer, H. (2009). "How Do Gamblers End Gambling: Longitudinal Analysis of Internet Gambling Behaviors prior to Account Closure Due to Gambling Related Problems", *Journal of Gambling Studies*, 25(2), 239–252.

⁴²¹For some safety parameters, cf. Peller, A.J., LaPlante, D.A., and Shaffer, H.J. (2008). "Parameters for Safer Gambling Behavior: Examining the Empirical Research", *Journal of Gambling Studies*, 24(4), 519–534.

land-based gambling. It could be played anytime and in a private setting. They estimated the changes of winning to be better, saw it as less dangerous and could choose to stop gambling any time. Online gamblers saw greater benefits from gambling online than off-line.⁴²²

9.2.8 Mutual Recognition

The gambling sector has not been harmonised at the European level. The question arises to which extent there is an obligation for the host state to recognise regulatory standards of the home state. Alternatively, the question may also be to which extent authorities have to take into account controls that have already been exercised by other authorities. This question arose in *Placanica*. When assessing the necessity of the national restrictions, *Advocate General Colomer* advocated that the principles of mutual recognition should apply in the case. In his view, national authorities should recognise the requirements imposed and controlled by another Member State as sufficient. There was no reason to apply double checks.⁴²³ The Court of Justice, however, did not follow his opinion.⁴²⁴

The question re-emerged in *Liga Portuguesa, Sporting Exchange* and *Markus Stoss*. In the former two cases, the Court of Justice made it clear that there was *no obligation to mutually recognise authorisations* in the area of gambling. The motivation was that games of chance via the Internet had not been harmonised in the Union and involved *different and more substantial risks* than land-based games of chance.⁴²⁵ In relation to the land-based forms of games of chance, the Court's argumentation was similar. While it also noted the lack of harmonisation, it expressly referred to the margin of appreciation that Member States enjoyed in this area.⁴²⁶ According to the Court, mutual recognition could only play a role in one situation:

⁴²² Lee, G., and McGuigan, R. (2008). "Differences between Land-Based and Online Gamblers", *Journal of Academy of Business and Economics*, 8(1), 72–85, at 81.

⁴²³ Opinion of Advocate General Colomer in C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891; cf. also opinion of Advocate General Alber in C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, and opinion of Advocate General Fennelly in C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, paras 15 and 21.

⁴²⁴ C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

⁴²⁵ C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para. 69.

⁴²⁶ C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) *Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa 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. 112.

only if the monopolies at issue in the main proceedings were held incompatible with Article [49 TFEU] or Article [56 TFEU] would the question as to the possible existence of such an obligation of mutual recognition of authorisations issued in other Member States be capable of having any relevance for the purposes of resolving the disputes in the main proceedings.⁴²⁷

Considering the wide margin of appreciation that the Court of Justice has applied in relation to gambling services, the *non-applicability* of the principle of mutual recognition is not surprising. Since the Court of Justice had conceded that it was up to each Member State to define the objectives of its gambling policy as well as the protection level, (unlimited) mutual recognition would indeed be a far-reaching step. There are benefits and costs to consider for governments.⁴²⁸ Some Member States may primarily profit from the benefits of online gambling (tax revenues) while others may end up with the *social costs*, namely *gambling-related harm*. Eventually, this point will need to be discussed.⁴²⁹

Surprising was the rationale that the Court of Justice used to argue its conclusion. The Court chose in *Liga Portuguesa* an unconventional approach. The *Portuguese government argued that it did not have the same means of control* in relation to a foreign operator, such as Bwin, as it had in relation to its own operator Santa Casa.⁴³⁰ From a Member State's perspective, this is a valid point to argue. The Court's reply to this concern was unexpected since it did not address the pleaded difficulties of the host state (Portugal) but the difficulties of the state of *establishment* (sic!) to control its licensees. According to the Court, the Portuguese government could take the view that the quality assessment by the authorities of another Member State did not sufficiently assure consumer protection

in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators [such as Bwin].⁴³¹

The unconventional phrasing of the Court's argument leaves two options: either it was a mistake or an *obiter dictum*. A mistake can be argued with a systematic reading of the decision. The Court's reply does not address the concerns that were argued by the Portuguese government. Indeed, the Court of Justice started its 'reply' to the argument of the Portuguese government with "*in that regard*, it should be noted that the sector involving games of chance offered via the internet has not been

⁴²⁷ Ibid., para. 110.

⁴²⁸ Walker, D.M., *The Economics of Casino Gambling*, Berlin/Heidelberg/New York: Springer Verlag 2007; Grinols, E.L., *Gambling in America: Costs and Benefits*, Cambridge: Cambridge University Press, 2004.

⁴²⁹ For a discussion of pan-European tax issues, cf. van der Paardt, R.N.G. (2009), "Taxation of Internet Gaming and Gambling in the European Union", *ERA Forum*, 10(4), 525–531; for tax issues in the US, cf. Clotfelter, C.T., "Gambling Taxes" in *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving*, Cnossen, S. (Ed.), Oxford: Oxford University Press, 2005, pp. 84–119.

⁴³⁰ C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para. 68.

⁴³¹ Ibid., para. 69.

the subject of Community harmonisation.”⁴³² Consequently, the question would logically be whether the Portuguese authorities could validly rely on the alleged difficulties of assessment *on the Portuguese side*.

The second option is that of an *obiter dictum*. In that case, the question pertains to the rationale behind the statement. The Court’s remark is far-reaching as it alludes to severe difficulties that the authorities of the states of *establishment* face in assessing their licensees. Was the Court of Justice trying to tell national authorities (for example, in Malta and the UK) that they were facing almost insurmountable difficulties in assessing their licensees?⁴³³ The Court of Justice has occasionally acted as ‘national legislator’ *in favour* of the Single Market.⁴³⁴ The opposite is unheard of. An additional element to argue the *obiter dictum* alternative is the fact that the Court of Justice repeated the same statement in subsequent cases.⁴³⁵

The approach of the Court of Justice to mutual recognition in the gambling sector can be summarised as follows. If the national monopoly or licensing model is found to be compatible with EU law, there is *no space to apply the principle of mutual recognition*, both in relation to land-based and online games. In the negative case, this still does not automatically mean that national authorities could not require a foreign operator to seek a national licence nor does it mean that a Member State has to liberalise its gambling market. Due to the primacy of EU law, a transitional period cannot apply, but the Member State is free to reform its monopoly to make it compatible with EU law. The Court of Justice refrained from offering further indications for this latter situation.⁴³⁶

⁴³² *Ibid.*, para. 69. Italic emphasis added.

⁴³³ *Ibid.*, para. 69.

⁴³⁴ Using teleological and dynamic methods of interpretation as well as the ‘effet utile’ approach, the CJEU has on several occasions taken a role that is reminiscent of a national legislator *in favour* of the Single Market. An illustrative example was C-106/77 *Amministrazione delle Finanze dello Stato Simmenthal SpA* [1978] ECR 629, para 21 where the national judge was asked to set aside national law that conflicts with EU law: “It follows [...] that every national court must [...] set aside any provision of national law which may conflict with [Community law], whether prior or subsequent to the Community rule”. For the former two paragraphs, cf. Planzer, “Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning”.

⁴³⁵ C-203/08 *Sporting Exchange Ltd. Trading as ‘Betfair’, v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, para. 33; C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, para. 96.

⁴³⁶ Recently reconfirmed in C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)* [2013] nyr, para. 46. Regarding the CJEU’s case law on mutual recognition, cf. also Hatzopoulos, V. (2013). “The Court’s Approach to Services (2006–2012): From Case Law to Case Load?”, *Common Market Law Review*, 50(2), 459–501; Doukas, D. (2011). “In a Bet There Is a Fool and a State Monopoly: Are the Odds Stacked Against Cross-Border Gambling?”, *European Law Review*, 36(2), 243–263; Anagnostaras, G. (2012). “Les jeux sont faits? Mutual Recognition and the Specificities of Online Gambling”, *European Law Review*, 37(2), 191–203; Dawes, A., and Struckmann, K. (2010). “Rien ne va plus? Mutual Recognition and the Free Movement of Services in the Gambling Sector After the “Santa Casa” Judgment”, *European Law Review*, 35(2), 236–262.

The EFTA Court took a different approach than the Court of Justice. It chose a more fundamental freedom friendly approach in its *EFTA-Ladbrokes* decision while opting for a more moderate solution than the one suggested by Advocate General Colomer in *Placanica*. The EFTA Court had to decide whether the Norwegian government could preclude gambling companies, which were licensed in another EEA Contracting State, from providing and marketing games in Norway. If the national court found the restrictions to be lawful, the host state had the right to preclude foreign operators. If by contrast the restrictions were not justified, “national authorities may still require foreign operators to seek a national licence under the same conditions that apply to domestic operators.”⁴³⁷ Due to the lack of harmonisation “different levels of protection may exist throughout the EEA. A licence permitting the offering of gaming services may be less strict in the home State of the gaming operator than in the host State.”⁴³⁸

The EFTA Court added an important element that limited the discretion of Member States for future cases. National measures could *not be excessive* in relation to the objective pursued:

This would be the case if the requirements to which the issue of a licence is subject coincided with the requirements in the home State. That means, firstly, that in considering applications for licences and in granting them, the Contracting Party in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of establishment and secondly, that it must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State.⁴³⁹

The stance on mutual recognition taken by the EFTA Court follows a similar pattern as the solution chosen by the Court of Justice in other non-harmonised areas⁴⁴⁰ as well as the solution provided in the *Services Directive*.⁴⁴¹ By contrast, the Court of Justice recently held that Member States were not obliged to take into account licensing requirements already fulfilled in other Member States. The referring Austrian court seemed to suggest that the regulatory interests of the Austrian government were already sufficiently taken into account in the state of establishment

⁴³⁷ E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 84.

⁴³⁸ *Ibid.*, para. 85.

⁴³⁹ *Ibid.*, para. 86.

⁴⁴⁰ Cf. e.g. C-382/08 *Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen* [2011] ECR I-139, paras 38–42. The case regarded the licensing of commercial balloon flights. It should be noted that the public interest objectives were arguably at least as serious as those in the gambling cases: protection of the life and health of persons and safety of air transport. Further case law quoted in C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, para. 94.

⁴⁴¹ Art. 10(3) provides that national measures must not duplicate “requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State.” Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (‘Services Directive’).

of the online operator (Malta) and that in fact the Maltese provisions were more rigorous than those applicable in Austria.⁴⁴² *Dickinger & Ömer* was the first case in which a Member State intervened to support the private parties and not the government of another Member State. The Maltese government emphasised its pioneer role in ensuring controlling and monitoring mechanisms specifically designed for online games of chance. There were strict access controls, such as an examination of the operators' professional qualities and integrity. Operators remained subject to continued checks and monitoring by the competent Maltese regulatory authorities.⁴⁴³ However, the Court of Justice held:

It must be recalled in this respect that no duty of mutual recognition of authorisations [...] can exist in the current state of European Union law [...]. The various Member States do not necessarily have the same technical means available for controlling online games of chance, and do not necessarily make the same choices in this respect. [...] the fact that a particular level of protection of consumers against fraud by an operator may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not permit of the conclusion that the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not grasp. Consequently, the case-law relied on by Mr Dickinger and Mr Ömer and the Maltese Government [...] does not apply, in the present state of development of European Union law, in a field such as that of games of chance, which is not harmonised at European Union level, and in which the Member States have a wide discretion in relation to the objectives they wish to pursue and the level of protection they seek.⁴⁴⁴

In the light of the clear and repeated rejection of mutual recognition, it is no surprise that the Court of Justice was not willing to follow the far-reaching opinion of Advocate General Mazák in *HIT & HIT LARIX*.⁴⁴⁵ The Court approved Austrian legislation under which operators licensed abroad, who wish to advertise their services in Austria, must demonstrate that the consumer protection provisions in their state of establishment correspond to the Austrian provisions. Therefore, the Court seemed to shift the burden of proof on the (foreign) operators. Yet, the Court also held that it would be disproportionate to require the rules of the other Member State to be 'identical' or to impose rules that are not directly related to consumer protection.⁴⁴⁶

⁴⁴² C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 90.

⁴⁴³ *Ibid.*, paras 91–93.

⁴⁴⁴ *Ibid.*, paras 96–99.

⁴⁴⁵ Opinion of Advocate General Mazák in C-176/11 *HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen* [2012] nyr.

⁴⁴⁶ *Ibid.*, paras 28–32.

9.2.9 *Illicit Penalties*

It is commonplace for Member States, irrespective of the chosen regulatory model, to enforce their regulatory choices by criminal sanctions. In more liberal licensing models, there is also a rationale of competition policy for the use of criminal law: licensed operators should not suffer from unfair competition by unlicensed operators. The enforcement of rules by means of sanctions (of criminal or other nature) is not questionable as such. Where national restrictions of fundamental freedoms are compatible with EU law, the national legislator can sanction violations of an exclusive right system by penalties.⁴⁴⁷ Under EU law, the question may arise whether national sanctions appear to be disproportionate considering all legal and factual circumstances of a gambling regime.

In *Gambelli*, the Court of Justice raised doubts as to the suitability, namely the consistency of the Italian measures. In particular, the practice of encouraging participation in gambling while pleading the objective of limiting gambling opportunities appeared to be inconsistent. The Court asked the referring Italian court to consider these circumstances when deciding upon the necessity of the criminal penalties imposed on individuals choosing to gamble with unlicensed operators.⁴⁴⁸ *Gambelli* also concerned criminal sanctions imposed on unlicensed agents serving as intermediaries for operators in other Member States. The Court raised the question whether such sanctions could still be seen as necessary considering that operators in other Member States were already under strict controls of the relevant surveillance authorities:

The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State [...] is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.⁴⁴⁹

In the *Sjöberg* case, the sanctions were imposed on publishers who had included ads in their newspapers for foreign (unlicensed) operators. Swedish law imposed criminal sanctions for promoting gambling offers organised abroad.⁴⁵⁰ It appeared that the same offence in relation to unlicensed gambling offers by Swedish operators

⁴⁴⁷ Recently confirmed in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 32 and 43, *e contrario*, and C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, para. 85, *e contrario*.

⁴⁴⁸ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 72.

⁴⁴⁹ *Ibid.*, para. 73.

⁴⁵⁰ For a comparative look at alcohol, cf. the judgment in the *Gourmet* case regarding the Swedish prohibition to advertise spirits in print magazines: C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) [2001] ECR I-1795.

was *only punishable by an administrative penalty*. It was for the referring court to examine whether the two situations were subject to non-discriminatory, equivalent treatment. In this context, not only the legislation mattered but also the effective enforcement in practice. Thus, the national court had to

ascertain whether, on the facts, those infringements are prosecuted by the competent authorities with the same diligence and lead to the imposition of equivalent penalties by the competent courts.⁴⁵¹

The Court of Justice reaffirmed in *Markus Stoss* that

a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of EU law.⁴⁵²

The critical stance towards unjustified or excessive criminal sanctions was reconfirmed in *Dickinger & Ömer*, both by the Advocate General⁴⁵³ and the Court.⁴⁵⁴

Recently, the Court of Justice also underlined the aspects of *foreseeability, legal certainty and non-arbitrariness* in relation to penalties. It was necessary for the circumstances in which those penalties will be applied to be set out in a “clear, precise and unequivocal manner.” The relevant standard is whether “a reasonably informed tenderer exercising ordinary care could have understood the exact significance” of references to penalties. In relation to the Italian tendering procedure it held that the penalty of the withdrawal of the licence could only be regarded as proportionate if it was based on a judgment having the force of *res iudicata* and concerned a *sufficiently serious offence*. The Court of Justice extended by this judgment its critical stance from criminal penalties to (mere) *administrative penalties*.⁴⁵⁵

9.2.10 Licensing Tenders: Procedure and Requirements

It was established that the Court of Justice has generally applied a lenient proportionality review; in recent decisions, a somehow stricter review could be noted. By contrast, the Court of Justice has *strictly reviewed the necessity of (criminal or administrative) penalties*. As it will be shown, the Court of Justice

⁴⁵¹ C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 55.

