

## 2. Initial CJEU Case Law on Gambling

Games of chance were first brought before the CJEU in the early 1990s. *Schindler*<sup>5</sup> was concerned with (paper<sup>6</sup>) lottery advertisements from Germany offered (via the Netherlands) to United Kingdom nationals, which was deemed illegal under United Kingdom law. In their observations on the legislation at issue, most of the EC Member States of the time argued that, from the perspective of national legislation, games of chance were not an economic activity (and as such attributable to the European Single Market) but instead a matter of public law and order as well as security, and consequently of police law, which remained the domain of the Member States.

At the time, however, the CJEU did not concur with this reasoning but decided that the operation of games of chance was a “service” (today Art 56 ff TFEU). Within the scope of the “free market”, the freedom to provide services also includes services that may be provided without the service provider crossing EU internal borders, even via mail, telephone, or the internet. The freedom to provide services requires not only the elimination of all discrimination against service providers from other Member States, but also the abolition of any restriction on the freedom to provide services, even if that restriction applies without distinction to national providers of services and to those of other Member States,<sup>7</sup> unless such restrictions are justified by “overriding reasons in the public interest”.<sup>8</sup>

In its judgment in *Schindler*<sup>9</sup>, the CJEU acknowledged that the objectives of the restrictive state regulations mentioned above are such “*overriding reasons in the public interest*”, if such legislation is proportionate to the objectives pursued thereby, meaning that such regulations do not go beyond the requirements for attaining said objectives. The CJEU firmly stuck to this principle in all subsequent judgments in *Läärä*<sup>10</sup>, *Zenatti*<sup>11</sup>, *Gambelli*<sup>12</sup>, *Placanica*<sup>13</sup>, *Liga Portuguesa*<sup>14</sup>, *Sporting Exchange*<sup>15</sup>, *Ladbroke*<sup>16</sup>, and *Sjöberg/Gerdin*<sup>17</sup>, although two Advocate Generals had advised the Court to open up the European Single Market also to games of chance – in *Placanica* with the remarkable opening statement: “*Rien ne va plus. The Court of Justice can no longer avoid carrying out an in-depth examination of*

5 CJEU, 24 March 1994, Case C-275/92, ECR 1994, I-1039.

6 Today the problem has rather shifted to illegal internet offers.

7 Settled case law of the CJEU since the Judgment in *Van Binsbergen*, Case C-33/74, ECR 1974, 1299.

8 Settled case law, see CJEU Case C-369/96 and C-376/96, *Arblade*, ECR 1999, I-8453.

9 FN 5.

10 CJEU, 21 September 1999, Case C-124/97, ECR 1999, I-6067.

11 CJEU, 21 October 1999, Case C-67/98, ECR 1999, I-7289.

12 CJEU, 6 November 2003, Case C-243/01, ECR 2003, I-13076.

13 CJEU, 6 March 2007, Case C-338/04, C-359/04 and C-360/04, ECR 2007, I-01891.

14 CJEU, 8 September 2009, Case C-42/07, EU:C:2009:519.

15 CJEU, 3 June 2010, Case C-203/08, EU:C:2010:307.

16 CJEU, 3 June 2010, Case C-258/08, EU:C:2010:308.

17 CJEU, 8 July 2010, Case C-447/08 and Case C-448/08, EU:C:2010:415.

of gambling services in the group of obliged entities (Art 2(1)(3)(f)). With the exception of casinos, and following an appropriate risk assessment, Member States may decide to exempt, in full or in part, providers of certain gambling services from customer due diligence on the basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services (Art 2(2)(1)).

