

## European Legal Perspectives: Gambling Case Law And Empirical Evidence

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*GamblingCompliance interviews academic and lawyer Simon Planzer, whose recently released research looked into the key assumptions of European case law and the extent to which they are supported by empirical evidence.*

With the European Commission's two-year action plan under way, there has been a call for evidence around gambling in Europe. The letters of inquiry sent by the European Commission to 20 member states highlight this evidence gathering exercise, as does the commission's communication when it suggests a behavioural study on online gambling.

According to Simon Planzer's recently released research, this evidence-led approach compares with the more moral-based treatment of gambling in European case law. To discuss this research and the insight it may provide into current debates, GamblingCompliance interviewed the author, who recently made available his doctoral thesis entitled "European Gambling Law: The Case Law of the European High Courts through the Prism of Empirical Evidence on Gambling Addiction".

**GamblingCompliance: Your doctoral thesis, "European Gambling Law", while analysing the legal treatment of gambling in the European Union/the European Economic Area, also goes beyond a classic legal analysis. Can you explain your approach?**

Simon Planzer: As you note correctly, the book does two things. On the one hand, it offers a full overview of the legal situation of gambling in the European Internal Market. It discusses the applicable EU provisions and analyses in detail the whole line of case law. In addition, the book takes an interdisciplinary approach in that it presents the current state of research on gambling addiction. This empirical part in turn informs the legal analysis.

**GC: Why did you choose such an approach?**

SP: Out of scientific curiosity! First of all, I was not interested in just engaging in the politicised discussion whether or not the gambling sector should be harmonised. Second, I noted from the outset that the public debates and legal proceedings are surrounded by a lot of claims regarding the nature of gambling addiction. In turn, certain key assumptions have had significant legal consequences. Therefore, I wanted to find out to which extent the assumptions are supported by empirical evidence and what factors led to their adoption. In other words, I wanted to link the lawyers' and regulators' world to the world of empirical sciences.

**GC: Your research becomes available at an interesting time for the European gambling industry. What insight do you think your research can provide stakeholders, particularly with respect to the European Commission's action plan on online gambling?**

SP: It is always commendable to remain modest about one's own research. Having said that, I think it is nevertheless fair to say that the book contributes to clarifying the legal situation and to remedying the lack of empirical evidence. Stakeholders can find three things: first, an exhaustive legal analysis (compliance of national measures with EU law), second, an introduction to gambling addiction that summarises the empirical evidence that is directly relevant for policymakers and industry (consumer protection), and finally, the book integrates the scientific evidence in the legal analysis, that is, it assesses to which extent the assumptions made in legal proceedings are supported by the scientific evidence.

You mention the European Commission's 2012 action plan on online gambling. The book covers and links two areas that the European Commission identified as key areas in its action plan: "the compliance of national regulatory frameworks with EU law" and "protecting consumers and citizens, minors and vulnerable groups".

Maybe I should also note that my research strictly focused on legal and empirical points; I am not taking a political stance, for instance with regard to the question whether gambling should be regulated at national or European level. Simply, in my conclusions, I call for enhanced cooperation between national and European authorities to protect consumer interests more effectively. The European Commission has the competences to at least coordinate such efforts. In my view, a coordinated cooperation can serve consumer interests, for instance a more active exchange between national and European experts. It seems that the European Commission takes a similar view in its Communication where it calls for enhanced administrative cooperation and efficient enforcement.

**GC: A large part of your research focused on the case law of the Court of Justice regarding gambling. What have you found?**

SP: In view of the scarcity of applicable European legislation — few directives apply to gambling services and none of them harmonise the sector — the focus necessarily fell on the case law. I contrasted the case law with the scientific literature on gambling addiction and I found a mixed picture. Some assumptions on gambling addiction find (partial) empirical support while others do not. Instead, certain judicial statements, not dissimilar to many political statements, illustrate a moral perspective on games of chance.

**GC: What is problematic about moral views on gambling, more precisely, for both the case law you analysed and more broadly, for policymaking?**

SP: Your question is of course legitimate. Everybody can have his or her subjective moral views on all kind of aspects of life. However, I trust you will agree that policymakers, by contrast, should not regulate risks simply based on their personal beliefs but try to objectivise policies addressing risks by basing them on facts.

As [with] other industries, gambling involves certain risks, mostly relating to addiction and crime. I should add that these risks must be addressed irrespective of the question whether the state or private companies operate the games. The problem with a moral perspective is that it regularly hinders an objective evidence-informed risk assessment. The question is: do the facts shape somebody's opinion or is it the opinion that shapes the facts for that person?