⁴⁵² C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07), and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa AutomatenService Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 115.

⁴⁵³ Opinion of Advocate General Bot in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 37–50.

⁴⁵⁴ *Ibid.*, paras 32 and 43.

⁴⁵⁵ C-72/10 and C-77/10 (Joined Cases) Marcello Costa & Ugo Cifone [2012] nyr, paras 78–79, 83.

has also applied a *stricter scrutiny in relation to requirements for (potential) licensees and imposed minimum standards for licensing tenders*.

In *Commission v Italy*, the Italian government increased the number of horse-race betting shops from 329 to 1,000. 671 new licences were awarded in a tendering procedure, but the 329 existing old licences were simply renewed. The Court found that the failure to invite competing bids infringed the *general principle of transparency*, in particular the *obligation to ensure a sufficient degree of advertising towards potential tenderers*. Since this case was a *direct action against an evident infringement*, the judgment did not reveal much about the Court's proportionality review practice. The measure was not even suitable: the Italian government could not explain how the simple renewal of the existing licences served the public interest objective of preventing clandestine betting activities.⁴⁵⁶

As noted earlier, the Court's remarks in the subsequent *Sporting Exchange* decision were highly ambiguous.⁴⁵⁷ It was only in the later German and Austrian cases that the review practice became clearer. According to the facts in *Carmen Media*, the competent German authorities had discretion as to whether they would grant an administrative authorisation or not. Even though there was a *de facto* monopolistic system in place, the authorities enjoyed discretion to provide for additional authorisations. As a consequence, the Court held:

if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.⁴⁵⁸

In the Austrian case *Engelmann*, the Court had to address the question whether it was compatible with EU law to oblige potential licensees to adopt the legal form of a public limited company and to have their company seat in Austria. In principle, the Court did not rule out this possibility as certain objectives might justify this requirement.

The obligations binding public limited companies in regard, in particular, to their internal organisation, the keeping of their accounts, the scrutiny to which they may be subject and relations with third parties could justify such a requirement, having regard to the specific characteristics of the gaming sector and the dangers connected with it.⁴⁵⁹

It would be for the national court to verify whether these objectives were pursued and whether the measures respected the principle of proportionality. The Court of

⁴⁵⁶ C-260/04 *Commission v Italy* [2007] ECR I-7083. The Court further held that "the need to ensure continuity, financial stability and a proper return on past investments for licence holders" could not serve as overriding reasons in the general interest (para. 35).

⁴⁵⁷ C-203/08 *Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, paras 58–59; cf. comment in Planzer, "The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach".

⁴⁵⁸ C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 87.

⁴⁵⁹ C-64/08 *Criminal Proceedings against Ernst Engelmann* [2010] ECR I-8219, para. 30.

Justice however narrowed the margin of appreciation, adding that the requirement to have seat in Austria *could deter companies from participating in the tender*. If such restriction were found to be discriminatory, it could only be justified under an express Treaty derogation. The objective pleaded by the Austrian government was effective control over operators regarding criminal or fraudulent activities. The Court held:

Without it being necessary to determine whether that objective can fall within the definition of public policy, it need merely be pointed out in this respect that the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime. There are indeed various measures available to monitor the activities and accounts of such operators [...]. Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition, as the Advocate General has stated in point 60 of his Opinion, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers. [...] there is nothing to prevent supervision being carried out on the premises of those establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.⁴⁶⁰

The Court of Justice was even stricter in *Dickinger & Ömer* with regard to the seat requirement. Austrian law required that the Austrian monopoly of operating lotteries needed to have its registered office within the national territory. Following the Advocate General's view, the Court found the requirement to be a *discriminatory* restriction, which could only be justified by an express *Treaty derogation*. It raised doubts that *public policy* could serve as justification ground since this concept needed to be narrowly construed and required a genuine and sufficiently serious threat to a fundamental interest of society. It asked the referring court to ascertain whether there were other *less restrictive means* to ensure the supervision of operators. The Court noted that national law, which awards concessions based on the *criterion of maximising public revenue*, systematically works to the disadvantage of foreign operators and could not be regarded as compatible with EU law. It also held that no public interest objective was pleaded to justify the requirement that the holder of the concession was not allowed to set up branches outside Austria.⁴⁶¹

In relation to the mandatory *legal form of a capital company* the Court reconfirmed its position from the *Engelmann* judgment that such requirement could be justified by the objectives of preventing money laundering and fraud. In relation to the requirement of a *paid-up nominal or share capital* of EUR 109,000,000, the Court of Justice reminded that restrictions could not go beyond what was necessary for achieving the aim pursued. The referring court would have to ascertain whether other means were available to ensure that the claims of winning gamblers will be honoured by the operator.⁴⁶²

⁴⁶⁰ *Ibid.*, paras 37–39.

⁴⁶¹ C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 78–88.

⁴⁶² *Ibid.*, paras 76–77; cf. also C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 30.

A major aspect on which the Court of Justice has insisted in relation to licensing tenders is the *obligation of transparency*. In *Engelmann*, it stated that, in spite of the lack of applicable secondary law, the obligation of transparency fully applied in relation to gambling licenses or concessions:

the public authorities which grant such concessions are none the less bound to comply with the fundamental rules of the Treaties, in particular Articles [49 TFEU] and [56 TFEU], and with the consequent obligation of transparency [...]. Without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed [...]. The grant of a concession, in the absence of any transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, who have no real possibility of manifesting their interest in obtaining the concession in question. Such a difference in treatment is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality, and constitutes indirect discrimination on grounds of nationality prohibited by Articles [49 TFEU] and [56 TFEU], unless it is justified by objective circumstances [...]. The fact that the issue of licences to operate gaming establishments may not be the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article [56 TFEU], in particular the principle of equal treatment and the obligation of transparency [...]. Indeed, the obligation of transparency amounts to a condition which must be met before a Member State can exercise its right to award licences to operate gaming establishments, irrespective of the method of selecting operators, because the effects of the award of such licences on undertakings which are established in other Member States and potentially interested in engaging in that activity are the same as those of a service concession contract.⁴⁶³

These statements clarified earlier remarks of the Court. In *Sporting Exchange*, it had first given the impression that these requirements would apply to any licensing procedure, because the detrimental nature of competition in the gambling market needed to be distinguished from the positive nature of a competitive call for tenders.⁴⁶⁴ Despite this statement about the positive effects of a competitive tender procedure, the Court found in the next sentence that the requirements of equal treatment and transparency did not apply

if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.⁴⁶⁵

This interpretation left the question unanswered whether the Dutch licensees satisfied those conditions. *It was left to the referring Raad van State to decide upon*

⁴⁶³ C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, paras 49–53.

⁴⁶⁴ C-203/08 *Sporting Exchange Ltd. Trading as ‘Betfair’ v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, paras 58–59; Cf. comment in Planzer, “The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach”.

⁴⁶⁵ C-203/08 *Sporting Exchange Ltd. Trading as ‘Betfair’, v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, para. 59.

this issue. That court subsequently found that the relationship between De Lotto (sports-betting licensee) and Scientific Games Racing (horseracing licensee) and the Dutch state did not meet the requirement of a relationship characterised by a sufficiently strict control. Therefore, the obligation of transparency had not been respected. The Raad van State found the relevant licensing procedure incompatible with EU law.⁴⁶⁶

The Services Directive does not apply to gambling services (see Sect. 4.2.9). Nonetheless, the Court of Justice has insisted in relation to licensing procedures on elements, namely transparency and non-discrimination, which can be found in the Services Directive. The Court derives those obligations from the fundamental Treaty rules. Similar to the Directive, which does not apply to exclusive right holders, the Court does not impose the aforementioned obligations on gambling (public or private) monopolies under direct state supervision or subject to strict control by the state.

The judgment in *Costa & Cifone* reconfirmed the aforementioned obligations imposed by the case law.⁴⁶⁷ The case related to the re-distribution of betting licenses in Italy. The formerly applicable licensing system had been found in breach of EU law and had excluded a category of operators from the award of licences. The Italian government sought to remedy that breach by putting out to tender a significant number of new licences. Meanwhile, it protected the market positions acquired by the existing operators, as it required new licensees to observe a minimum distance to establishments of existing operators. Restating its case law, the Court reminded the *principles of equivalence, effectiveness, equal treatment, non-discrimination* and the *obligation of transparency*. In the cases at hand, the principle of equal treatment required

that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. This is especially the case in a situation such as that in the cases before the referring court, in which a breach of EU law on the part of the licensing authority concerned has already resulted in unequal treatment for some operators.⁴⁶⁸

In fact, the existing operators had already been able to establish themselves on the market with a certain reputation and a measure of customer loyalty. Imposing a minimum distance on new licensees would offer existing operators an even greater competitive advantage. This would result in a new breach of EU law, namely of the principle of effectiveness and the principle of non-discrimination.⁴⁶⁹

In sum, the Court of Justice has distinguished in its case law two situations between which the standard of review differs. First, the state provides one operator with the *exclusive right* to provide (certain types of) gambling services and *exercises*

⁴⁶⁶ *Betfair v the Minister of Justice*, case no 200700622/1/H3-A, judgment of 23 March 2011.

⁴⁶⁷ Picod, F. (2012). “Encadrement strict d’un appel d’offres de jeux de hasard”, *La Semaine Juridique Edition Générale*, 13.

⁴⁶⁸ C-72/10 and C-77/10 (Joined Cases) *Marcello Costa & Ugo Cifone* [2012] nyr, paras 50–51, 54–57.

⁴⁶⁹ *Ibid.*, paras 53 and 58.

strict control on this single (state or private) operator. In such situation, the usual requirements of non-discrimination and transparency, as laid down in the case law on services concessions, do not apply and the Court hardly practises a proportionality review. Second, *the aforementioned conditions are not fulfilled*, that is, the law allows for several licensees or the control over the exclusive right holder is not sufficiently strict. In this latter case, *the procedural requirements of non-discrimination and transparency apply* and the Court of Justice is inclined to closely review the proportionality of the national gambling regime. The requirements applying in the two distinct situations must not be confused.⁴⁷⁰

9.2.11 Results

Section 9.2 discussed the proportionality review in the case law on gambling through the prism of empirical evidence. It was compared to which extent the Court of Justice's views on gambling addiction find support in current empirical research. It was inquired whether the wide margin of appreciation was counterbalanced by a *meaningful proportionality review*. It was found that *different standards of review applied to different categories* and these categories were accordingly studied one after the other.

The first categories included the *definition of the level of consumer protection*, *the choice of the regulatory model (exclusive right holder versus licensing system)* and the arguments of 'channelling' as well as of the 'detrimental nature' of *competition*. Until recently, the first two aspects were not reviewed by the Court of Justice as the Court left it to the Member States to define the protection level, which they pursue and to choose the regulatory model, which they find appropriate. By contrast, the EFTA Court found it important to review how high the protection level was *in practice*; restrictions on the exclusive right holder like opening hours, number of outlets, advertising and development of new games needed to be considered. *The EFTA Court reviewed the necessity of monopolies and expressly applied the less restrictive test* in both its gambling cases. It denied their necessity in relation to crime concerns but accepted it in relation to gambling addiction.

In relation to exclusive right systems (private or public monopolies), the reference of the Court of Justice to the principle of proportionality remained, until recently, *rhetoric*. The Court of Justice found monopolies "certainly more effective" in addressing gambling-related risks, such as gambling addiction. However, hardly any empirical research has directly addressed this question. An extent *literature review in 2011 did not find direct empirical evidence* regarding the comparative effectiveness

⁴⁷⁰Concurring: Hecker, M. (2007). "Italien und das Glücksspiel – Zenatti, Gambelli, Placanica und kein Ende?", *European Law Reporter*, 10, 357–360. However, in *Garkalns*, the CJEU seemed to water down this distinction. On the one hand, it required the national court to review whether the state strictly supervised the gambling activities, even though a licensing system with several operators was concerned. On the other hand, the CJEU discussed in less detail the requirements stemming from the principle of equal treatment and the obligation of transparency. C-470/11 *Garkalns SIA v Rigas dome* [2012] nyr, in particular para. 47.

of different regulatory approaches to gambling but solely varying opinions expressed by scholars. A subsequent pan-European study could not identify statistically relevant differences with regard to prevalence rates of disordered gambling associated with licensees on the one hand and public monopolies on the other. In recent judgments, the Court of Justice adjusted its approach and *started to (leniently) review the protection level and exclusive right holders*. It found that a monopoly could only be installed to ensure a particularly high level of consumer protection in practice.

The Court of Justice approved the so-called ‘channelling’ argument since *Läärä*. That argument has taken various forms such as the need to channel the ‘desire to gamble’ or to channel gambling offers through single right holders. It was noted that there was no general, uncontrollable desire to gamble. Section 9.1 found that only about 0.5 to 2 % of the population experience life-time gambling disorder. Second, it must be considered that *channelling is not a scientific term* but an empty shell that is *used differently by different bodies*: the EFTA Court used it, for instance, in relation to licensing systems. In Swiss law, it refers to the policy of channelling gambling services through casino venues run by competing licensees.

Advocate General Bot, followed by the Court of Justice, held in *Sporting Exchange* that competition in the field of gambling services had *detrimental effects*, resulting in an increase in gambling addiction. The aforementioned literature review could *not identify published empirical evidence* on this point. Some of the few jurisdictions, for which a series of reliable prevalence rates are available, include the US and the UK. These jurisdictions do not show higher rates of gambling disorder than the rough global average, in spite of a market with competing licensees.

Another category involved the criterion of a ‘consistent and systematic’ gambling policy, in particular ‘*controlled expansion*’ and ‘*advertising*’. While the Court of Justice started to review the proportionality in *Gambelli*, the standard of review remained lenient. In *Placanica*, the Court approved the concept that a single right holder may engage in controlled expansion of games and advertising, and confirmed this approach expressly in relation to gambling addiction concerns in *Ladbrokes*. Such expansion may not necessarily be inconsistent and may be needed to draw players away from the blackmarket. *The EFTA Court showed a stricter review practice*: a monopoly operator had to limit its gambling offers and abstain from extensive marketing practices. It was for the Member State to demonstrate the consistency of its policy. More recently, the Court of Justice’s review practice also became stricter and its conclusions in *Markus Stoss* and *Carmen Media* seemed to be influenced by the approach of the EFTA Court.

The empirical evidence shows some support for the stance of the Court of Justice. The so-called *exposure model* did not find support in long-term epidemiological data. While rates of gambling disorder first increased in the US, the *most recent rates are at similar levels as in the late 1970s* – in spite of much greater exposure to games of chance. In the UK, the rates remained stable in spite of a significant liberalisation of land-based and online gambling by the 2005 Gambling Act. Research also found that *people who had recently moved to Nevada showed higher rates of disordered gambling* than people who had been residing in Nevada for 10 years or more.

Scientists have argued that the exposure model needed to be combined with the *adaptation model*: populations may first experience an increase in disordered gambling before adapting to the new environmental exposure. There is empirical support for responsible 'controlled expansion' policies. However, the Court of Justice limited this argument to single right holders. There are no indications in the literature to suggest that social adaptation processes relate to a *specific* regulatory model only. In fact, the afore-described effects were particularly shown in the UK and the US, therefore relating to systems where the majority of games are run by competing licensees.

With regard to advertising, the Court of Justice showed in its earlier case law a lenient proportionality review. It argued *inter alia* that exclusive right holders might need to advertise their offers in order to draw players away from the blackmarket. They could not excessively incite and encourage consumers. The EFTA Court reviewed advertising practices more strictly, taking in particular a critical stance towards extensive marketing practices. More recently, the Court of Justice adjusted its approach and reviewed the consistency of measures more closely as well. Exclusive right holders could not trivialise gambling problems and present gambling in a mere positive way. In *Dickinger & Ömer*, the Court further considered the young age of consumers targeted by the advertising and distinguished between (restrained) informative versus (expansionist) encouraging advertising practices.