### 3.3. Money Laundering Act (GwG)

The central body of laws on combating money laundering in Germany is the Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act; Geldwäschegesetz – GwG).<sup>47</sup> Its original version of 25 October 1993<sup>48</sup> was designed to implement and transpose the First Money Laundering Directive into national law (91/308/EEC).<sup>49</sup> In accordance with Sect 14(1)(7) GwG old version, casinos were already required to take precautions against being misused for the purpose of money laundering. Pursuant to Sect 3(1)(1) and Sect 6(1) GwG old version, they were obliged to require identification, if the deposited amount of money exceeded DM 20,000 or in case of a suspicious transaction. In addition, Sect 11(1) GwG old version set forth a reporting obligation of suspicious transactions for casinos. Therefore, the German legislator went even further than the First Money Laundering Directive, which did not explicitly include any provisions for casinos (yet). This step was based on the consideration that, just as financial institutions, casinos were places of frequent payments in cash, which made them just as vulnerable to money laundering.<sup>50</sup>

The Money Laundering Act in the version of the Act on the Improvement of the Suppression of Money Laundering and Combating the Financing of Terrorism (Anti-Money Laundering Act; Geldwäschebekämpfungsgesetz) of 14 August 2002<sup>51</sup>, which transposed the Second Money Laundering Directive (2001/97/EC) into national law,<sup>52</sup> included a relevant change to casinos: in accordance with the Anti-Money Laundering Act, the identification obligation threshold was lowered to EUR 1,000 (corresponding to the threshold of the directive).

The redrafted Act on the Improvement of the Suppression of Money Laundering and Combating the Financing of Terrorism (Anti-Money Laundering Act Addendum; Geldwäschebekämpfungsergänzungsgesetz – GwBekErgG) of 13 August 2008<sup>53</sup> presented an extensive overhaul of the Money Laundering Act and transposed the Third Money Laundering Directive (2005/60/EC) into national law. The redrafted

---

47 On the historical development of combating money laundering in Germany, see also *Diekmann/ Dragon/Schulze*, Geldwäschebekämpfung im Nichtbankensektor, *GewArch* 2012, 431.

48 Federal Law Gazette I p. 1770.

49 Cf. BT-Drs 220/92 21.

50 Cf. BT-Drs 220/92 29 as well as FN 46 on the reporting obligation of suspicious transactions for casinos.

51 Federal Law Gazette I p. 3105.

52 BT-Drs 14/8739 1; BT-Drs 14/9263 1.

53 Federal Law Gazette I p. 1690.

In case of online games provided from another Member State, the authorities of the Member State of destination are therefore unable to “*carry out themselves the controls and checks which they consider necessary to make on the premises in which the service-provider carries out its activities.*”<sup>6</sup>

## 2. Legal Situation in Austria

In accordance with Art 10(1)(4) B-VG<sup>7</sup> (Austrian Federal Constitutional Law), the federation has powers of legislation and execution in “monopolies”. These competences include, inter alia, the gambling sector.<sup>8</sup> Which matters are actually subject to the public monopoly is set forth in the Austrian Gaming Act (GspG)<sup>9</sup>. This federal act governs all games, in which the decision on its outcome is solely or predominantly reliant on chance. Therefore, the aleatoric aspect of such games is the decisive feature of differentiation.<sup>10</sup> Any other games without these characteristics – e.g., chess, pool, or tarot – are considered games of skill and as such not subject to the public monopoly. Moreover, (sports)betting is generally not interpreted as a game of chance and, in consequence, subject to state laws,<sup>11</sup> which is why there are individual licenses in Austria’s federal provinces.

The Austrian Gaming Act pursues regulatory objectives – more precisely, the intention of directing the human desire to gamble into the right channels.<sup>12</sup> Instead of prohibiting gambling in general, the public monopoly is designed to prevent gamblers from drifting into illegality and unlawful activity.<sup>13</sup> In order to minimise the negative impact of games of chance, the Austrian Gaming Act provides strict monitoring and control mechanisms for the monopoly holder to observe. In this context, the protection of gamblers assumes highest priority.

Both at the fundamental rights (domestic) and Community law level, there have been numerous attempts of combatting this gambling monopoly, which is why the Austrian State was forced to justify the monopoly on several occasions. While the monopoly’s compatibility with the freedom to conduct business in accordance with Art 6 StGG (Basic Law on the General Rights of Nationals)<sup>14</sup> is the most

6 Opinion AG Bot, Case C-347/09, *Dickinger/Ömer*, para. 133.

7 Federal Law Gazette 1930/1 as amended by Federal Law Gazette I. 2018/22.

8 *Segalla*, Glücksspiel- und Wettrecht, in *Holoubek/Potacs* (Eds.), *Öffentliches Wirtschaftsrecht II*<sup>3</sup> (2013) 261 (263).

