General assessment

'Empirical Views on European Gambling Law and Addiction' consists of twelve chapters, the content of which I shall discuss in the second part of my review. The pioneering spirit of the book lies in the fact that it combines two approaches of very different nature: legal and empirical. Let us first take a look at the legal analysis, before saying a few words about Planzer's empirical perspective on gambling law.

The book offers a comprehensive and rigorous legal analysis of all relevant EU/EEA primary, secondary and case law. The voluminous case law of the Court of Justice of the EU and the EFTA Court is discussed in detail. While many other publications choose a case-after-case discussion, which often results in a somehow odd reading experience, Planzer chose to analyse the case law very systematically and in a practical order. All relevant passages of the numerous judgments are critically discussed. The analysis follows the order of judicial adjudication: scope of application, justification grounds, use of the margin of appreciation and finally proportionality review. Any practitioner interested in gambling issues will appreciate the book for this thorough legal analysis.

In addition, Planzer finds a pioneering new angle: his analysis is enriched by the integration of a wealth of empirical research. This is a great added value for gaming lawyers, regulators, judges and policy makers who are normally not familiar with the fairly complex literature on gambling addiction. Planzer manages to explain the most relevant aspects of this mental health disorder in a language that is surprisingly easy to follow, considering the complexity of this field.

Linking the empirical evidence with the legal analysis, Planzer assesses to which extent key findings in the case law are actually supported by the present state of empirical evidence. In its judgements, the Court of Justice of the EU has made certain assumptions about gambling (addiction), at times far-reaching, that had direct legal consequences. For instance, it has been argued that an exclusive operator would protect consumers more effectively than competing operators or that competition between licensed operators would lead to increased risk of gambling addiction. Arguing with plenty of empirical publications, Planzer dispels many of these myths that are all too often adhered to in gambling policy, regulation and adjudication. This truly is a novel and much-needed contribution in our field of practice that helps to shift the discussion from assumptions towards evidence. Planzer's analysis illustrates the direct relevance of scientific findings for gaming lawyers, regulators, judges and policy makers alike.
Contents

Part I

‘Empirical Views on European Gambling Law and Addiction’ consists of two parts that contain twelve chapters. First, Part I deals with the relevant EU legal framework in general. Part I frames the subsequent discussion and illustrates to which extent the case law on gambling differs from the general law on fundamental freedoms.

After an introduction, Chapter 2 primarily outlines the competences that the EU has regarding Internal Market and consumer protection matters and explains the interplay between EU law and national gambling regulation.

Chapter 3 provides an excellent overview of the general law on fundamental freedoms (goods, persons, services, establishment, capital) and the conditions under which they can be restricted (Treaty restrictions as well as mandatory requirements recognised in the case law). The chapter focuses on the Court of Justice’s practice regarding the proportionality review and, in particular, the use of the margin of appreciation. This concise overview nicely prepares for the subsequent analysis in Part II.

Further provisions of EU law that may apply to gambling matters are outlined in Chapter 4, both primary law (Treaty provisions on competition and state aid) and secondary law (directives). The relevance of each directive that fully or partly applies to gambling matters is explained. Finally, Chapter 5 summarises the results of Part I.

While Part I illustrated the general legal framework, Part II analyses the EU gambling case law specifically. Similar to Chapter 3, Part II follows the practical order of judicial adjudication. First, the scope of application is discussed (Chapter 6), namely which fundamental freedoms apply to gambling activities and under which conditions games actually qualify as games of chance. If they do not qualify (e.g., prize competitions or games not played for the prospect of winning money), the wide margin of appreciation usually granted does not apply.

Chapter 7 critically discusses the legitimacy of the justification grounds used in the gambling case law. Contrary to other fields, the Court of Justice has even accepted an economic justification (proceeds contribute to public interest purposes). Only in recent decisions, the Court recognised the existence of a conflict of interest among charity operators and public authorities. This chapter critiques the double standards applied in the use of the public morality justification that Member States have regularly used as well as the moralistic language of the Court of Justice. It demystifies the alleged legitimacy of the public morality argument in 21st century Europe.

Chapters 8 and 9 form the core of Planzer’s analysis. They inquire in great detail whether the Court’s deviation from the general use of the margin of appreciation (Chapter 8) and the proportionality review (Chapter 9) has been justified. Chapter 8 explains the origin, nature and rationale of the margin of appreciation. Since that doctrine was heavily shaped by the European Court of Human Rights, Chapter 8 establishes the principles and criteria that have steered the use of the doctrine at this court. The justification grounds that are relevant in the gambling case law are in particular studied: health (addiction), crime, and public morality. Taking into account the commonalities and differences between the two courts, Planzer convincingly argues that the Court of Justice should adopt the Strasbourg Court’s coherent approach. The wide discretion granted by the Court of Justice is not justified.

Chapter 9 starts with an introduction to the nature and mechanisms of gambling addiction. Even though a lot of empirical research is quoted, the book’s language is nevertheless easy to understand for non-scientists, too. On the basis of this empirical input, the Court of Justice’s proportionality review is analysed: judicial assumptions are contrasted with empirical findings. Planzer demystifies several key assumptions that the Court has made. He does this in a very clinical and unemotional manner.

Instead of settling for an overall assessment, Planzer identifies different standards of review for different aspects of the gambling case law. For instance, the Court has hardly practised any proportionality review regarding the regulatory model chosen by the Member State (prohibition, monopoly, licensing system). By contrast, the Court has reviewed rather strictly (criminal and administrative) penalties and procedural requirements in licensing tenders.

Planzer then compares the Court’s approach to the review practice in other cases that involved similar consumer protection concerns (alcohol addiction; risk relating to the internet) and the peculiar approach on gambling is thereby confirmed. The chapter inquires next the reasons and consequences of this approach. Planzer finds sensible explanations and notes a ‘judicial vacuum’, that is, an absence of an effective proportionality review, jointly exercised by the Court of Justice and the national courts.

Finally, the book concludes with two extra chapters that inquire the role of the precautionary principle (Chapter 10) and EU fundamental rights (Chapter 11) in relation to gambling matters. Considering the notion, genesis, scope, rationale and criteria of application, Planzer concludes that the precautionary principle cannot apply to gambling related health risks. Chapter 11 identifies applicable EU fundamental rights, namely the freedom to conduct a business (Article 16 Charter of Fundamental Rights of the EU), the freedom to choose an occupation and the right to engage in work (Article 15) as well the freedom of expression and information (Article 11) in relation to advertising.

Planzer also clarifies the relationship between EU fundamental freedoms and EU fundamental rights and examines whether the scope of application of fundamental rights changed with the Lisbon Treaty.

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