An extent literature review showed that there was no direct empirical evidence as to the impact of advertising on the prevalence of gambling disorder. It was convincingly argued in the literature that the effects on the general population were likely to be overestimated, especially in mature markets. Nonetheless, studies show that advertising may have negative effects on vulnerable groups such as *adolescents* and *disordered gamblers*. Some disordered gamblers experience problems resisting the trigger in the form of advertising. Adolescents were found to be particularly receptive of (gambling) advertising and counter-advertising, which shaped their views on the positive and negative sides of gambling. There is similar empirical evidence from other fields like tobacco and alcohol advertising. What seems to matter is that consumers receive a balanced picture of the chances and risks of gambling. In particular *vulnerable groups* must be protected from the harmful effects of disordered gambling. Empirical evidence supports the practice of the Internal Market Courts of taking a critical stance towards certain advertising practices.

Other categories involved the proportionality *review of games that show a higher dangerousness* according to the courts. This is the case for slot machines and gambling on the Internet. More dangerous games may justify stricter limitations of fundamental freedoms. On the other hand, substantial expansion may question the consistency of a monopolist system. There are studies showing that EGM's are amongst the preferred gambling activities of pathological gamblers. But high rates were in particular found with *EGM's being located in bars*, underlining the importance of environmental factors. The available evidence is limited. In particular, it is unclear whether EGM's contribute to the development and maintenance of disordered gambling.

The other category of games that is seen as dangerous in the case law are games *over the Internet*. The Court of Justice stated in *Carmen Media* that they combined many factors that were likely to foster the development of gambling addiction – without distinguishing between different types of online games. The Court of Justice hardly reviewed the proportionality in relation to online games. Empirical evidence does not support the view that online gambling leads to sharply increased levels of gambling disorder. In spite of the significant increase of gambling services on the Internet, prevalence rates of gambling disorder have remained stable. *In line with the adaptation model*, the rates in the UK remained stable in spite of a liberalisation of the online gambling sector. *In the US, whose residents' share in the global gambling market is one quarter to one third (despite the prohibition in place)*, recent prevalence rates are as low as in the 1970s.

The question remains if there was empirical evidence for 'Internet addiction' as such. The only behavioural addiction recognised in the DSM is gambling disorder, but DSM-5 suggests to further study 'Internet gaming disorder'. Researchers have studied actual online gambling behaviour of players. These studies show that the large majority of the online gamblers play very moderately with regard to money and time commitment. It was noted that the Court's lenient proportionality review exclusively focused on potential threats without considering potential benefits of the Internet in view of responsible gambling policies.

In a next step, the Court's approach to *mutual recognition* and the necessity for additional controls was assessed. If the national licensing system is found to be compatible with EU law, there is no space to apply the principle of mutual recognition. In the negative case, national authorities can still require that foreign operators need to seek a national licence. While the Court's result was hardly surprising, its argumentation in relation to online operators was. It argued in *Liga Portuguesa* that authorities of the state of establishment did not have sufficient means to control their own licensees. *The EFTA Court took a more mutual recognition-friendly approach*. If restrictions to fundamental freedoms of foreign operators were found to be unlawful, national authorities could still require a national licence. However, they needed to take into account those requirements that were already fulfilled in the home state.

The strictest proportionality review was noted in relation to penalties and procedural requirements in licensing tenders. Criminal penalties were found to be disproportionate in several cases. They could not be imposed for failure to complete an administrative formality where the latter was rendered impossible in infringement of EU law. In *Costa & Cifone*, the Court of Justice disapproved even administrative(!) penalties. The authorities' decision to grant a licence needed to be based on objective, non-discriminatory and non-arbitrary criteria and operators had a right to effective judicial remedy. The Court of Justice even alluded to the principle of the least restrictive measure in *Engelmann*. Excessive seat requirements for operators were found disproportionate in relation to crime concerns. The principles of transparency and equal treatment fully apply when allocating gambling licenses.

9.3 The Peculiar Approach in the Review Practice of the Court of Justice of the EU

The Court of Justice and the EU legislator have repeatedly referred to a peculiar nature of gambling, namely based on gambling addiction concerns. Section 9.1 illustrated that gambling disorder does not show a peculiar nature. On the contrary, it shares manifold commonalities with other expressions of addiction. With regard to public morality concerns, it was concluded that they are secondary as they relate to undesired side effects of gambling and not to the activity as such. Gambling is not a core case of public morality. With regard to crime as justification ground, it will be for other authors to verify whether fraud, embezzlement and money laundering in relation to gambling activities are somehow peculiar.⁴⁷¹ The approach of the EFTA Court did at least not seem to support such view.⁴⁷²

The idea of gambling or gambling addiction being of peculiar nature has been refuted. The detailed empirical views on the case law showed that gambling addiction is not of peculiar nature. The wide margin of appreciation and the lenient proportionality review practised by the Court of Justice are special. The analysis showed that the Court's review practice deviated from the general criteria of the doctrine on the margin of appreciation. Its early case law also significantly differed from that of the EFTA Court, but the Court of Justice has adjusted its approach in recent decisions. The lenient review of the Court of Justice prompted Lein to rhetorically ask whether the Court's review in the field of gambling constituted a gamble.⁴⁷³ Other scholars concluded that the Court of Justice's use of the margin of appreciation and its review practice led to a virtual dismantling of the Internal Market requirements in the field of gambling.⁴⁷⁴

This section compares the approach chosen by the Court of Justice in the gambling cases with closely related fields (Sect. 9.3.1). It discusses cases that involved concerns in relation to *addiction* and to the *Internet* since the Court has applied a particularly lenient proportionality review in relation to these two dimensions of gambling. If this analysis confirms the special approach chosen in relation to gambling, a subsequent analysis needs to inquire the reasons for such approach (Sect. 9.3.2). Finally, Sect. 9.3.3 discusses the *consequences* of the chosen approach.

⁴⁷¹ For a contribution challenging the view that online gambling constitutes a major threat regarding money laundering, cf. Levi, M. (2009). "E-Gaming and Money Laundering Risks: A European Overview", *ERA Forum*, 10(4), 533–546; cf. also Skala, J., "Money Laundering and Internet Gambling: A Suspicious Affinity?" in *Cross-Border Gambling on the Internet – Challenging National and International Law*, Swiss Institute of Comparative Law (Ed.), Publications of the Swiss Institute of Comparative Law, vol. 47, Zurich: Schulthess, 2004, pp. 305–348.

⁴⁷² E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 50.

⁴⁷³ Lein, E. (2007). "Quo vadis Luxemburg? Die europäische Rechtsprechung zum Glücksspielrecht", *ERA Forum*, 8(3), 373–403, at 375.

⁴⁷⁴ Van Den Bogaert, S., and Cuyvers, A. (2011). "'Money for Nothing': The Case Law of the EU Court of Justice on the Regulation of Gambling", *Common Market Law Review*, 48(4), 1175–1213, at 1208.

9.3.1 Cases with Similar Consumer Protection Concerns

9.3.1.1 Concerns Relating to Addiction and Adolescents

Sections 9.1.3, 9.1.4 and 9.1.5 established the close relationship between gambling disorder and other forms of addiction. DSM-5 reclassified gambling disorder together with substance use disorders under ‘substance-related and addictive disorders’. From a scientific point of view, addiction to games of chance is not peculiar. Its mechanisms and nature are *inter alia* closely related to alcohol-use disorder (see Sect. 9.1.3.3).

Governments around the world have tried to protect consumers from the abuse of and the addiction to substances such as alcohol. Similarly, authorities have attempted to protect consumers from harmful behaviour relating to gambling. Policies aiming at protecting people from substance- or behaviour-related risks may result in restrictions of fundamental freedoms. The Court of Justice has dealt with restrictions that are based on policies aiming at preventing addiction. The fight against alcohol addiction was at the heart of several cases. The Swedish case *Rosengren* is used here to illustrate the Court’s approach. This case is particularly suitable for comparative purposes since it involved concerns in relation to *adolescents*. As it was shown, this population group has a higher vulnerability to addictive disorders. The case regarded ‘Systembolaget’, the Swedish alcohol retailing system. In Sweden, the law (‘alkohollagen’) confers a state monopoly over retail sales of wine, strong beer and spirits to a company constituted for that purpose.⁴⁷⁵

The appellants in the main proceedings had ordered cases of Spanish wine by way of correspondence. The cases were confiscated by the Swedish customs as the alcohol order should have been processed through Systembolaget. After several appeals against the confiscation, the Swedish Supreme Court (‘Högsta domstolen’) referred questions to the Court of Justice as to the compatibility of the prohibition to directly import alcoholic beverages into Sweden without at the same time taking care of the transport.

The restrictions in *Rosengren* were not argued by ‘consumer protection’ as an overriding reason of public interest but under the express Treaty exception of the *protection of the health and life of humans* under Article 36 TFEU. This is relevant since the Court in *Commission versus Spain* noted that the restrictions to gambling could not be argued on public health grounds as the government had failed to show that gambling addiction had reached a *dimension*, which could justify relying on public health grounds.⁴⁷⁶ According to the Court, the latter ground therefore relates to health concerns of bigger dimension than gambling disorder.

⁴⁷⁵ Former Advocate General Alber used this case for a comparative analysis of the gambling case law of the CJEU, even though from another angle (justifiability of monopolies): Alber, S. (2007). “Freier Dienstleistungsverkehr auch für Glücksspiele? Zur Rechtsprechung des EuGH zum Glücksspielbereich”, *ERA Forum*, 8(3), 321–355, at 342.

⁴⁷⁶ C-153/08 *Commission v Spain* [2009] ECR I-9735, para. 40. For a comment, cf. Picod, F. (2009). “Condamnation d’une législation fiscale relative aux jeux de hasard”, *La Semaine Juridique Edition Générale*, 43.

Prior to the *Rosengren* decision, the Court had already held that Member States could themselves decide what degree of protection they wished to ensure within the limits of the Treaties,⁴⁷⁷ and recognised that legislation aiming to control the consumption of alcohol in order to prevent detrimental effects reflected health and public policy concerns in Article 36 TFEU.⁴⁷⁸

Similar to the gambling case law, the Court referred to the national restrictions as ‘channelling’ measures. The Swedish government justified them with the general need to limit the consumption of alcohol. This argument is reminiscent of the gambling jurisprudence.

In relation to the health concerns linked to alcohol addiction, the Court of Justice expressly applied the *principle of less restrictive measures* within the proportionality review. If the health and life of humans could be protected just as effectively by measures that were less restrictive of intra-Union trade, the national measures could not profit from the Treaty exception.⁴⁷⁹ By contrast, the Court of Justice has in general refrained from referring to this principle and leniently reviewed the necessity of gambling-related restrictions aimed at controlling gambling addiction.

The Court of Justice closely reviewed the Swedish legislation and the actual application of it *in practice*, underlining the *burden of proof* on the state. Systembolaget had the legal possibility to refuse the processing of a purchase order. Yet, it did not follow from the information available to the Court that Systembolaget did in practice refuse to make such supply. The measures were held unsuitable to generally limit the consumption of alcohol because of the rather marginal nature of their effects.

On a second ground, the Swedish government argued that the channelling measures, which directed the demand through Systembolaget, pursued the objective of protecting specifically *younger persons* from the detrimental effects of alcohol consumption. People placing orders through Systembolaget had to be at least 20 years of age. Under this age, alcohol could also not be imported by individuals. The protection of the health of adolescents constitutes a particularly legitimate argument and finds support in empirical evidence. It was shown that this age group features increased vulnerability to gambling disorder and substance use disorders (see Sect. 9.1.3.5).⁴⁸⁰

The Court approved the aim of preventing younger persons from purchasing alcohol; this aim ultimately served to reduce the health risk in relation to alcohol consumption. Nevertheless, the Court reminded that it was for the state to show that

⁴⁷⁷ C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887, para. 103.

⁴⁷⁸ C-434/04 *Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik* [2006] ECR I-9171, para. 28.

⁴⁷⁹ C-170/04 *Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren* [2007] ECR I-4071, para. 43.

⁴⁸⁰ The need to protect young persons in particular was discussed for instance in C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, paras 103, 105, 111; C-347/09 *Criminal Proceedings against Jochen Dickinger and Franz Ömer* [2011] ECR I-8185, para. 60.

the measures were proportionate. This would not be the case if the objective could be achieved by less restrictive measures. The general Swedish prohibition to import alcohol by way of correspondence, irrespective of the age of the purchaser, went beyond what was necessary to achieve the objective.

The Court also closely scrutinised the *consistency* of the Swedish alcohol regime. It noted that beside the generally applicable monopoly of *Systembolaget* in distributing alcohol and checking the age of purchasers, there were also some methods of distribution that conferred the responsibility for age checks on third parties, such as in food shops or service stations. The Court went as far as to openly doubt that age checks were performed in situations where *Systembolaget* supplied customers in stations or coach stops. Due to these likely inconsistencies in practice, the Court found that the objective could only be met partly.

The intensity of the proportionality review of the Court went even further in that it inquired itself into less restrictive but equally effective measures in view of the objective of the protection of the health of adolescents. It referred to the Commission's suggestion: the purchaser could declare on a form accompanying the alcoholic beverages that he is more than 20 years of age. Remarkable about this solution is not only that *the Court of Justice itself argued an alternative, less restrictive measure* but also the high *burden of proof* that it imposed on the government.

The information before the Court does not, on its own, permit the view to be taken that such a method, which attracts appropriate criminal penalties in the event of non-compliance, would necessarily be less effective than that implemented by *Systembolaget*.⁴⁸¹

The standard of review applied in *Rosengren* contrasts strongly with that in the case law on gambling.⁴⁸² The decision cannot be explained as a kind of accident of a small bench, given it was handed down with the Court of Justice sitting as *Grand Chamber*. The Court had found measures to be disproportionate already in earlier cases relating to alcohol and health.⁴⁸³ Considering the Court's approach with regard to gambling addiction, *the difference in dealing with measures relating to alcohol addiction* is remarkable. In *Rosengren*, the Court applied a fully fledged proportionality test regarding the Swedish restrictions, including the search for alternative, less restrictive measures.⁴⁸⁴ Each objective was assessed separately and thoroughly.

⁴⁸¹ C-170/04 *Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren* [2007] ECR I-4071, para. 56.

⁴⁸² Concurring: Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 163.

⁴⁸³ Cf. *ex multis* C-189/95 Criminal proceedings against Harry Franzén [1997] ECR I-5909; C-178/84 *Commission v Germany* [1987] ECR 1227. Similarly, the EFTA Court found measures related to alcohol and public health disproportionate, cf. *ex multis* E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994–1995] EFTA Court Report 15; E-6/96 *Tore Wilhelmsen AS v Oslo kommune* [1997] EFTA Court Report 53; E-1/97 *Fridtjof Frank Gundersen v Oslo kommune*, supported by the Government of the Kingdom of Norway [1997] EFTA Court Report 108. For a comparison of these alcohol cases, cf. Baudenbacher, C. (1998). "Vier Jahre EFTA-Gerichtshof" *Europäische Zeitschrift für Wirtschaftsrecht*, 9(13), 391–397.

⁴⁸⁴ C-170/04 *Klas Rosengren, Bengt Morelli, Hans Särman, Mats Åkerström, Åke Kempe, Anders Kempe, Mats Kempe, Björn Rosengren, Martin Lindberg, Jon Pierre, Tony Staf v Riksåklagaren* [2007] ECR I-4071, paras 44–57.