9 Federal Law of 28 November 1989 to make provision about gambling (Gaming Act), on amending the Federal Budget Act and on repealing the Federal Law on life insurance with lottery drawing (GSpG), Federal Law Gazette 1989/62 as amended by Federal Law Gazette I. 2017/107.

10 *Schwertmann*, Online-Glücksspiel in Österreich, JLR 2014/2, 74 (76).

11 *Strejcek/Bresich* in *Strejcek/Bresich* (Eds.), *Glücksspielgesetz – GspG 1989*<sup>2</sup> (2011) 25.

12 *Ibidem*.

13 No 1067 of the supplements to the stenographic protocol of the National Council 15. I.p. 15.

14 Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and *Länder* represented in the Council of the Realm, Imperial Law Gazette 1867/142 as amended by Federal Law Gazette 1988/684.

In contrast to the levy from lottery and other similar games, a new tax element was introduced: the “minimum partial tax on technical games” which replaced the fixed rate of levy from lottery and other similar games on slot machines and other technical devices. The partial tax on technical games (the product of the tax base on technical games and the rate on the tax base) cannot be any lower than the minimum partial tax on technical games.<sup>6</sup> The number of authorised game positions of each authorised device determines the minimum partial tax on technical games.

## 5. Minimum Partial Tax on Technical Games

The following section will address the question whether the minimum partial tax on technical games is compatible with the Constitution of the Czech Republic. In order to answer this question, we need to examine the decision of the Constitutional Court Pl ÚS 15/15 from January 2018.

The minimum partial tax on technical games is essentially similar to the fixed rate of levy from lotteries and other similar games for slot machines and other devices. These elements – minimum partial tax and fixed rate – apply irrespective of whether the gaming machine (slot machine or other device) is actually in operation or not. The minimum partial tax on technical games must be paid even if the machine or device does not generate any profit.

The minimum partial tax on technical games was established to reduce the number of slot machines and other devices. In the opinion of the Constitutional Court, this aim is legitimate and, moreover, a rational simplification of tax administration. Considering that the Constitutional Court found the fixed share of the levy from lotteries and other similar games to be constitutional, the minimum partial tax on technical games should be in line with the Constitution of the Czech Republic.

## 6. Differential Rates for Individual Gambling Types

As outlined in the beginning of this contribution, the question remains whether it is possible to set differential rates of gambling tax for individual gambling types. The Gambling Act regulates eight types of games of chance that may be operated based on licensing or notification: lottery, odds bet, totalizator game, bingo, technical game, live game, raffle, and small-size tournament. As mentioned earlier, the gambling tax rate for technical games amounts to 35 per cent; the rate for other games to 23 per cent. In other words, in the Czech Republic the gambling tax rate is differential. The gambling tax is only one in a whole set of measures provided by the new regulation on games of chance. It is primarily designed to both prevent and combat socially pathological phenomena associated with the operation of gambling, resulting in the protection of gamblers. In consequence, the gambling tax fulfils both a protective and regulatory function.<sup>7</sup>

6 Law No 2016/187 Sb, on Gambling Tax, Sec 5 (3).

7 Needless to say, the gambling tax has a fiscal function as well.

land-based casino industry a strong voice in the future development of gambling regulations at EU level, a more comprehensive engagement within the rapidly changing industry, as well as with policy and regulatory developments would be needed. The 2005 foundation of the European Casino Association (ECA) as an international association under Belgium law was a reaction to this need. The first chairman of the association was Anders Galfvensjö, CEO of Casino Cosmopol.<sup>5</sup> The nomination process, which was reportedly based purely on the seating order at the founding meeting, proved to be defining in the coming years. Ron Goudsmit, Vice-President of Holland Casino and sitting next to Galfvensjö was elected Vice-Chairman and replaced him one year later. He, together with Guido Berghmans, General Director of Casino 2000 in Luxembourg, led the association until 2015, when Goudsmit was elected First Honorary President of the ECA.