**GC: You contrast a moral view with an empirical perspective. What insight would an empirical perspective give to the case law you analysed?**

SP: In defence of the Court of Justice, I must say that it is in the first place for the legislator to pass regulation that addresses risks. Between the lines of many judgments, you can tell that the court has not been particularly amused that it is expected to make policy decisions on gambling. However, in the midst of legal uncertainty, the court did end up with these cases and had to take a stance.

The insight that an empirical perspective would give to the case law is not any different to the one it would give to regulators. Moving away from a morally informed perception of gambling allows you to properly address the actual risks. Let me give you an example. In the case law, you can see that the court approved of the goal of preventing private operators from profiting of the exploitation of the weakness of players and their misfortune. This reflects a moral, but not a risk-focused perspective. I trust that you agree that it is unacceptable allowing the exploitation of gambling addicts, irrespective of whether the profits go to commercial operators, the state budget or to charity purposes. You will in any event not find such distinction in medical manuals. The diagnostic criteria of a pathological gambler are not depending on the operator that he plays with.

An empirical perspective also suggests the question: Is gambling the problem or is it the detrimental side effects that the activity potentially involves? Prevalence rates globally show that the large majority of people do not gamble excessively. However, there are certain risks, mostly relating to addiction, fraud and money laundering. The term "risks" refers to facts that can be observed and addressed by policies, and these policies can and should be evaluated, leading over time to best practices. In short, an empirical perspective leads to risk-focused policies that are interested in facts.

**GC: Looking at consumer protection and gambling addiction, is this addiction approached differently by policymakers in Europe, compared with other addictions? If so, why do you think this is the case?**

SP: Yes, gambling addiction was long seen as a kind of peculiar case. I can think of two reasons. First, large-scale gambling and internet gambling have been a new phenomenon in some European countries. It is normal that regulators are initially uncertain about how to deal with new risks.

Another reason is that addiction was traditionally seen as being necessarily linked to drugs. But research has shown that things are far more complex: alcohol is not an illicit drug, and people can get addicted to it. More interestingly, gambling does not even involve the in-take of a substance, and still, the diagnostic criteria for a person addicted to gambling are similar to those addicted to substances.

In fact, there is solid empirical evidence showing manifold commonalities between substance-related addictions and pathological gambling. What is more, the leading medical manual, the DSM (Diagnostic and Statistical Manual on Mental Diseases) is going to categorise pathological gambling (new, gambling disorder) together with substance-related addictions in its forthcoming revised edition. Other so-called behavioural addictions, such as internet addiction, will be considered for future revisions. These facts illustrate that an exclusive focus on the agent, i.e., games of chance, is not useful; factors relating to the host and environmental factors have a significant impact on the development of addictive disorders.

**GC: Is the different treatment of gambling addiction compared with other addictions reflected in the case law you analysed? Have cases involving other addictions been approached differently?**

SP: Yes, this can be observed. Take for instance the Swedish case “Rosengren” in which the Court of Justice very much questioned the compatibility of the Swedish state retailing system of Systembolaget. That case regarded concerns relating to alcohol addiction, in particular among youth – in other words, concerns very similar to the ones mentioned in relation to gambling, including the vulnerable group (youth). Contrary to the gambling cases, the Court of Justice applied a very strict proportionality review. It went as far as to suggest itself alternative measures that would be less restrictive on intra-community trade while still protecting youth from addiction. I do not see how such significantly different approach can be justified from what we know about the nature and mechanisms of gambling and alcohol addiction. Hence, there must have been other reasons for the court’s choices.

**GC: What could we learn from how other addictions are regulated or approached by policymakers?**

SP: Research on behavioural addictions, such as gambling addiction, in particular regarding online games, is younger than on other forms of addiction. What is more, the biggest part of research has been done outside of Europe, mostly in North America. Considering the commonalities, for instance the impact of socio-economic factors, comorbidity with other disorders or addiction-hopping to mention just a few, regulators can build on the expertise gained from policies on other addictions. Which policies have proven to be successful, which ones have failed? Can regulators find best practices developed in other countries? Of course, you always need to take into account differences too. For instance, there are unhealthy and unproblematic levels of consumption regarding wine and gambling. By contrast, research does not suggest that there are healthy levels of consumption of cigarettes.

In short, we need to take a holistic perspective, which does not just focus on the object of addiction, but also takes into account important environmental factors and factors relating to the person.