The striking difference regarding the choice of language and the clarity of the findings compared to the judgments in the gambling cases was also noted by other authors.⁴⁸⁵ In the gambling cases, the Court's proportionality review of measures relating to gambling addiction has generally been limited to a (lenient) suitability test. There has also been a tendency to assess the objectives 'together' or 'as a whole'. More recently, however, the Court of Justice has started to intensify the proportionality review.

9.3.1.2 Concerns Relating to the Internet

The *Rosengren* case was chosen because of its close relationship regarding health concerns of addiction. The following cases were also chosen because of their relation to the gambling cases. They show a close parallel due to the object of attention: the Internet. The decisions deal with the Internet and the risks it involves as a new service channel for consumers. In the gambling cases, the Court of Justice showed a very sceptical stance towards the Internet as it involved different and more substantial risks in the view of the judiciary.⁴⁸⁶

The two cases that are used for comparison are *DocMorris*⁴⁸⁷ and *Ker-Optika*.⁴⁸⁸ Both relate to the service of *offering products via the Internet*, the first of medicine and the latter of contact lenses.⁴⁸⁹ The competent Hungarian health authority ('*ANTSZ*') prohibited *Ker-Optika*'s activity of selling contact lenses via its website as this service could only be provided in a shop specialising in the sale of medical devices or by home delivery of such shop to the final customer.⁴⁹⁰ Upon several appeals, the Court of Justice was asked whether the restrictions to the free movement of goods could be justified. The Court recognised the requirement that qualified staff should initially counsel the customers on the questions whether and how they should use lenses. The Court found it, however, unnecessary that customers had to be advised at every occasion of purchasing contact lenses.

However, customers can be advised, in the same way, before the supply of contact lenses, as part of the process of selling the lenses via the Internet, by means of the interactive features on the Internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses.⁴⁹¹

⁴⁸⁵ Lein, "Quo vadis Luxemburg? Die europäische Rechtsprechung zum Glücksspielrecht", at 401.

⁴⁸⁶ C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para. 102.

⁴⁸⁷ C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887.

⁴⁸⁸ C-108/09 *Ker-Optika bt v ANTSZ Dél-dunántúli Regionális Intézet* [2010] ECR I-12213.

⁴⁸⁹ For a more detailed analysis comparing *Ker-Optika* and *DocMorris* with the reasoning in the case law on online gambling, cf. Littler, A. (2011). "Internet-Based Trade and the Court of Justice: Different Sector, Different Attitude", *European Journal of Risk Regulation*, 2(1), 78–84.

⁴⁹⁰ Picod, F. (2010). "La vente des lentilles de contact ne peut pas être réservée à des magasins spécialisés", *La Semaine Juridique Edition Générale*, 50.

⁴⁹¹ C-108/09 *Ker-Optika bt v ANTSZ Dél-dunántúli Regionális Intézet* [2010] ECR I-12213, para. 69.

The Court further recognised that Member States could require that qualified staff verified the positioning of the lenses on the customer's eyes and advised the customer on the correct use and care of the lenses. However, those services were required only at the moment of first supply.⁴⁹²

[W]hile the extended use of contact lenses must be accompanied by supplementary information and advice, those can be given to the customer by means of the interactive features to be found on the supplier's Internet site.

Moreover, the Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the customer, at a distance, individualised information and advice on the use and care of the contact lenses. The provision of such information and advice at a distance may, moreover, offer advantages, since the lens user is enabled to submit questions which are well thought out and pertinent, and without the need to go out.⁴⁹³

The Court of Justice concluded that there were *less restrictive means available* to ensure the protection of the health of consumers of contact lenses and the Hungarian legislation was thus found to be disproportionate.⁴⁹⁴

Seven years prior to *Ker-Optika*, the Court handed down its ruling in *DocMorris*.⁴⁹⁵ The German association of pharmacists was challenging the Internet sale of medicine by a Dutch pharmacy, which delivered its medicinal products by international mail order. The restrictions were based on *public health* grounds, namely that medicine may be incorrectly used and services of online pharmacies abused. In *Ker-Optika*, the Court of Justice referred on several occasions to its *DocMorris* decision and confirmed the approach chosen in the earlier case. The Court distinguished between two kinds of medicine: the first requiring prescription and the second not requiring prescription. It held that an absolute, undifferentiated prohibition of this distribution channel, that is, mail order via the Internet, could not be justified. The need to *advise customers could also be satisfied via the Internet*. In fact,

internet buying may have certain advantages, such as the ability to place the order from home or the office, without the need to go out, and to have time to think about the questions to ask the pharmacists, and these advantages must be taken into account.⁴⁹⁶

Besides expressly underlining these advantages of the medium, the Court of Justice also addressed the risks by which the restrictions had been justified, namely that medicine could be incorrectly used and that medicine could be abused.

As regards incorrect use of the medicine, the risk thereof can be reduced through an increase in the number of on-line interactive features, which the customer must use before being able

⁴⁹² *Ibid.*, paras 70–71.

⁴⁹³ *Ibid.*, paras 72–73.

⁴⁹⁴ The CJEU's stricter proportionality review cannot be explained with a fully harmonised sector of law. Only part of the facts fell within the scope of Directive 2000/31. The conditions under which contact lenses sold via the Internet could be supplied within a Member State fell outside the scope of this Directive. Cf. *ibid.*, paras 30 and 77.

⁴⁹⁵ C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887.

⁴⁹⁶ *Ibid.*, para. 113.

to proceed to a purchase. As regards possible abuse, it is not apparent that for persons who wish to acquire non-prescription medicines unlawfully, purchase in a traditional pharmacy is more difficult than an internet purchase.⁴⁹⁷

The approach of the Court towards the Internet as a new service channel in *Ker-Optika* and *DocMorris* is noteworthy for several reasons. First, the justification ground relevant in these cases was ‘public health’.⁴⁹⁸ The Court qualified this ground as more severe than consumer protection.⁴⁹⁹ Nevertheless, the Court’s review practice was in these cases stricter than in the gambling case law.

Second, as many new technologies, the medium *Internet brings simultaneously both risks and opportunities*. The Court of Justice solely underlined the risks in relation to online gambling. With regard to online sales of goods, it underlined the opportunities that the new medium brings for consumers and rebutted the risks.⁵⁰⁰

As a consequence, the Court’s proportionality review in relation to services via the Internet was much stricter in the aforementioned cases than in the case law on gambling. A broader perspective on the Court of Justice’s general practice of proportionality review seems to confirm the divergence of the approach chosen in relation to gambling services. While it tends to review EU acts and decisions only leniently,⁵⁰¹ the Court engages in a fairly intensive review where national measures restrict rights protected by EU law, namely fundamental freedoms.⁵⁰² Compared to the gambling case law, the Court reviewed even certain core cases of morality more strictly.⁵⁰³

9.3.2 Causes: Political Considerations and Moral Views on Gambling

The analysis of the Court of Justice’s jurisprudence showed a use of the margin of appreciation that significantly differs in the area of gambling services. It was further

⁴⁹⁷ *Ibid.*, para. 114.

⁴⁹⁸ More precisely, “the health and life of humans” as it is referred to in the provisions relating to the free movement of goods.

⁴⁹⁹ C-153/08 *Commission v Spain* [2009] ECR I-9735, para. 40.

⁵⁰⁰ Concurring: Littler, “Internet-Based Trade and the Court of Justice: Different Sector, Different Attitude”, at 83–84.

⁵⁰¹ The Court of Justice grants for instance wide discretion to the Commission in relation to anti-dumping measures (*ex multis*, cf. Van Bael, I., “Lessons for the EEC: More Transparency, Less Discretion, and, at Last, a Debate?” in *Anti-Dumping Law and Practice: A Comparative Study*, Jackson, J.H., and Vermulst, E. (Eds.), London: Harvester Wheatsheaf, 1990).

⁵⁰² *Ex multis*, Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 21.

⁵⁰³ *Ex multis*, C-121/85 *Conegate Limited v HM Customs & Excise* [1986] ECR 1007.

demonstrated that neither the general case law nor empirical evidence on gambling addiction could explain the different approach. The question remains *why* the Court of Justice chose to apply a very wide margin of appreciation and a lenient proportionality review in the field of games of chance. The following analysis *tries to identify the extra-legal factors* that impacted the judges at the Court of Justice in their decision-making. The analysis first inquires the broader *historical-political setting* and subsequently the *moral statements* made by the Court of Justice.

9.3.2.1 German Reunification, Treaty of Maastricht and Principle of Subsidiarity

There is a bigger setting to the gambling cases that is not to be neglected: the political discussions regarding the *principle of subsidiarity* that were dominant in the early 1990s. As this section shall show, they had an impact on the use of the margin of appreciation in the early gambling case law. The early case law in turn served *as decisive precedent* for the subsequent decisions.

The first request for a preliminary ruling in the area of gambling services was received at the Court of Justice on 18 June 1992. The judgment was handed down on 24 March 1994.⁵⁰⁴ At that time, the political leaders of the EU were keen to emphasise *national sovereignty and the principle of subsidiarity*. By contrast, up until 1992, the political discourse had been different and dominated by the *broadening and deepening of European integration*. What led the political discourse to take such a significant turn?

The initial event – a moment of historic dimension indeed – was the fall of the Berlin Wall on 9 November 1989. Records from the Kremlin, which were only recently released, destroyed the belief that the Western Allies unconditionally supported Western Germany's aspiration for reunification. France and the UK opposed a reunification of Germany.⁵⁰⁵ UK Prime Minister Thatcher and French President Mitterrand feared that the already thriving German economic engine would become even more powerful, combined with a bigger land mass and population. Germany as the political and economic hegemon was not an appealing thought to London and Paris. The ultimate fear was that an even more powerful Germany might start to reconsider its commitment to European integration and opt for a 'Sonderweg'.

The challenge was to make Germany's European commitment irreversible, and the French government came up with the solution: Germany had to give up its strong currency ('Deutsche Mark'), the financial backbone of its economic might, and commit to the European Economic and Monetary Union with its common currency, the Euro.⁵⁰⁶

⁵⁰⁴The next gambling case C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjät (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067 was received at the CJEU on 25 March 1997.

⁵⁰⁵"*Thatcher Told Gorbachev Britain Did Not Want German Reunification*", *The Times*, 11 September 2009.

⁵⁰⁶Eckert, D., *Weltkrieg der Währungen: Wie Euro, Gold und Yuan um das Erbe des Dollar kämpfen – und was das für unser Geld bedeutet*, Munich: Finanz Buch Verlag, 2010; "*Germany's*

In parallel, the combination of the collapse of communist regimes in Central Eastern Europe and the prospect of a German reunification led to the commitment to reinforce the international position of the European Economic Community.⁵⁰⁷ In addition to a common currency, a common foreign and security policy as well as cooperation in internal affairs and justice came on the table of negotiations: factors that were supposed to reinforce the international position of Europe. These ambitious efforts culminated in the signing of the Maastricht Treaty on 7 February 1992.⁵⁰⁸

The population in certain Member States was not necessarily supportive of such big steps. The drafters of the Maastricht Treaty included elements aimed at increasing the popularity of the move. ‘*Subsidiarity*’ as a general principle of Union law with general applicability was introduced.⁵⁰⁹ ‘European citizenship’ served also as a promotional tool since it constituted a rather easy and non-consequential conglomerate of new rights.⁵¹⁰ Despite these goodies, the referendum on the Maastricht Treaty in the founding Member State France passed by mere luck with a 51 % approval rate, and few months later Denmark rejected the Treaty.⁵¹¹ These results came as a wakeup call for many European political leaders.

It was in the aftermath of this *alarming lack of popular support* for a continued deepening and broadening of European integration that EU leaders felt the necessity to underline more prominently national sovereignty. A thorough review of the conclusions of the presidencies of the European Council⁵¹² shows that the *political*

Neighbors Try to Redeem Their 1989 Negativity”, Deutsche Welle, 8 September 2009. In return, Germany insisted on a strong independent European Central Bank. After this political deal was struck between Chancellor Kohl and President Mitterrand, the Treaty on the Final Settlement with Respect to Germany, also referred to as the Two Plus Four Agreement, was signed on 12 September 1990; cf. “Treaty on the Final Settlement with Respect to Germany”, available at <http://usa.usembassy.de/etexts/2plusfour8994e.htm>.

⁵⁰⁷ “Birth of the Treaty of Maastricht on European Union”, available at http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm.

⁵⁰⁸ Ibid.

⁵⁰⁹ Article G of the Maastricht Treaty states: “The following Article shall be inserted: Article 3b The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

⁵¹⁰ Weiler, J.H.H. (1997). “The Selling of Europe: The Discourse of European Citizenship in the IGC 1996”, *Jean Monnet Working Paper*, no 3/97 available at <http://centers.law.nyu.edu/janmonnet/papers/96/9603.html>.

⁵¹¹ For a discussion, cf. Svensson, P. (1994). “*The Danish Yes to Maastricht and Edinburgh. The EC Referendum of May 1993*”, *Scandinavian Political Studies*, 17(1), 69–82. A renegotiated version of the Treaty, offering Denmark several special terms, passed in a second referendum in June 1993 with 57 %. The third referendum on the Treaty, in Ireland, passed in June 1992 with 69 %. People in Ireland were aware of the fact that their country had substantially profited from European structural aid.

⁵¹² Art. 15(1–2) TEU: “1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

discourse changed significantly during that period of time. The principle of subsidiarity became suddenly the central topic of discussion of the European Council while it had been largely marginalised before.

Following the Danish ‘nej’ on 2 June 1992, the European Council met at the end of June 1992 in Lisbon. In the conclusions of the presidency, the European Council elaborated on “a Union close to its citizens.” It was “convinced that harmonious development of the Union [...] depends [...] on the strict application [...] of the principle of subsidiarity by all the institutions.”⁵¹³ This would “ensure a direction [...] in conformity with the common wish of Member States and of their citizens.”⁵¹⁴ The Commission and the Council of Ministers were invited to “undertake urgent work on the procedural and practical steps to implement the principle and to report to the European Council in Edinburgh.”⁵¹⁵

The tone was further intensified following a second shock, the near-failure in the French referendum on 20 September 1992. In a three page declaration entitled ‘A Community close to its Citizens’,⁵¹⁶ the conclusions of the presidency discussed the question of how to bring the Community closer to its citizens and the importance of the principle of subsidiarity. “Making the principle of subsidiarity work should be a priority for all the Community institutions.”⁵¹⁷ Moreover, the report of the Commission, requested by the European Council in Birmingham,⁵¹⁸ stated that the Commission “following consultations with interested parties, [...] intends to abandon certain initiatives that had been planned.” This included *inter alia* proposals on the harmonisation of the regulation of gambling.⁵¹⁹

The next summit of the European Council took place in *Edinburgh* in December 1992, when the Swiss voters had just rejected the ratification of the EEA Agreement.⁵²⁰ Referring to the conclusions of the presidency, the outcomes of the summit were

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.” As opposed to the aforementioned post-Lisbon version, in the 1990s, the European Council was not led by its President but by a rotating presidency among Member States that changed every half a year. Its political purpose, however, was similar.

⁵¹³ Conclusions of the Presidency at the Lisbon European Council, at 9.

⁵¹⁴ *Ibid.*, at 9.

⁵¹⁵ *Ibid.*, at 9.

⁵¹⁶ It should also be noted that between the two summits the wording of the title changed from a ‘Union’ to a ‘Community’ close to its citizens, thus *returning* to the pre-Maastricht language.

⁵¹⁷ Conclusions of the Presidency at the Birmingham European Council, Annex 1, at 6.

⁵¹⁸ *Ibid.*, at 1.

⁵¹⁹ Conclusions of the Presidency at the Edinburgh European Council, Annex 2 to Part A, at 3.