#### 4. The Impact of the Internet for the Gambling Industry

The internet brought along online gambling, which was used by new entrants into the gambling industry to distribute traditional offline games, such as poker or slot machines, via new online distribution channels. This further underlined the need for a strong and effective organisation active at the EU level. While there had always been a certain amount of illegal slot machines across Europe, this new form of illegal gambling increased the problem substantially. Beforehand, there were mainly smaller operations that through the online sphere were now supplemented by companies operating in multiple jurisdictions with sizeable organisations and financial resources behind them.

Little effort was now needed to set up a gambling website, as there was no longer a requirement to be physically present in the country where the consumer was located. This created issues for countries, as countless online gambling websites were now targeting their citizens with their products and services, while remaining outside of the legislative framework. This led to an undermining of national gambling policies and its objectives, as well as a loss of tax revenue and overall loss of control that, as many have argued, damaged consumer protection and, at times, extended into the criminal sphere. From the outset, national governments and law enforcement were not well equipped to counter the illegal provision of online gambling in many EU countries. The sheer size of the new actors overwhelmed authorities used to dealing with a handful of licensees. Data quoted in the 2011 European Commission “Green Paper on on-line gambling in the Internal Market”<sup>6</sup> showed that at the time roughly 14,823 illegal gambling websites were active in Europe with less than 15 per cent operating with a licence (of any kind).

<sup>5</sup> Casino Cosmopol is the state-owned casino operator in Sweden founded in 1999.

<sup>6</sup> European Commission, Green Paper on Online Gambling in the Internal Market, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0128&from=EN> (accessed 21 November 2018).

stake size continued to increase following exposure to the message. However, several limitations exist, most notably the fact that participants gambled with tokens rather than their own money. Despite the fact there was a monetary prize for the participant with the most tokens at the end of the experiment, not gambling with one's own money is likely to have muted the effects of both the wins and losses, as well as the impact of the pop-up message in both outcome conditions. In addition, the computer-simulated and laboratory-based conditions did not have ecological validity and did not replicate many of the structural and situational factors associated with in-vivo electronic gambling. However, this is often the trade-off associated with experiments requiring high levels of experimental control. In addition, the study was unable to identify which part of the message actually exerted a behavioural influence in terms of speed of gambling. It is not clear whether the instructive part of the message, the self-appraisal content, or indeed both parts of the message, had the impact.

## 2.4. Monetary and Time-based Pop-up Messaging

Engaging in potentially addictive behaviour, including gambling, is associated with losing track of both time and space through a process of dissociation<sup>34</sup>, particularly among problem gamblers.<sup>35</sup> Dissociation is one potential mechanism believed to explain why many gamblers, especially problem gamblers, exceed predetermined time and monetary limits.<sup>36</sup> Similar to self-appraisal messaging, it has been argued that time and monetary pop-up reminders may combat such dissociative states as well as the failure to adhere to pre-set time and monetary limits. *Stewart and Wohl*<sup>37</sup> conducted a randomised, controlled experiment assessing the efficacy of monetary reminder pop-up messages in their ability to facilitate adherence to self-set monetary limits. A total of 59 university students with varying pre-screened levels of problem gambling severity participated in a virtual reality slot machine simulation. In support of the use of monetary pop-up reminders, results showed participants in the pop-up message condition were significantly more likely to stick to their pre-set limit (89.66 per cent) compared to a control (no pop-up) condition (43.33 per cent). Results also showed that higher gambling symptomology and dissociation were associated with lower monetary limit adherence. The fact that there was no mediating effect of dissociation on limit adherence in the pop-up condition

34 *Jacobs*, Evidence for a Common Dissociative-like Reaction among Addicts, *Journal of Gambling Behavior* 1988/4(1), 27.

35 *Diskin/Hodgins*, *Journal of Gambling Studies* 1999/15(1), 17; *Diskin/Hodgins*, Narrowed Focus and Dissociative Experiences in a Community Sample of Experienced Video Lottery Gamblers, *Canadian Journal of Behavioural Science* 2001/33(1), 58; *Griffiths et al.*, Dissociative States in Problem Gambling, in *Allcock* (Ed.), *Current Issues Related to Dissociation* (2006) 27–37.