**GC: Another interesting area your research touched upon was looking at the political considerations in the early 1990s. Specifically you outline how the Principle of Subsidiarity became part of the Treaty just before the first gambling cases were referred to the Court of Justice. Do these political developments coupled with a moral view of gambling help explain why the court came to the decisions it did, and perhaps explain where we are today?**

SP: I must say I was myself surprised by the findings, realising to which extent the early gambling case law was influenced by the political considerations at that time. I closely studied the documents of the summits of the European Council in the early 1990s. Following the fall of the Berlin Wall up until 1992, the language of the conclusions of the Presidencies were dominated by the goal of broadening and deepening European

integration. Germany had agreed to sacrifice its Deutsch Mark and join the common currency. The Maastricht Treaty was signed, transforming the economic community into a political European Union. The European Commission was preparing proposals to harmonise gambling and other sectors. Subsidiarity hardly played a central role during the summits.

The change came in the aftermath of the negative referendum in Denmark and the almost failure of the Maastricht Treaty in France. The political discourse changed significantly: the principle of subsidiarity became suddenly the central topic during the summits of the European Council. However, the change in the rhetoric served reaching the goal of successfully completing the ratification process of the Maastricht Treaty in all Member States. From a legal perspective, however, hardly anything changed. First of all, the principle of subsidiarity was not new, it had historical antecedents in the Treaties and the case law. Second, even the council during its Edinburgh summit held that “the principle shall respect [...] the maintaining in full of the *acquis communautaire*.”

I was then surprised to see that the court in its first gambling case, *Schindler*, did indeed take these political considerations into account. Advocate General Gulmann delivered an opinion that contained a lot of political considerations, *inter alia* referring to the discussions of the Edinburgh summit and even arguing with the financial interests that were at stake for the member states — an argument that normally is never accepted as a justification ground by the court. Being confronted for the first time with a gambling case, the court adopted a lot of that reasoning. In *Schindler*, and other early judgments, you also find many moral statements on gambling. Of course, the court adjusted its approach significantly in *Gambelli* and later judgments. However, as the Court of Justice generally likes to build on precedent, we still find many of these early statements in recent judgments.

**GC: You write in your research of the “malfunctioning judicial dialogue between the CJEU and national courts”, what do you mean here? Can this be cured?**

SP: Yes, I describe what I call a “judicial vacuum”. Normally, in the judicial dialogue between the Court of Justice and national courts, the former offers a (more or less) detailed interpretation of EU law, that is, of the compliance of national rules with EU law, and shapes criteria how the national court will have to assess the proportionality of the measures. The national court then applies this guidance in the case pending before it. What happened in gambling, at least until recent years, was that the Court of Justice gave little guidance to national courts that in turn kept referring cases to Luxembourg. Advocate General Colomer expressly invited the court to give more substantial guidance in view of the large number of referred cases.

However, the Court of Justice preferred to leave things mainly with the national courts. The detailed report prepared for the commission by the Swiss Institute of Comparative Law found that national courts often simply quoted the court’s formula — without actually reviewing national measures. In other words, gambling formed an area of law that, until recently, was largely sheltered from (national) judicial review. It is however important to add that the differences can be significant from one Member State to another: German and Austrian courts for instance tend to be stricter in their proportionality review. These differences are problematic in that they lead to varying protection levels of the fundamental freedoms within the same Internal Market, even though the same risks are at stake (addiction, crime).

**GC: In your analysis you review some assumptions, such as whether certain games are addictive or whether competition leads to increased levels of addiction. I know that you have looked, in related research, into what impact different regulatory models have on rates of gambling addiction. What have you found, is there any emerging evidence which could contribute to current debates?**

SP: The idea that the presence of several licenced operators competing for customers necessarily leads to higher levels of gambling addiction was introduced in an opinion by Advocate General Bot in the Dutch case “Sporting Exchange” and the Court adopted this assumption in its judgment. Together with colleagues from Harvard University, we collected the available prevalence rates in the EU and EFTA member states and ran correlational analyses, comparing the effectiveness of different regulatory models. Our research does not indicate such correlation.

Addiction is a complex phenomenon and its development is influenced by numerous factors. Attempts to explain addiction by reducing its causality to one simplistic reason are certainly not in the interest of protecting

consumers. To illustrate this point: both Norway and Finland for instance had state monopolies in place, but Norway tended to have low prevalence rates while Finland tended to have significantly higher rates. As lawyers, we should be humble enough to recognise that law is just one (environmental) factor among other factors that may influence the prevalence of addiction. Those interested in the prevalence rates and regulatory data can find them at <http://www.planzer-law.ch/en/academia/free-downloads/>.

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## About Simon Planzer

Dr Planzer has been working as researcher and practising attorney, specialising in gambling law, risk regulation, and EU affairs. He teaches European Economic Law at the University of St.Gallen HSG, Switzerland. The research on his doctoral thesis, including a long research stay at Harvard University, was supported by the Swiss National Science Foundation. [www.planzer-law.com](http://www.planzer-law.com).

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