⁵²⁰ Agreement on the European Economic Area, OJ L 001, 03.01.1994. *Nach dem schweizerischen Nein und dem liechtensteinischen Ja zum EWR*, Baudenbacher, C., and Brauchlin, E. (Eds.), St.Gallen: Wissenschaftlicher Verlag, 1993.

supposed to “pave the way for a return to confidence by its citizens in European construction.”⁵²¹ An annex outlined in detail how the principle of subsidiarity was to be implemented: “This principle contributes to the respect for the national identities of Member States and safeguards their powers. It aims at decisions within the European Union being taken as closely as possible to the citizen.”⁵²²

A close analysis of the conclusions of the presidencies makes it clear that the *aforementioned rhetoric merely served to accommodate political concerns*. The principle of subsidiarity had historical antecedents in the Treaties and the case law; it was not a new invention.⁵²³ It was even expressly held that “[t]he application of the principle shall respect [...] the maintaining in full of the *acquis communautaire*.”⁵²⁴ Also, the principle of subsidiarity should not have direct effect.⁵²⁵

The political discourse prior to the referenda on the Maastricht Treaty illustrates the *significant shift of language*. At the time when Germany’s reunification was successfully negotiated,⁵²⁶ the European Council discussed the “extension and strengthening of Community action” in December 1990. It noted “a wide recognition of the need to extend or redefine the Community’s competence in specific areas [...] *inter alia [...] the health sector and in particular the combating of major diseases*.”⁵²⁷

In this context, it is almost impossible not to contemplate the possibility that *gambling addiction and other related disorders* could be part of a holistic EU public health policy today if the discourse had not significantly changed at that time. It is not insensible to consider that gambling addiction could have been much earlier on the table of DG Internal Market or DG SANCO – arguably not to the detriment of the health of consumers.

Prior to the referenda, the principle of subsidiarity had played only *a minor role in the political discussions*. The relevant conclusions had only mentioned it in one paragraph. However, they did expressly hold under the heading ‘[e]ffectiveness and efficiency of the Union’ that the extension of the competences of the Union “must be accompanied by a strengthening of the Commission’s role and in particular of its implementing powers so that it may, like the other institutions, help to make Community action more effective.”⁵²⁸ There can be no doubt that this language is significantly different to that in the conclusions of the summits posterior to the Danish and French referenda.

The Court of Justice received the first gambling case at a time when the political discourse had completely changed from integration-oriented towards

⁵²¹ Conclusions of the Presidency at the Edinburgh European Council, Part A, at 3.

⁵²² *Ibid.*, Annex 1 to Part A, at 14.

⁵²³ *Ibid.*, Annex 1 to Part A, at 15.

⁵²⁴ *Ibid.*, Annex 1 to Part A, at 17. Italic emphasis added.

⁵²⁵ *Ibid.*, Annex 1 to Part A, at 17.

⁵²⁶ Around the same time, the Treaty on the Final Settlement with Respect to Germany was signed on 12 September 1990. It paved the way for the reunification of Germany. Text of the Treaty available at “Treaty on the Final Settlement with Respect to Germany”, available at <http://usa.usembassy.de/etexts/2plusfour8994e.htm>.

⁵²⁷ Conclusions of the Presidency at the Rome 2 European Council Part 1, at 7–8. Italic emphasis added.

⁵²⁸ *Ibid.*, Part 1, at 9.

subsidiarity-concerned. The principle of subsidiarity was the dominant political topic at that time. Contrary to the changed political discourse, *the legal framework remained essentially unchanged*, including the Court's power to review national measures on their compatibility with EU law. As the Edinburgh summit concluded, "[t]he application of the principle shall respect [...] the maintaining in full of the *acquis communautaire*" and the principle should not have direct effect.⁵²⁹

9.3.2.2 Early Case Law

A significant change in the political discourse from a broadening and deepening of integration towards an emphasis on subsidiarity took place in the early 1990s. A political change does not necessarily mean that this shift also impacted the Court of Justice's work. It must be inquired whether there are indications in opinions and judgments that the new emphasis on the principle of subsidiarity had an influence on the decision-making of the Court. It is also examined whether a moral perspective on games of chance affected the decision-making of the judges.

The Opinion of Advocate General Gulmann

Judgments of the Court of Justice are regularly rather short,⁵³⁰ as opposed to the decisions of the General Court, and the choices can often only be fully understood by a reading of the opinions of the Advocates General.⁵³¹ *Schindler* is an illustrative example. Though the Advocate General's reasoned submissions have no binding effect upon the Court,⁵³² it should be considered that the judges sitting in *Schindler* were for the first time confronted with a question regarding the gambling sector. This fact added substantial weight to the Advocate General's opinion. As this retrospective of the gambling case law shall show, Advocate General Gulmann introduced considerations that were key for the approach chosen by the judges. An indicator for the vital importance of this case for the Member States can furthermore be seen in the fact that all but one intervened.⁵³³

⁵²⁹ Conclusions of the Presidency at the Edinburgh European Council, Annex 1 to Part A, at 17.

⁵³⁰ The style of the reasoning of the Court of Justice strongly contrasts with for instance that of the German Constitutional Court. The latter regularly outlines in detail the various points of consideration. Cf. e.g. Kischel, U. (2000). "Die Kontrolle der Verhältnismässigkeit durch den europäischen Gerichtshof" *Europarecht*, 35(3), 380–402, at 396.

⁵³¹ Maduro, M.P., "The European Court of Justice" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008, pp. 207–226, at 226.

⁵³² Art. 252 TFEU.

⁵³³ According to Article 40 of the Statute of the Court of Justice, Member States can intervene in cases before the Court. Interveners however have to bear their own costs, which prevents Member States from intervening too easily. In C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, all Member States, except for Italy, intervened in favour of the UK government. Even though the case concerned the lottery sector only, the

Advocate General Gulmann's opinion gave *significant weight to political considerations*. This can already be seen by the structure of the opinion. The Advocate General did not immediately proceed to a legal assessment. His opinion starts off with *general political considerations*, outlining the then dominant state of regulation in the European gambling markets. From the outset, his remarks appeared to approve the necessity of a general prohibition of gambling services.

In the legal systems of all the Member States there is a fundamental prohibition on lotteries and other forms of games of chance. The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons, should not be permitted.⁵³⁴

In several passages, he made the Court aware of the "*considerable practical and fundamental interest*" of the case.⁵³⁵ Gambling was an important source of revenue for the Member States with a total turnover of over ECU 45,000 million. Member States regulated "this sector in an intensive and fairly restrictive manner."⁵³⁶ Overall, the regulation aimed at restricting the supply of gambling offers to protect consumers from "*gambling fever*."⁵³⁷

The Advocate General took express reference to the *political discourse at the Edinburgh summit* and reminded that the Commission had "informed the European Council that in view of the principle of subsidiarity [...], it has decided not to submit proposals for Community rules in [the] field [of gambling]."⁵³⁸ He then noted a lack of relevant secondary law and, combined with the principle of subsidiarity, concluded that it could be "presumed" that Member States can "require revenue to be used solely for public or public-interest purposes; and restrict the supply of lotteries."⁵³⁹

The Advocate General also discussed a point that would be reactivated later by Advocate General Bot: the *detrimental nature of competition* in the gambling sector. According to Gulmann, the supply of lottery offers needed to be limited; otherwise, the different national lotteries would unduly compete with each other. Large lotteries would have significant competitive advantages compared to smaller lotteries⁵⁴⁰ because they could offer the biggest prizes, with consumers being attracted by big prizes. He further combined this point with the importance of the revenues for the public purse. A different outcome was not wishful in the eyes of the Advocate General as it would result in competition "between public funds and public-interest purposes in the various Member States."⁵⁴¹

Court's assessment was likely to cause implications for the gambling sector as a whole.

⁵³⁴ Opinion of Advocate General Gulmann in *ibid.*, para. 1. The wording in French is just as categorical as that in English: "il s' agit d' une activité qu' on ne saurait admettre pour des raisons éthiques et sociales."

⁵³⁵ Opinion of Advocate General Gulmann in *ibid.*, para. 3.

⁵³⁶ Opinion of Advocate General Gulmann in *ibid.*, paras 5–10 and 31.

⁵³⁷ Opinion of Advocate General Gulmann in *ibid.*, para. 37.

⁵³⁸ Opinion of Advocate General Gulmann in *ibid.*, para. 30.

⁵³⁹ Opinion of Advocate General Gulmann in *ibid.*, para. 38.

⁵⁴⁰ Opinion of Advocate General Gulmann in *ibid.*, para. 112 fn 40.

⁵⁴¹ Opinion of Advocate General Gulmann in *ibid.*, para. 49.

It was only after these broad political considerations, which contrasted wishful with non-wishful political outcomes, that the Advocate General approached the legal assessment of the case. He identified three grounds that could each justify the limitations: the fight against crime (fraud, money laundering), the limitation of the supply of lottery services to protect consumers from detrimental social and health consequences, and the allocation of the revenues for public interest purposes with the latter being emphasised throughout the opinion.⁵⁴² In this context, he suggested a further approach that was also adopted by the Court of Justice. According to some of the pleadings, he suggested that the aforementioned justifications “cannot be taken in isolation one from another.” The second part of the paragraph shows the ambiguity of this peculiar approach.

While it is necessary to consider each factor separately, that does not, however, rule out the possibility that the factors taken together may justify the restrictions even if, considered separately, they cannot do so.⁵⁴³

This ‘overall assessment’ proved to significantly impact the review practice of the Court in numerous cases. Measures only partly justified by one ground and only partly by another could amount to a *full justification* if taken together. The Court’s very reluctant proportionality review, especially in the early case law, illustrates this approach.

Another dominant political component in the opinion was that the Advocate General repeatedly argued with the regulatory *status quo* in the Member States. He noted that there was a “consensus of the Member States that there is a real need to limit the supply of gambling and that such limitation [...] must necessarily be undertaken by each Member State separately.”⁵⁴⁴ He also reminded that an opposite ruling would lead to detrimental competition between public interest purposes of Member States,⁵⁴⁵ and the regulations of all the Member States showed that the market mechanisms could and should not apply.⁵⁴⁶ It is, however, not immediately clear why the *status quo* of national law should be decisive for the interpretation of Union law.

Advocate General Gulmann’s opinion was strongly driven by *political and moral considerations*, and it took express reference to the then recent *discussion of the principle of subsidiarity* in the European Council. The principle of subsidiarity, the Member States’ regulatory *status quo* and the financial interests of Member States played a central role in its argumentation. The opinion also pointed out several times at the “*special nature*” of lotteries, due to which the market mechanisms could not apply.⁵⁴⁷ He also assumed that Member States needed to limit the supply of gambling to prevent “gambling fever.” Consequently, the margin of appreciation granted in the opinion was virtually unlimited.

⁵⁴² Opinion of Advocate General Gulmann in *ibid.*, para. 88.

⁵⁴³ Opinion of Advocate General Gulmann in *ibid.*, para. 91.

⁵⁴⁴ Opinion of Advocate General Gulmann in *ibid.*, para. 101.

⁵⁴⁵ Opinion of Advocate General Gulmann in *ibid.*, paras 113–114.

⁵⁴⁶ Opinion of Advocate General Gulmann in *ibid.*, para. 120.

⁵⁴⁷ Opinion of Advocate General Gulmann in *ibid.*, paras 20–21 and 120.

The Role of Precedent

The next issue is whether these political and moral considerations affected the judgment of the Court of Justice. As the review of the early case law showed, several of the Court's key remarks on gambling are reminiscent of Advocate General Gulmann's considerations. The first two decisions, namely *Schindler*⁵⁴⁸ and *Läärä*,⁵⁴⁹ formed decisive precedent in that they defined the margin of appreciation that should generally apply to games of chance. The Court *largely followed* the views put forward by Advocate General Gulmann. In particular, it held:⁵⁵⁰

[I]t is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit.⁵⁵¹

Similar to the Advocate General, the Court of Justice further emphasised a "peculiar nature of lotteries,"⁵⁵² and found "the morality of lotteries [...] at least questionable."⁵⁵³ The sole notable divergence between judgment and opinion was that the Court did not agree that the public interest proceeds formed an independent justification ground. It was nevertheless "not without relevance [...] that lotteries may make a significant contribution to the financing of benevolent or public interest activities."⁵⁵⁴

The Court of Justice also followed its Advocate General in that the objectives needed to be "*taken together*." This resulted in the Court of Justice not assessing the different justification grounds separately but limiting itself to an overall approach. Concepts like 'peculiar nature' or considerations 'taken together' resulted in the early case law, namely *Schindler*, *Läärä* and *Anomar*, in an *unlimited margin of appreciation*.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067.

⁵⁵⁰ The opinion of Advocate General Gulmann had particular importance since it was the first time that the Court of Justice decided in a gambling-related matter. Advocate General Gulmann, who subsequently became judge at the Court of Justice, sat as judge in the second gambling case *Läärä*.

⁵⁵¹ C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 60.

⁵⁵² *Ibid.*, para. 59.

⁵⁵³ *Ibid.*, para. 32. The Court had used the same wording already in the prominent *Grogan* case regarding the Irish prohibition to inform on clinics that perform abortion services abroad: cf. C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et alii* [1991] ECR I-4685, para. 20. For other examples of delicate and politically sensitive areas, cf. C-196/87 *Udo Steyemann v Staatssecretaris van Justitie* [1988] ECR 6159 concerning the application of the Treaty rules to the economic activities of religious organisations, and C-186/87 *Ian William Cowan v Trésor public* [1989] ECR 195 concerning the application of the Treaty to national rules on compensation for victims of acts of violence.

⁵⁵⁴ C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 60.

The Court of Justice also expressed moral views on gambling services as it had already noted that it was “not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling.”⁵⁵⁵ In its early case law, it adopted moral concepts such as “squandering money on gambling” or that private profit could be seen as morally doubtful.⁵⁵⁶ The channelling argument that was adopted in *Läärä* also served in the Court’s view to use the gambling revenues for public interest purposes.⁵⁵⁷ The idea of a kind of ‘moral equilibrium’ or ‘venial sin’ was subsequently rejected both by the EFTA Court and Advocates General.⁵⁵⁸ The Court also adhered to the view that there was a general desire to gamble or even a “human passion for gambling.”⁵⁵⁹ These moral views on gambling contrast strongly with empirical views on the regulation of gambling and gambling addiction.

In sum, *political considerations and a moral perspective on games of chance were dominant in the early case law*. This conditioned the development of the case law since the Court of Justice generally relies on precedent, even though there is no obligation of *stare decisis*.⁵⁶⁰ Certainly, the Court of Justice added new criteria to its jurisprudence, such as the requirement of a ‘consistent and systematic’ policy in *Gambelli*.⁵⁶¹ Nonetheless, the Court’s formula from the early case law still re-emerged even in recent decisions, thus affecting the standard of review.⁵⁶² In *Sjöberg*, the Court of Justice linked several of the aforementioned moral statements in one paragraph.

⁵⁵⁵ *Ibid.*, para. 60.

⁵⁵⁶ *Ibid.*, paras 57 and 60.

⁵⁵⁷ C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para. 37.

⁵⁵⁸ E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 48; opinion of Advocate General La Pergola in C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para. 35, cf. also paras 11 *if.* and 12.

⁵⁵⁹ 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-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. 75.

⁵⁶⁰ For a detailed discussion of the practice of precedent at various courts, cf. *The Role of Precedent, International Dispute Resolution Conference*, vol. 3, Baudenbacher, C., and Planzer, S. (Eds.), Stuttgart: German Law Publishers, 2011.

⁵⁶¹ C-243/01 *Criminal Proceedings against Piergiorgio Gambelli et alii* [2003] ECR I-13031, para. 67.

⁵⁶² Cf. e.g. regarding ‘squandering money’, C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)* [2013] nyr, paras 23 and 29.