36 *Stewart/Wohl*, Pop-up Messages, Dissociation, and Craving: How Monetary Limit Reminders Facilitate Adherence in a Session of Slot Machine Gambling, *Psychology of Addictive Behaviors* 2013/27(1), 268–73.

37 *Ibidem*.

individually determine the objectives of the treatment, thus rendering the often controversial debate over abstinence irrelevant. The primary symptoms observed in the course of gambling addiction are analogous to the description of alcohol addiction:<sup>9</sup> increased frequency (“dispensing”), increasing loss of control, a compulsive urge to return to gambling to the extent of being unable to abstain from it, failed attempts of exercising self-control, social withdrawal, the development of typical defence mechanisms, family trouble, resignation resulting from escalation, and despair to the extent of becoming suicidal. The group treatment of alcoholics and pathological gamblers fits into these parallels.

We agree with other authors that the inpatient treatment of pathological gamblers is necessary, when previously attempted measures have failed to deliver the expected results.

### 3. Various Stages of Gambling Addiction

Similar to the course of alcoholism, there is a certain tendency of gambling to develop in several stages leading to addiction. This process can be broken down into three phases: a winning phase, a losing phase, and a desperation phase.

*Bilke Hentsch et al.*<sup>10</sup> prefer a subdivision into a positive initial stage, a critical addiction stage, and an obsessive stage. In the winning phase, there is an initial, more or less incidental contact to gambling with occasional participation and predominantly positive experiences.

Money and winning increasingly become an unbelievably strong incentive. Smaller and larger winnings are experienced as stimuli, leading to enhanced self-esteem. Lifestyle adjustments are made towards gambling with an almost fairy-tale belief that it is possible to solve all of life’s problems with the earnings from gambling.<sup>11</sup> The individuals affected feel particularly justified in their narcissism, since they consider money to translate into attention and power.

Frustration over the first long losing streak is all the more intense, as such losses are experienced as extreme defeats combined with the erosion of an apparent rise. The transition from the winning streak to the losing streak is a smooth one. The intensity of gambling increases, that is, the frequency, duration, and the stakes become higher. In order to attain the desired effects, the gambler adopts a higher risk strategy, and the manifested momentum accelerates the spiral of losses.

In an attempt to restore the original condition, the gambler must compensate for the losses with a new wave of concentrated and riskier gambling. This so-called “chasing” process leads to social problems that may even end in disaster. During

9 Meyer/Bachmann, Glücksspiel. Wenn der Traum vom Glück zum Alptraum wird (2005).

10 Bilke-Hentsch/Wölfling/Batra, Praxisbuch der Verhaltenssucht (2014).

11 Mann (Ed.), Verhaltenssuchte. Grundlagen, Diagnostik, Therapie, Prävention (2014).

## 6. Figures and Tables

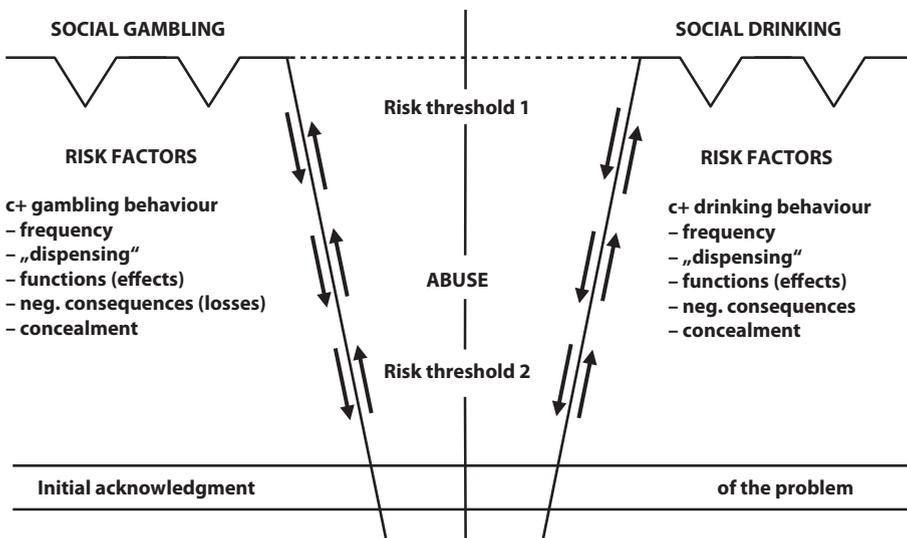


Figure 1: Typical development of a gambling or drinking problem 1st phase

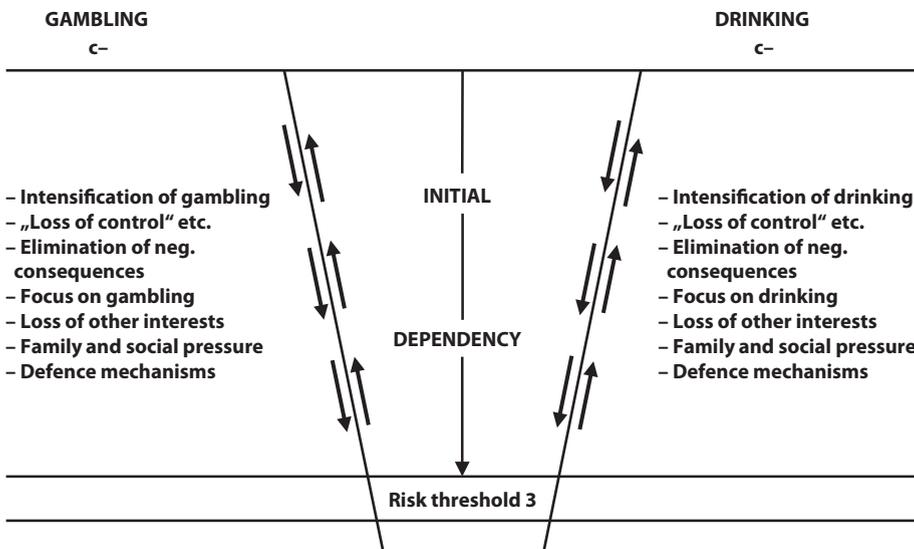


Figure 2: Typical development of a gambling or drinking problem 2nd phase

## 4. Digression into Law and Economics

The “economic analysis of law” (also called “law and economics”) makes it possible to analyse legal provisions using the means of economic theory. It is based on the traditional criterion of economics, namely efficiency – and that in a properly understood, broad sense: as social efficiency, under which social welfare is maximised by means of legal provisions while minimising social disadvantages (social costs in the broadest sense). Against this backdrop, legal provisions are understood as marginal conditions or restrictions of the decisions and actions of people, while it is their purpose to steer these decisions and actions into a beneficial direction both for the economy and society.

The analysis of legal provisions is divided into the following three aspects:

- **Evaluation:** The both intended and unintended effects of legal provisions are evaluated to lay the foundation for necessary adjustments.
- **Explanation:** The analysis of causes ranges from the misconduct of those involved due to insufficient deterrents to potential defects in the legislative process. This makes it possible, for example, to justify regulated market entry barriers as the result of redistribution policy actions undertaken by stakeholder associations.
- **Design:** This normative aspect of analysis primarily focuses on the design of legal provisions, so they *a priori* encourage economically desired behaviour and minimise the transaction costs<sup>13</sup> of the interaction.

This concentration on the effects of legal provisions forms the central difference between law and economics on the one side and traditional macro-economic theories (the “mainstream”) on the other: it directs the limelight from the analysis of individual decisions at a given set of side (or marginal) conditions to the analysis and research of causes and effects with regard to these side conditions.

In comparison to traditional side conditions of human activity, the marginal conditions of legislation are rather peculiar, as they are not (any more or less intensely) determined by the perceivable scarcity of resources (as in the case of limited budgets, drinking supplies, available time etc.), but by the fact that legal provisions can be violated without any directly perceivable physical or psychological effect by those addressed by the provision due to its intangible nature. If legal provisions are to create a specific desired effect, they must be combined with sanctions (reward or punishment). This is how legal provisions generate certain costs and consequences of decisions, thereby enabling them to influence the decisions of those involved.

---

13 Expenditures regarding time and other resources that hamper or increase the price of seamless interaction, and which have the effect of additional burdens not included in the price, whenever interaction is determined by pricing, as is typically the case in markets.