Considerations of a cultural, moral or religious nature can justify restrictions on the freedom of gambling operators to provide services, in particular in so far as it might be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune. According to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of gambling by entrusting it to public or charitable bodies.⁵⁶³

9.3.3 Consequences: Lack of Science-Informed Approach and Judicial Vacuum

9.3.3.1 Cultural Relativism

The political and moral considerations significantly affected the early gambling case law and initially resulted in an unlimited margin of appreciation. The Court of Justice did not engage in any proportionality review in *Schindler* and *Läärä*, and the subsequent decisions in *Zenatti*⁵⁶⁴ and *Anomar*⁵⁶⁵ did not alter this picture. The Court's reference to the principle of proportionality remained rhetoric until the *Gambelli*⁵⁶⁶ decision.

The Court kept repeating the formula that “it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling.”⁵⁶⁷ The peculiar nature of gambling was substantially argued by “moral, cultural and religious factors.”⁵⁶⁸ Chapter 7 concluded that gambling-related risks, in particular gambling disorder, were not primarily an issue for public morality but should be made subject of a scientific perspective. According to the argued two-category model, moral concerns fall in core cases of morality and non-core cases (see Sect. 7.3). In the first category, the behaviour as such is seen as morally reprehensible as was seen for instance in *Omega*.⁵⁶⁹ In the second category, the moral disapproval is not aimed at the behaviour as such but at potentially detrimental consequences of that behaviour. Society wishes to minimise risks associated with the behaviour. Gambling activities fall in this latter category. Gambling-related risks, namely gambling disorder, are about risk assessment and the discussion about how to minimise gambling-related

⁵⁶³ C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43.

⁵⁶⁴ C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289.

⁵⁶⁵ C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português* [2003] ECR I-8621.

⁵⁶⁶ C-243/01 *Criminal Proceedings against Piergiorgio Gambelli et alii* [2003] ECR I-13031.

⁵⁶⁷ C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 60.

⁵⁶⁸ *Ibid.*, para. 60.

⁵⁶⁹ C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

harm can be objectivised. Risks can be described in epidemiological studies and addressed with policies informed by empirical evidence.⁵⁷⁰

The Court of Justice dealt with gambling as an issue of public morality and not of risk assessment, science and empirical evidence. Therefore, it granted a very wide margin of appreciation *without substantially reviewing the proportionality* of the measures. On the axis of the *universality-diversity dichotomy*, the Court chose to accommodate alleged moral concerns even though the issue could be *predominantly assessed on other justification grounds*. In gambling issues, these are consumer protection (addiction and fraud) as well as public order (other forms of crime).

The moral perspective on games of chance and gambling addiction led the Court of Justice to a self-imposed self-restraint. The argument of ‘cultural differences’ reinforced this stance. Due to the precedence established in the early case law the Court must have found it hard to significantly alter its perspective in later cases. The criteria for alternative approaches would have been available from the EFTA Court and the ECtHR.⁵⁷¹

9.3.3.2 Lack of Science-Informed Approach

At first impression, one may think that a moral perspective on games of chance is not such big problem and that a wide margin of appreciation for national authorities is not *per se* a bad thing. Yet, there is a problem to the moral perspective that goes beyond a mere incoherence in legal doctrine. By approving and supporting this perspective, the Court of Justice *did not objectivise the discussion* on gambling-related risks. The political and judicial discussion of gambling issues is still strongly informed by assumptions rather than a focus on empirical evidence.

As Collins noted, moral and ideological agendas regularly corrupt addiction policies. A value-loaded discussion makes it extremely hard to achieve a *rational and humane discussion on addiction policy*.⁵⁷² Addiction problems, such as gambling disorder, are dramatised and reduced to an easily identifiable cause. This in turn lays the ground for the call of a restrictive public policy that is aimed at protecting citizens from the ‘social evil’.⁵⁷³

A scientific perspective on gambling disorder is far less dramatic and offers a more complex picture of causality as it was described in Sects. 9.1 and 9.2. Ross

⁵⁷⁰ Regarding the problem of causality of information, cf. Gasser, *Kausalität und Zurechnung von Information als Rechtsproblem*.

⁵⁷¹ *Handyside v the UK*, Application no 5493/72 [1976], para. 49; *E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 55.

⁵⁷² Collins, “Defining Addiction and Identifying the Public Interest in Liberal Democracies”, at 411.

⁵⁷³ Cf. wording of the CJEU in C-447/08 and C-448/08 (Joined Cases) *Criminal Proceedings against Otto Sjöberg* (C-447/08) and *Anders Gerdin* (C-448/08) [2010] ECR I-6921.

and Kincaid noted correctly that scientific knowledge tended to undermine dramatic purity.⁵⁷⁴

By relying on a moral perspective, the Court of Justice did not steer the discussion towards the necessity of informing gambling policies by scientific research. Neither did the Court of Justice itself engage in such discussion nor did it ask national courts to assess the risks from this angle. Similarly, the constructive role that international best practice could play was neglected.⁵⁷⁵

There were opportunities where the Court of Justice made allusions that it may wish to rely on empirical evidence in future cases.⁵⁷⁶ In *Gambelli*, the Court initiated its demand for a “consistent and systematic” policy for national measures to qualify as suitable.⁵⁷⁷ One week later, the Court noted in an *obiter dictum* in *Lindman* that the case file disclosed no “statistical or other evidence” that would enable conclusions as regards the gravity of the risks of games of chance.⁵⁷⁸ The fact that the Court handed down these criteria within one week raised expectations that the scientific perspective on gambling would gain importance in future cases. While the decisions in *Gambelli* and *Lindman* could have served as a basis on which to build a science-informed case law, the Court of Justice pursued its moral views on games of chance from the *early case law*.⁵⁷⁹

An element from more recent case law may illustrate the minimal role that actual empirical evidence plays. The Portuguese government argued in *Liga Portuguesa* that the existence of the national state monopolist Santa Casa over more than five centuries was evidence of its reliability.⁵⁸⁰ The Court’s conclusions suggest that it was persuaded by this argument. It seems daring to argue the

⁵⁷⁴ Ross, and Kincaid, “Introduction: What Is Addiction?”, at vii.

⁵⁷⁵ Best practices have been established or at least suggested for phenomena that are clearly more recent than gambling-related risks. Cf. e.g. Gasser, U. (2006b). “Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model”, *Fordham Intellectual Property, Media & Entertainment Law Journal*, 17, 39–113.

⁵⁷⁶ For the following paragraphs, cf. Planzer, “The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach”, at 293.

⁵⁷⁷ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 67: “[R]estrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.”

⁵⁷⁸ C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, paras 25–26.

⁵⁷⁹ An exception may be seen in the *Ladbroke* case where the CJEU asked the referring court to verify whether illegal gambling activities did in reality constitute a problem in the Netherlands and whether channelling measures would be apt to resolve this problem. The scale of the unlawful activities needed to be significant. Cf. C-258/08 *Ladbroke Betting & Gaming Ltd, Ladbroke International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR I-4757, paras 28–30; confirmed in the opinion of Advocate General Mazák in C-186/11 and C-209/11 (Joined Cases) *Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)* [2013] nyr, para. 57.

⁵⁸⁰ C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para. 65.

reliability and thus quality of an institution by its long existence. If this were a sufficient criterion, the presence of monopolies that existed for many decades, for instance in the energy sector, would have also been evidence of their reliability and quality.⁵⁸¹

Likewise, the Court of Justice did not underline the role of science in subsequent cases. In *Markus Stoss*, the referring court had asked whether the absence of any study on the proportionality of public monopolies before establishing such regime was compatible with EU law and referred to the criterion raised in *Lindman* regarding evidence. Yet, the Court found that the requirement to base that decision on evidence relied on a misreading of its case law.⁵⁸²

In more recent decisions, however, the Court of Justice occasionally emphasised the burden of proof of Member States. It needed to be shown whether the risks that are claimed did in fact exist in the market at the material time and whether the expansionist gambling policy could have solved the problem. The Court recalled this element in *Dickinger & Ömer* that it had originally introduced in *Ladbrokes*.⁵⁸³

It must be noted that a scientific perspective does not necessarily mean that the Court of Justice itself would need to get involved in the assessment and weighing of empirical evidence on gambling addiction. The ECtHR gives in this context helpful guidance. A certain margin of appreciation can be granted to national authorities as so-called ‘medical discretion’. When a *difficult weighing of complex medical or scientific data* is at hand, specialised staff and local authorities are in a better position to accomplish that task. Judges cannot be expected to possess or acquire specialised medical expertise. The Court of Justice and the national courts could focus in their reviews on a limited number of issues. Have the domestic authorities relied on *best international science and empirical evidence*? Have they shown *professionalism* and pursued standards of *best practice* in implementing the gambling policy?

9.3.3.3 Malfunctioning Judicial Dialogue Between the Court of Justice of the EU and National Courts

Legal Uncertainty and a Reluctant Court of Justice

Following the *Placanica* decision, the Court of Justice remained, until recently, reluctant in reviewing the proportionality of gambling measures. This proved to be

⁵⁸¹ Planzer, “Liga Portuguesa – The ECJ and Its Mysterious Way of Reasoning”.

⁵⁸² C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa 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. 72.

⁵⁸³ C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 56–57 and 66–67.

particularly true when health concerns were pleaded. The Court did not substantially elaborate on the criterion of a ‘consistent and systematic’ policy. It would not appear that this reluctance was coincidental; several decisions were taken with the Court sitting as Grand Chamber. There is also another indicator: Contrary to some Advocates General,⁵⁸⁴ the Court of Justice did not refer to the gambling judgments handed down by the EFTA Court in *ESA versus Norway* and *EFTA-Ladbrokes*.⁵⁸⁵ The EFTA Court had applied a *stricter standard of review* and had given more substantial guidance regarding the meaning of ‘consistent and systematic’.⁵⁸⁶ Baudenbacher observed that the Court of Justice seems to be reluctant to enter a debate where it disagrees with the reasoning of its sister court.⁵⁸⁷ The Court of Justice, at that time, chose to go a different way in its gambling jurisprudence. However, its significantly stricter review in the cases *Markus Stoss* and *Zeturf* indicates an adjustment of the Court’s practice and thus an implicit reference to its sister court.⁵⁸⁸

⁵⁸⁴ Opinions of Advocate General Bot in C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, at fn 15; C-203/08 Sporting Exchange Ltd. Trading as ‘Betfair’ v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator [2010] ECR I-4695, at fn 56; C-258/08 Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, at fn 56; and C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 313; opinion of Advocate General Mengozzi in C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa AutomatenService Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 60; opinion of Advocate General Trstenjak in C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH [2010] ECR I-217, fn 68. Yet, it is noteworthy that the Advocates General chose to cite the EFTA Court only in relation to points that offered wide discretion to Member States. They did not cite those aspects in relation to which the EFTA Court had applied a stricter review. For the judicial dialogue between the CJEU and the EFTA Court and the role of the Advocates General therein, cf. Baudenbacher, “The EFTA Court, the ECJ, and the Latter’s Advocates General – A Tale of Judicial Dialogue”.

⁵⁸⁵ E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8; E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86.

⁵⁸⁶ Planzer, “The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach”, at 293.

⁵⁸⁷ Baudenbacher, C. (2005). “The EFTA Court: An Actor in the European Judicial Dialogue”, *Fordham International Law Journal*, 28(2), 353–391, at 390.

⁵⁸⁸ As opposed to its usual approach, the CJEU reviewed the necessity of the regulatory model of an exclusive right holder in these cases. While not explicitly referring to the case law of the EFTA Court, it adhered in *Zeturf* to the latter’s reasoning: “a measure as restrictive as a monopoly can be justified only in order to ensure a particularly high level of protection with regard to those objectives” (para. 46); cf. already *Markus Stoss*, para. 83. Passages in which the CJEU silently integrates wording or rationale from judgments of its sister court have been described as ‘implicit references’ (Johansson, M., “The Two EEA Courts – Sisters in Arms” in *Judicial Protection in the European Economic Area*, EFTA Court (Ed.), Stuttgart: German Law Publishers, 2012, 212–217, at 214).

The Commission's Green Paper on online gambling lists the interests that stakeholders have in the gambling sector. Legal security takes the central role.⁵⁸⁹ The lack of legal security is evident in the gambling sector. Arguably, this is due to a combination of the lack of EU secondary law and the reluctance of the Court of Justice to offer substantial guidance to national courts. The legal insecurity can be identified in the *abundance of proceedings before national courts* that concern the compatibility of national gambling laws with EU law. According to a pan-European report composed by the Swiss Institute of Comparative Law, the number of proceedings amounted already in early 2006 to almost 600 cases.⁵⁹⁰ The number was particularly high in Germany where differences in outcomes have often been quite substantial between different courts. As a result, national courts kept referring preliminary questions to the Court of Justice – an unsatisfactory situation that was also noted by Advocate General Colomer.⁵⁹¹ Some authors referred to a chaotic state of gambling law that public and private operators experienced.⁵⁹²

Eventually, it seemed to be clear that the Court of Justice did not wish to change its approach and offer substantial guidance.⁵⁹³ In its post-*Placanica* decisions, it did not refer to the more detailed rulings of the EFTA Court. Several judgments showed that the Court of Justice wishes a more active role of the national courts, because it repeatedly emphasised their role in the review process. The decisions in *Sporting Exchange* and *Ladbrokes* (and subsequent judgments) made this quite clear. The Court kept emphasising the *role of national courts in reviewing* the objective and the proportionality of national measures.⁵⁹⁴

This path is not unproblematic. First, the *rationale of the preliminary ruling procedure* needs to be considered. Under the preliminary ruling procedure of Article 267 TFEU, the Court is required to offer guidance to the referring court. Advocate

⁵⁸⁹ Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 3–6.

⁵⁹⁰ Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, cited in Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 6 fn 6.

⁵⁹¹ Advocate General Colomer correctly noted in an opinion *not* related to gambling issues that the CJEU should not hesitate to offer a ‘complete solution’ in its judgment – including a discussion of the proportionality of the measures – “which [...] avoids subsequent referrals” “[a]s has happened with internet gambling.” C-11/06 and C-12/06 (Joined cases) *Rhiannon Morgan v Bezirksregierung Köln* (C-11/06) and *Iris Bucher v Landrat des Kreises Düren* (C-12/06) [2007] ECR I-9161, para. 112 and fn 70.

⁵⁹² Mertens, K. (2006). ““Bet and Lose” oder doch “betandwin”? – Zum anhaltenden Chaos im Recht der Sportwetten”, *Deutsches Verwaltungsblatt*, 121(24), 1564–1570.

⁵⁹³ However, the CJEU seemed to recognise this problem in C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 50.

⁵⁹⁴ Planzer, “The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach”, at 293. Cf. also C-212/08 *Zeturf Ltd v Premier ministre* [2011] ECR I-5633, paras 62, 69–70; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 50.

General Colomer provided a witty formula to describe this requirement.⁵⁹⁵ And Advocate General La Pergola concisely noted in *Läärä* that the Court is required

to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible.⁵⁹⁶

In related fields, the Court of Justice showed the willingness to offer useful guidance that informs the proportionality review of the referring court.⁵⁹⁷ There is also a *frustrating time factor* for national courts. In spite of significant improvements, a reference to the Court of Justice still results in a delay of the procedure of a couple of years. If referring judges did not expect substantial guidance from the Court of Justice, they would hardly opt for a reference.

Judicial Vacuum

It may be argued that the reluctance of the Court of Justice can be counterbalanced by an *effective judicial control by national courts*. As the Court of Justice leaves a wide margin of appreciation to national authorities, it is for the national courts to use this space of manoeuvre.⁵⁹⁸ For the following considerations, it is necessary to distinguish direct actions from preliminary rulings. In the former procedure,⁵⁹⁹ if discretion is granted to national authorities, it is granted to the sole national power involved – the executive power. By contrast, the preliminary ruling procedure⁶⁰⁰ constitutes an institutionalised judicial dialogue between the national courts and the Court of Justice. The equivalent procedure before the EFTA Court is the advisory opinion procedure. The margin of appreciation granted by the Court of Justice in preliminary rulings is to be *shared between the national judicial branch and the executive branch*. The Court of Justice sends the case back to the national court, which has to decide on the merits of the case. Therefore, it is ultimately left to the national court to which extent it passes the granted margin of appreciation on to the

⁵⁹⁵ “The foregoing observations [in the Opinion] provide the ingredients with which to compose a recipe which will furnish the referring court with the seasoning it needs to offer the parties in the main proceedings a meal which is to their taste and which reconciles their different aspirations.” Opinion of Advocate General Colomer in C-374/05 Gintec International Import Export GmbH v Verband Sozialer Wettbewerb eV [2007] ECR I-9517, para. 80.

⁵⁹⁶ Opinion of Advocate General La Pergola in C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, para. 23.

⁵⁹⁷ Cf. e.g. C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171, para. 39. The case regarded public health concerns in relation to alcohol.

⁵⁹⁸ In relation to alcohol and public health concerns, the CJEU occasionally left it to the referring court to review the proportionality of the measures while nevertheless guiding the national court’s review by offering clear criteria: *ibid.*, para. 39.

⁵⁹⁹ Art. 258 TFEU.

⁶⁰⁰ Art. 267 TFEU.

executive branch. This does not exempt national courts from reviewing the proportionality of the measures.

The Study of Gambling Services in the Internal Market of the European Union by the Swiss Institute of Comparative Law looked *inter alia* into the review practice of courts in the Member States. It assessed in particular *whether and to which extent national courts were scrutinising the proportionality* when deciding upon the compatibility of national gambling laws with EU law.

The study found that even in cases where justification grounds were given, both national legislatures and the jurisprudence did regularly not refer to precise criteria to evaluate the proportionality of national measures. In any case, if at all, proportionality tests were mainly conducted by courts but not legislatures.⁶⁰¹ Especially in cases where measures were held to be justified, the tendency of the courts was to simply refer to the *notion of 'proportionality' in very broad terms*. Courts may thus limit their review to the mere statement that a “measure is proportionate” or that it is “in accordance with the criteria set out in the Gambelli judgment.”⁶⁰² Even though a slightly increased attention to the proportionality review could be noted since the *Gambelli* decision, the report concluded that the review remained rather superficial in most cases.⁶⁰³

National courts, however, mostly refer rather globally to the principle of proportionality, simply stating that a measure is “proportionate” or “proportionate in the light of EC law” or of “the Gambelli criteria”, without engaging in any detailed analysis.⁶⁰⁴

In a situation where the guidance by the Court of Justice is limited to very broadly phrased criteria, national courts may find it difficult to proceed to a meaningful proportionality review. The consequence of such joint lenient review practice is a *'judicial vacuum': an area of law empty of meaningful judicial scrutiny*.⁶⁰⁵ Gambling laws and administrative decisions are hardly scrutinised. The functioning of the judicial dialogue between interpreting court (Court of Justice) and applying courts (national courts) is weakened. The outcome is that the Court of Justice is reluctant in giving meaningful, substantial guidance because it wants the national courts to solve the issues while the latter limit their scrutiny to an exercise restricted to *referring to the recurring formula of the Court of Justice*. Hence, no court applies a meaningful scrutiny, resulting in a judicial vacuum.

⁶⁰¹ Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 984 and 986.

⁶⁰² *Ibid.*, Chap. 2, at 984.

⁶⁰³ *Ibid.*, Chap. 2, at 986–987.

⁶⁰⁴ *Ibid.*, Chap. 2, at 990.

⁶⁰⁵ Planzer, S., *Assessing the Impact of Regulation* (paper presented at Responsible Gaming Day, Brussels, 13 October 2010).

Cultural Differences in Review Practice

The extent to which national courts review legal acts and government decisions is subject to the powers that these courts are granted by national law. Yet, it is also subject to different *judicial cultures*, which may strongly vary from country to country. The self-perception of judges, that is, the interpretation of their role in the bigger societal system, may differ from one Member State to another. It can also vary individually from judge to judge. The Study of Gambling Services supports this view. Among those countries that were identified as jurisdictions where a number of courts *only made a global reference* to the principle of proportionality were inter alia *Denmark, Finland and Sweden*. By contrast, there were also a few jurisdictions in which a number of courts referred to concrete criteria in their proportionality analysis: Austria, Belgium, Germany, Italy, Luxembourg and the Netherlands.⁶⁰⁶ In particular, *only Austrian and German courts found it important to inquire into alternative measures* that would be less restrictive to intra-Union trade while still being equally effective.⁶⁰⁷ Not least because of their historical experience with totalitarian regimes, the German and Austrian legal systems provide for courts that are expected to closely review government decisions. The central role attributed to courts also affects the self-perception of judges to ensure the rule of law. It can hardly be disputed that German courts are generally not hesitant in reviewing laws and acts.⁶⁰⁸ The German Constitutional Court demonstrated the willingness to closely review the proportionality of restrictive gambling measures in its well-known judgment regarding the *gambling monopoly in Bavaria*.⁶⁰⁹ Ennuschat observed that this court applied a stricter review than the Court of Justice.⁶¹⁰

⁶⁰⁶The study found court decisions from Germany, Italy and the Netherlands with *both* strict and lenient review practices. The study does not attempt to deliver an explanation for this fact. In Germany, the mixed constellation is very likely to come from the fact that this country has had more gambling cases than any other Member State. They are likely to go into the hundreds. It is thus quite normal to find diverging approaches. With regard to Italy, the Study may have been under the impression of the *Gesualdi* judgment by the Corte suprema di cassazione (Supreme Court of Cassation): Cass. SU Sent. 111/04 of 26 April 2004, Mario Gesualdi et alii, available at <http://www.ictlex.net/?p=382>. At the time when the study was drafted, this judgment received wide attention. Despite the critical stance of the CJEU in *Gambelli*, the Italian Supreme Court found in *Gesualdi* that the Italian betting and gaming legislation was compatible with EU law. Cf. C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891, para. 15. The Supreme Court's decision in *Gesualdi* was seen as 'side-stepping' the clear doubts regarding consistency in *Gambelli*: Cuyvers, A. (2008). "C-338/04, C-359/04 and C-360/04 (Joined Cases) Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891", *Common Market Law Review*, 45(2), 515–536, at 526.

⁶⁰⁷Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 987.

⁶⁰⁸*Ex multis* Schwarze, J., *Europäisches Verwaltungsrecht*, 2nd edition, Baden-Baden: Nomos Verlagsgesellschaft, 2005.

⁶⁰⁹BVerfG, 1 BvR 1054/01, Verfassungsmässigkeit des deutschen Sportwetten-Monopols.

⁶¹⁰Ennuschat, "Aktuelle Entwicklungen in der Rechtsprechung von EuGH und BVerfG", at 74.

This is substantially different in other countries. The significant difference of the proportionality review practice in Scandinavia relates to differences in judicial culture. While the scope of this book does not permit an account of these factors in great detail, a brief overview of some aspects is given in the following.

The Danish situation may serve to illustrate some broad considerations of judicial culture. Courts in that country assumed the power to review laws from ‘Folketinget’ (the Danish parliament) as well as acts of the government. However, there is *strong reluctance to review laws*, not to mention to overturn them. This includes the ‘Højesteret’ (the Danish Supreme Court). The reluctance is more a phenomenon of *judicial culture* rather than one of judicial powers. By law, any Danish court can review laws on their constitutionality. Yet, only one real case is known in which Højesteret found a law unconstitutional, that is, not simply for formal reasons.⁶¹¹

Beside these broad considerations, a concrete difference in *legal instruments* should also be considered.⁶¹² As noted earlier, when reviewing administrative measures, Scandinavian courts were *traditionally* not familiar with the principle of proportionality but rather limited their review to a mere *reasonableness* test (see Sects. 3.4.1 and 9.3.3.3 *i.f.*). Based on considerations relating to the *supremacy* of EU law and the *principle of homogeneity* in EEA law, it can be argued that the EU/EEA principle of proportionality must also be applied by the EU/EEA national courts – *within the sphere of EU/EEA law*.⁶¹³

One cannot help to be reminded in this context of the well-known *Factortame* case. According to the doctrine of sovereignty of Parliament, UK courts could traditionally not disapply acts of Parliament by a temporary injunction. Notwithstanding this considerable difference in legal traditions, the Court of Justice held that UK courts must set aside such national rule and grant *interim relief* to market actors in a situation such as in *Factortame*.⁶¹⁴ Similar to UK

The German Constitutional Court assessed, however, the constitutionality of the monopoly and not the conformity with EU law.

⁶¹¹ *Tvind [1999] Ugeskrift for Retsvæsen 1999, 841 et seq.*

⁶¹² Yet another difference of judicial culture relates to methodology. Scandinavian courts traditionally attach great importance to the historical will of the (national) legislator and accordingly to the travaux préparatoires (Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at. 6). By strong contrast, the Internal Market Courts tend to rely on a combination of teleological, dynamic and effet utile interpretation, in particular in the absence of secondary law.

⁶¹³ Lilli concludes that the principle of proportionality *became part of Norwegian law* (ibid., at 44). Such conclusion ultimately accepts the reasoning in *Van Gend en Loos* as *directly* applicable for Norway. Considering that Scandinavian countries follow a *dualist conception*, separating the sphere of national law from the sphere of international law, such far-reaching conclusion may be contested by other Scandinavian scholars. The combined doctrine of *supremacy* and the principle of *homogeneity* provide, however, safe grounds to argue that Scandinavian courts *have to apply* the principle of proportionality *within the sphere of EU/EEA law*. Cf. for a similar argumentation in relation to direct effect of EEA law, Baudenbacher, “The EFTA Court – An Example of the Judicialisation of International Economic Law”, at 893.

⁶¹⁴ C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd et alii* [1990] ECR I-2433, paras 20–23.

courts that are bound to apply a legal instrument traditionally alien to their legal heritage, Scandinavian courts – as other EU/EEA national courts – are bound to review the proportionality of national measures at the level required by the European case law. It was suggested in the literature that Norwegian courts proceed to a proportionality review when dealing with EEA law (and ECHR law) but may often incorrectly apply the proportionality test, that is, not in line with the review criteria of the European High Courts.⁶¹⁵ The earlier mentioned empirical study seems to support the view of a very lenient judicial review.⁶¹⁶ It was further argued that UK courts effectively apply a proportionality review on substance – in spite of also using language reminiscent of common law, particularly relating to the *Wednesbury* test.⁶¹⁷ However, final conclusions on this topic would require a close analysis of a significant number of cases from these jurisdictions.

A more lenient proportionality review by Scandinavian courts may not be specific to the gambling cases. However, another aspect must be considered in this context too. It was previously noted that the Court of Justice generally leaves it to the referring court to assess the proportionality *stricto sensu* of a measure (see Sect. 3.3 *if.*). Due to the aforementioned factors, the third subtest of proportionality may rarely be judicially reviewed. Yet, the leniency of proportionality review in the area of gambling goes far beyond that situation. It was shown that the gambling jurisprudence of the Court of Justice additionally left large aspects relating to the subtests of *suitability* and *necessity* to the discretion of the referring courts (see Sect. 9.2). If national courts refrain from meaningfully assessing not only the *proportionality stricto sensu* but also the suitability and necessity of national restrictions, there is little judicial review of proportionality left.

The case law shows that even the more substantial proportionality review of the EFTA Court did not trigger a full scrutiny of the proportionality of the measures by the Norwegian courts. A Norwegian scholar noted that the Oslo District Court⁶¹⁸ assessed the suitability of the measures, but that court's discussion of necessity was more formal rather than on substance. The necessity review was largely limited to references to the EFTA Court's criteria in the advisory opinion, without effectively applying the criteria to the concrete facts of the case or inquiring into less restrictive

⁶¹⁵ Harbo, *The Function of Proportionality Analysis in European Law*, 235.

⁶¹⁶ Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*.

⁶¹⁷ Craig, P., "Unreasonableness and Proportionality in UK Law" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 85–106, at 105; Harbo, *The Function of Proportionality Analysis in European Law*, at 173. Contrary to Lord Hoffmann, Green predicted a significant impact of the principle of proportionality also for cases with no link to EU law or the ECHR (Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law"; Green, N., "Proportionality and the Supremacy of Parliament in the UK" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publisher, 1999, pp. 145–164).

⁶¹⁸ Oslo Tingrett *Ladbrokes Ltd. mot Kultur og Kirkedepartementet*, judgment of 3 October 2008.

measures.⁶¹⁹ It was suggested that a misconception on the part of the Oslo District Court led to the lenient review: the discretion granted by the EFTA Court in the advisory opinion was seen as automatically justifying an essentially unlimited margin of appreciation for the Norwegian government as regards the necessity of the measures.⁶²⁰ This was arguably not what the EFTA Court's decision implied.⁶²¹ In the gaming machines case, the Norwegian Supreme Court expressly relied on the aforementioned logic. It argued that the EFTA Court had interpreted leniently the necessity criterion in *ESA v Norway* and that this approach harmonised well with the Norwegian tradition of judicial review of *distinctly political measures*.⁶²² As a consequence, it largely refrained from reviewing the measures as to their necessity.⁶²³

9.3.3.4 Varying Intensity of Review by the Court of Justice of the EU

Role of Composition of Bench

The intensity of the judicial review by national courts depends on varying judicial cultures as well as individual differences among judges. These differences can also play a role at the Court of Justice, the EFTA Court and the ECtHR. For procedural reasons, it is hard to identify individual differences. Only judges at the ECtHR are permitted to draft *dissenting or concurring opinions*. Judges at the Court of Justice and the EFTA Court are bound by the secrecy of deliberations and are not allowed to unveil the individual voting behaviour. Their opinions could be deduced from speeches and publications, but judges generally refrain from being too outspoken to avoid recusal in future cases. Different of course is the situation of *Advocates General*. Their view on the case is known in detail as opinions are associated with specific Advocates General. In addition, opinions tend to be much more detailed than judgments, at least in the case of the Court of Justice.⁶²⁴

Nonetheless, it may be interesting to assess whether certain patterns can be identified in the gambling cases. In the case of the EFTA Court, the exercise is

⁶¹⁹ Harbo, *The Function of Proportionality Analysis in European Law*, at 179–184.

⁶²⁰ *Ibid.*, at 183.

⁶²¹ “Even though the Contracting Parties do have discretion in setting the level of protection in the field of gambling, this does not mean that the measures are sheltered from judicial review as to their necessity” (E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 55).

⁶²² Rt. 2007: 1003 (*Spilleautomat*), para. 104–106, quoted in Harbo, *The Function of Proportionality Analysis in European Law*, at 94.

⁶²³ However, it must also be noted that the Supreme Court's judgment was not handed down subsequent to an advisory opinion. The EFTA Court's decision was taken in a direct action procedure, and the Norwegian Supreme Court had stayed proceedings to await the ruling of the EFTA Court.

⁶²⁴ Maduro, “The European Court of Justice”, at 226.

superfluous from the outset since this court generally sits in the identical composition of the three judges composing the EFTA Court. This was not different in the two gambling cases, because no *ad hoc* judge was sitting in those cases.

In the case of the Court of Justice, it is at least possible to see who sat as *Advocate General* and *judge* in a given case. The '*juge rapporteur*' may have a substantial influence, because in this function a judge needs to look more closely at the case and the issues it involves. It was mentioned that the early case law showed an essentially unlimited margin of appreciation. A significant change came with *Gambelli*, *Lindman* and *Placanica*. This was followed by a series of decisions that left a mixed picture regarding judicial review.

In the early period, some key persons can be identified. *Advocate General Gulmann* drafted the opinion in the very first gambling case. Many of the considerations in this opinion were instrumental to the development of the case law (see Sect. 9.3.2.2). *Gulmann* also *became judge* at the Court of Justice and sat in the second gambling case *Läärä*. His influence in *Läärä* was likely to be significant, considering his experience as *Advocate General* in *Schindler* and the fact that the bench in *Schindler* had followed his opinion. With regard to the influential function of '*juge rapporteur*', Judge *Puissochet* served this function in the cases *Läärä*, *Zenatti* and *Anomar*.

The significant change in *Gambelli*, *Lindman* and *Placanica* was also associated to a certain composition. *Judge Edward* served as '*juge rapporteur*' in *Gambelli* and *Lindman*. The *Advocates General* in *Gambelli* and *Placanica* asked for a much stricter review than previously applied: *Alber* in *Gambelli* and *Colomer* in *Placanica*.

The following judgments are difficult to associate to specific jurists. Some decisions were stricter, others more lenient. Clearly identifiable is only the role of *Advocate General Bot* in *Liga Portuguesa*, *Sporting Exchange*, *Ladbrokes*, *Sjöberg*, *Winner Wetten* and *Dickinger & Ömer*, especially when contrasted with the opinions of *Advocate General Mengozzi* in *Markus Stoss* and *Carmen Media* or *Advocate General Mazák* in *HIT & HIT LARIX* and in the Greek case '*OPAP*'. The latter *Advocates General* suggested a stricter review than *Bot*.⁶²⁵ Unclear is the influence of *Judge Schiemann* who served as '*juge rapporteur*' on almost all cases from *Placanica* until *Costa & Cifone*.⁶²⁶ An additional difficulty lies in the fact that several of these decisions were decided with the Court of Justice sitting as *Grand Chamber*.

In sum, a look at the composition of the bench cannot fully clarify the varying use of the margin of appreciation in the post-*Anomar* case law.

⁶²⁵By way of exception, the Court of Justice decided in C-212/08 *Zeturf Ltd v Premier ministre* [2011] ECR I-5633 to proceed to judgment without an opinion of *Advocate General Jääskinen*.

⁶²⁶Considering the cases from *Placanica* to *Costa & Cifone*: *Judge Schiemann* was *juge rapporteur* in all but two cases: *Judge Cunha Rodrigues* served as '*juge rapporteur*' in C-203/08 *Sporting Exchange Ltd. Trading as 'Betfair' v Minister van Justitie, Intervening Party: Stichting de Nationale Sporttotalisator* [2010] ECR I-4695, and the related C-258/08 *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR I-4757. *Judge Schiemann* did not sit in these two related cases.

Role of Referring Court and Case File

Apart from the judges sitting in the case, the referring courts have played a major role for the use of the proportionality review of the Court of Justice. Varying judicial cultures influenced the review process in national proceedings, with Scandinavian courts being rather reluctant to review laws and government practice. Austrian, German and Italian courts were more inclined to review the proportionality of measures.⁶²⁷

There is another aspect underlining the central role of national courts. It was partly the *referring courts that were guiding the Court of Justice*. There is a recognisable pattern: Where the Court of Justice chose to review national measures more strictly, the respective referring court *had pointed at the facts of the case in quite critical language*. This was the case for references from Austria, Germany and Italy. It may be more than a coincidence that those countries are also among those that host courts, which show a higher willingness to review national laws on their conformity with constitutional and EU law. These courts influenced the Court of Justice by phrasing their references in critical terms. In particular, *they emphasised inconsistencies* in the national gambling regime and often suggested themselves that the pleaded objectives were not coherently pursued. After such a reference, it was hard for the judges at the Court of Justice to ignore the highlighted inconsistencies. The Court of Justice made it clear that the suitability of the measures presupposed that they were coherent and consistent.⁶²⁸ A few examples shall illustrate this point.

In *Gambelli*, it was the referring Italian court that drew the attention of the Court of Justice to some striking inconsistencies of the Italian gambling policy. It made the Court aware of Italy's policy of the expansion of gambling offers. The Court of Justice expressly quoted the referring court and the inconsistencies that court had noted.

The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.⁶²⁹

More recent references from Germany and Austria confirm this point, namely in the decisions *Markus Stoss*, *Carmen Media*, *Engelmann* and *Dickinger & Ömer*.⁶³⁰

⁶²⁷ Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 987.

⁶²⁸ Mathisen, G. (2010). "Consistency and Coherence as Conditions for Justifications of Member State Measures Restricting Free Movement", *Common Market Law Review*, 47(4), 1021–1048, at 1037–1038.

⁶²⁹ C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 22.

⁶³⁰ Another factor was arguably of significance too: except for *Dickinger & Ömer*, the opinions were delivered by Advocates General Mengozzi and Mazák. For Advocate General Mazák, cf. also his far-reaching opinion in *HIT & HIT LARIX*.

In *Markus Stoss*, the pattern became clear in several paragraphs.

The said court [Verwaltungsgericht Giessen] doubts whether the restrictions on the freedom of establishment and the freedom to provide services arising from that situation may be justified by objectives in the public interest [...] because of failure by the monopoly at issue in the main proceedings to satisfy the requirements of the principle of proportionality. [...] The doubts which that court has as to the conformity of the monopoly at issue in the main proceedings with European Union law ('EU law') are of three types. [...] In the view of the referring court, the Land Hessen has no consistent and systematic policy for restricting gambling.⁶³¹

The doubts of that court [Verwaltungsgericht Stuttgart] largely echo those expressed by the Verwaltungsgericht Gießen. [...] A consistent and systematic policy is also lacking, in the national court's view, having regard to the aggressive promotional activity of the holder of the public monopoly.⁶³²

The Court of Justice followed the pattern of *referring to the national courts' doubts* throughout its ruling; relevant passages can be found in paragraphs 89 to 90,⁶³³ 100⁶³⁴ as well as 105.⁶³⁵ A similar pattern can be identified in the Austrian case *Engelmann*. It even seemed that the referring judges had largely reached a conclusion and appeared to merely seek support by the Court of Justice.

That court [Landesgericht Linz] had doubts as to the compatibility of [Austrian law] with European Union law [...]. Those doubts are founded first of all on the fact that, to the best of the national court's knowledge, the adoption of the applicable provisions of the [Austrian Gambling Law] was not preceded by an analysis of the dangers of gambling addiction or of the possibilities of preventing it either de jure or de facto. [...] According to the Landesgericht Linz, those provisions run counter to the Court's case-law [...]. Secondly, the Landesgericht Linz harbours doubts as to whether Austrian policy in the sector of games of chance allowed under concessions is consistent and systematic. In its view there can be a consistent and systematic restriction on activity related to games of chance and wagers only where the legislature appraises all areas and sectors of games of chance and then intervenes according to the potential level of risk or dependency for each type of game. It states that this is not

⁶³¹ C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa AutomatenService Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, paras 20–26.

⁶³² *Ibid.*, paras 34–41.

⁶³³ “[...] the referring courts have doubts as to the scope of that latter requirement [limit betting activities in a consistent and systematic manner].”

⁶³⁴ “the referring courts have also noted, first, that the holder of the public monopoly on bets on sporting competitions is engaging [...] in intensive advertising campaigns emphasising the need to finance social, cultural or sporting activities to which the profits derived are allocated, thereby making it appear that maximisation of the profits destined for such activities is becoming an end in itself of the restrictive measures concerned. Those courts have also noted, secondly, [...] that [...] the public authorities are developing or tolerating policies of expanding supply.”

⁶³⁵ “the Verwaltungsgericht Stuttgart has also indicated that [...] the surplus revenue is paid into the public purse, and in so far as it is not possible to exclude the possibility that the financial support given to bodies recognised as being in the public interest permits the latter to develop activities in the public interest which the State might normally be called upon to undertake, thereby leading to a reduction in the State's expenses.”

the case in Austria. [...] Fourthly, the Landesgericht Linz refers to the active pursuit, by the national authorities, of tax revenue from the sums paid by the gaming establishments.⁶³⁶

The conclusion to be drawn from these cases is that the *role of the reference has been significant* for the review process of the Court of Justice. The latter applied a stricter review in cases where the referring courts had expressly emphasised inconsistencies in the national gambling regime. This was the case in the Italian cases of *Gambelli* and *Placanica*, the German cases of *Markus Stoss*, *Carmen Media*, and the Austrian cases of *Engelmann* and *Dickinger & Ömer*.

A further aspect underlining the importance of the reference is that *Gambelli* was assessed more critically than the previous case *Zenatti*. As the Commission correctly observed in *Gambelli*, the applicable Italian gambling regulation in *Gambelli* was largely similar to that in *Zenatti*.⁶³⁷ The difference indeed was that in *Gambelli*, the national court had repeatedly pointed at substantial inconsistencies in the Italian gambling regulation. The referring court's critical remarks were noted by *Advocate General Alber* who held:

Against that background, there can no longer be any talk of a coherent policy to limit gambling opportunities.⁶³⁸

The aforementioned cases also coincided with *Advocates General* who were favourable to a stricter review practice: *Alber* in *Gambelli*, *Colomer* in *Placanica* and *Mengozzi* in *Markus Stoss* and *Carmen Media*.

It is sensible to consider that the *Gambelli* ruling might well have looked significantly different if *only the applicants* had pointed at inconsistencies (and not the referring court) and if *another Advocate General* had delivered the opinion. In other cases that involved disputed facts, the Court of Justice showed a tendency to rely on the pleadings of counsels for government. This could be observed in *Liga Portuguesa* where, even according to intervening governments, some of the facts were not sufficiently clear. Nevertheless, the Court of Justice interpreted the unclear factual situation in favour of the Portuguese government.⁶³⁹ Similarly, the doubts raised by the applicant in *Läärä* where not discussed by the Court of Justice but only by *Advocate General La Pergola*.⁶⁴⁰

According to the underlying purpose of the preliminary ruling procedure, the Court of Justice does not decide on the merits of the case but is only asked to offer an interpretation of EU law. However, it would be artificial to conclude that the facts of the case will not impact the Court's interpretation of EU law. The referring court, more

⁶³⁶ C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, paras 19–23.

⁶³⁷ “The Commission submits that the issue in this case was disposed of by the judgment in *Zenatti*. In its view, the legislative amendments introduced in 2000 merely supplement the existing prohibition without introducing new grounds for criminal prosecution.” Opinion of *Advocate General Alber* in C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

⁶³⁸ Opinion of *Advocate General Alber* in *ibid.*, para. 122.

⁶³⁹ C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, paras 39–43, 62–66.

⁶⁴⁰ Opinion of *Advocate General La Pergola* in C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, paras 37–41.

precisely the description of the facts in the case file, holds the power to influence the Court of Justice's findings as regards the compatibility of the national provisions with EU law.

9.3.4 Results

Prior to Sect. 9.3 it was already established that the Court of Justice applied a review practice in the gambling cases that was characterised by a wide margin of appreciation and – in relation to many aspects – a lenient proportionality test. The Court's approach *deviated in important points from the approach of the EFTA Court and the criteria established by the ECtHR* in relation to the doctrine of the margin of appreciation. Section 9.3.1 double-checked those findings by contrasting them with cases from related fields: first from *alcohol addiction*, followed by risks and opportunities relating to the Internet.

It was shown that the Court applied in the Swedish case *Rosengren* a much stricter proportionality test, even though that case was argued on grounds of the protection of the health and life of humans under Article 36 TFEU. The Court of Justice adhered to the *principle of less restrictive measures* and reviewed closely the alcohol policy *in practice*. The Court itself *argued alternatives* that were less restrictive to intra-Union trade.

The Court of Justice's views on the Internet were then inquired. It underlined in *Ker-Optika the advantages that the medium Internet offered*. Customers could also be informed via the interactive features on the internet before purchasing contact lenses, not just in the shop, and the measures were found disproportionate. In *DocMorris*, the Court found that an absolute, undifferentiated prohibition on the distribution of medicinal products via the Internet was not justifiable, underlining several features, which land-based sales could not provide. While the Court of Justice in the gambling cases only noted the risks of the medium Internet, it emphasised its advantages in *Ker-Optika* and *DocMorris* in relation to pharmaceutical/medical products.

All three aforementioned cases were argued on the *Treaty exception of public health*. In *Commission versus Spain*, the Court of Justice noted that the restrictions to gambling could not be argued on public health grounds as gambling addiction had not reached such a *level of seriousness*. Nevertheless, the proportionality review in the three cases was clearly stricter than in the case law on gambling.

Section 9.3 then inquired the reasons for and consequences of the Court's special approach to gambling. The *historical-political setting* was analysed, which surrounded the early case law of the Court. The first gambling case *Schindler*, was lodged at a time when *political discussions* about national sovereignty and the principle of subsidiarity were at a peak. An analysis of the conclusions of the presidencies of the European Council showed that the *political discourse significantly changed* in the aftermath of the almost-failure of the Maastricht Treaty. The principle of subsidiarity suddenly became the central topic of the European Council.

The Commission was asked to consider abandoning certain legislative initiatives, which ultimately also led to the abandoning of the regulation of the gambling sector. Notably, these political considerations left the *acquis communautaire* and the Court of Justice's powers to review national measures untouched.

It was then demonstrated that the *opinion of Advocate General Gulmann* in *Schindler* expressly referred to the *political considerations* of the European Council and heavily emphasised the *financial interests* of Member States. It also underlined *moral aspects* and the *special nature of gambling* and applied a virtually unlimited margin of appreciation. These perspectives were proven to have impacted the choices of the Court of Justice in its early case law, with the Court expressly referring to the "moral, religious or cultural aspects" as well as the "peculiar nature" of gambling. As the Court does not like to depart from its precedent, *formula from the early case law kept re-emerging* in subsequent decisions.

Section 9.3 then discussed the consequences of the Court of Justice's approach. It was found that the Court dealt with gambling issues as a matter for public morality rather than for scientific risk regulation. The moral perspective led to a lack of a science-informed approach towards games of chance and gambling addiction. Some of the Court of Justice's remarks in *Gambelli* and *Lindman* could have served as a basis for *developing a science-oriented jurisprudence* but remained rather isolated statements as further case law showed.

Another consequence was noted in a *malfunctioning judicial dialogue between the Court of Justice and national courts*. Underlining the wide margin of appreciation, the Court of Justice demonstrated reluctance in offering substantial guidance to national courts and *emphasised the role of national courts* in the judicial review of national gambling policies. A study had found that national courts often did not review the proportionality of restrictive measures in gambling, *regularly limiting their 'assessment' to a mere reference to formula of the Court of Justice*. The outcome can be referred to as a '*judicial vacuum*': *an area of law empty of a meaningful judicial scrutiny*.

It was demonstrated that there were *significant differences of judicial cultures* between Member States. While numerous courts in Austria and Germany assessed measures that would be less restrictive to intra-Union trade, courts in Scandinavian countries regularly made simply a global reference to the principle of proportionality or formula of the Court of Justice. As illustrated along the examples of Denmark and Norway, the reluctance may often not be due to a lack of judicial powers but rather due to judicial traditions. It was for instance shown that the Danish Supreme Court ('Højesteret') hardly ever struck down a national law based on unconstitutionality and that the Norwegian courts traditionally only applied a reasonableness test rather than a proportionality test.

It was then assessed whether the varying intensity of judicial review at the Court of Justice could be associated with the changing composition of the bench. Since the EFTA Court sat in identical composition in the two gambling cases, it was superfluous to do such an assessment. At the Court of Justice, certain cautiously suggested patterns of decision-makers were identified. A practice of lenient review was associated with Advocates General Gulmann and Bot as well as '*juge*

rapporteur' Puissochet. By contrast, a stricter review was associated with Advocates General Alber, Colomer, Mazák and Mengozzi as well as '*juge rapporteur*' Edward.

The central role of referring courts was demonstrated. In cases where the Court of Justice chose to review national gambling policies more strictly, the referring Austrian, German and Italian courts had pointed to inconsistencies. The pattern could be well observed in *Gambelli*, *Placanica*, *Markus Stoss*, *Carmen Media*, *Engelmann* and *Dickinger & Ömer* in which the Court of Justice expressly referred to the critical remarks by the referring courts.