sues arise, they are often situation- and context-specific. There is no question that regulation informed by CBA has advantages over regulation informed by the decision making unaided by CBA or aided by the main alternatives to CBA. CBA is not inherently biased in the way benefits and costs are computed.[67] In the real world, situations where values play significant roles in CBA are rare.[68] Moreover, the way CBA is conducted itself can be regulated, and the values used and uncertainties in the analysis can be stated explicitly. Whether doing so in all cases serves a useful purpose is a different question; characterization of uncertainties about probabilities, for instance, may provide no or little information to decision makers.[69]

XII. Conclusions

Maria Lee should be commended on a job well done. Reflecting strong scholarship and prudent judgment, her new book deserves to be read widely. Her admirable attempt to throw light in the dark corners of EU risk decision making will be of great value to those who want to understand its essence. Although it does not give the reader the full picture, it discusses the key issues related to the big picture, which is no easy job indeed. And whilst it does not attempt to answer the multitude of questions raised by the EU's risk governance system, it brings up interesting issues and asks the right kind of questions. Thus, Lee's book is of greater value in raising questions than in answering them.

The reader who is well versed on risk governance will be able to discern the threads of post-modern thinking in Maria Lee's narrative and the potential subversive influence thereof on the legality and accuracy of outcomes. To a substantial degree, Lee's "transformative, liberatory hermeneutics"[70] of EU risk regulation endorses the thinking of those who advocate the need for a "new science" and a "new relationship between science and governance."[71] This school of thought has identified some issues that require attention, but it has not provided the right answers. The book should therefore be supplemented with other publications that highlight different ways of thinking about the same problems, in particular the rational and neo-rational approaches which focus more on ensuring the legality and accuracy of outcomes.

I already look forward to the third edition of Maria Lee's book, which, based on my own scientific, value-free extrapolation, will come out in 2023.[72]

Empirical Views on European Gambling Law and Addiction

by Simon Planzer
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*David Miers**

There has, of late, been no shortage of activity at the level of the European Union concerning its institutions' reach over or their ambitions for the regulation of both remote and non-remote gambling within and across the Member States. In 2012 the Commission published its Communication *Towards a comprehensive European framework for online gambling* and later that year the resulting Road Map, whose two-fold Initiative, *Recommendations on common protection of consumers* and *responsible gambling advertising,* aims to advance the EU's public interest in the protection of the consumers of internet gambling services.[1] Over the past 18 months there has at the European Parliament been a succession of Questions for Written Answer to the Commission concerning online gambling, children's access to

67 John D. Graham, Saving Lives Through Administrative Law and Economics, 157 U. PA. L. REV. 395 (2008).

68 Cass R. Sunstein. The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers). Columbia Law Review, Vol. 114, No. 1, 2014, pp. 167-211

69 Louis Anthony Cox Jr., Gerald G. Brown and Stephen M. Pollock, When Is Uncertainty about Uncertainty Worth Characterizing?, Interfaces, Vol. 38, No. 6 (Nov. - Dec., 2008), pp. 465-468.

70 Cf. Alan Sokal, Transgressing the Boundaries: Towards A Transformative Hermeneutics of Quantum Gravity. Social Text, 46/47, Summer 1996, pp. 217-252.

71 Silvio Funtowicz, Iain Shepherd and David Wilkinson. Science and governance in the European Union: a contribution to the debate, Science and Public Policy (2000) 27 (5): 327-336.

72 The formula is year of publication of next edition = year of publication of most recent edition plus 9 years.

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1 European Commission, *Towards a comprehensive European framework for online gambling Strasbourg*, 23 October 2012, Com (2012) 345 final; *Recommendation on common protection of consumers of gambling services* DG MARKT UNIT E3 (11/2012). http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_markt_022_023_gambling.pdf.

gambling products, the protection of consumers, illegal gambling, money laundering, and complaints about potential infringements. On this last matter, at the June 2012 EP conference 'How to Regulate Betting and Gambling in Europe – Track record and future perspectives', Michel Barnier, the then Internal Market Commissioner warned that his department would 'contact all the Member States concerned by ongoing cases or complaints in order to remind them of the applicable rules and suggest that any problematic situations are rectified in line with current case law. If blatant infringements persist, I will not hesitate to propose to my colleagues that the appropriate proceedings be taken or relaunched.'[2] This was no idle threat. In November 2013 the Commission opened six new infringement proceedings,[3] bringing at that date to 12 the number of open proceedings.

Barnier's warning was made in the context of his comments about the steps that, in the absence of harmonisation at the European level, Member States could and should take in order effectively to regulate online gambling. Ever since the landmark decision in *Schindler,*[4] the Court of Justice of the European Union (the Court) has, as it confirmed in *HIT and HIT Larix*, repeatedly held that in this and in the regulation of commercial gambling generally, 'legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question.'[5] The task for operators and Member States has always been to determine from the Court's case law exactly how that protection, whether viewed as a matter of commercial threat or opportunity, or as a matter of Treaty compliant regulation, could be rendered into national law. The task is not easy, and as he notes (p. 217), Dr Planzer is not the first author who has sought to exert some rational order on the Court's jurisprudence,[6] which, for some critics is in 'a chaotic state' (p. 238).[7] What singles out his contribution is his analysis of the empirical strength of the Court's reliance on the potential for gambling to become an 'addictive disorder' as the defining feature of its 'special' or 'peculiar' nature, justifying Member States' close, and whether public or private, often monopolistic regulation.[8]

Planzer's analysis is the real substance of his book, comprising about a third of its length. His laudable purpose is to use the available science 'to advance an evidence-based system for promulgating gambling-related policy' (p. viii). His target is the Court, which he concludes has 'dealt with gambling as an issue of public morality and not of risk assessment, science and empirical evidence' (p. 234). He makes a good critical case that, by virtue of their reluctance or lack of expertise to use the scientific understanding of gambling as a means of testing the proportionality of domestic regulation imposed in the name of preventing addiction, there exists as between the Court and the national courts a 'judicial vacuum: an area of law empty of meaningful judicial scrutiny' (p. 240).

2 http://europa.eu/rapid/press-release_SPEECH-12-502_en.htm?locale=en.

3 http://europa.eu/rapid/press-release_IP-13-1101_en.htm?locale=en.

4 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, Case C-275/92 (24 March 1994).

5 *HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen* , Case C-176/11 (12 July 2012) [24], citing *Liga Portuguesa de Futebol Profissional and Bwin International*, Case C-42/07 (14 October 2008) [59]-[88].

6 Planzer notes (p. 238) that the Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal market of the European Union* (2006) counted nearly 600 cases concerning gambling before the Court.

7 For a time it seemed to some commentators that the opinions of Advocates-General Alber in *Criminal proceedings against Piergiorgio Gambelli and Others*, Case 243/01 (6 November 2003) and Colomer in *Criminal proceedings against Massimiliano Placanica and others*, Case 338/04 (6 March 2007), indicated that there might be some mileage in the notion of the mutual recognition of the terms of an operator's licence in its Member State. But the idea of a 'regulatory passport' to cross-EU gambling facilities has been thoroughly quashed in a series of later decisions (see Planzer pp. 202-206); most recently in the Biasci case: *Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Toscana (Italy) lodged on 27 December 2011 - Daniele Biasci and Others v Ministero dell'Interno, Questura di Livorno*, Case C-660/11 (12 September 2013). 'The Court has held previously in that regard that, in the light of the wide discretion the Member States have in relation to the objectives they wish to pursue and the level of consumer protection they seek and in the absence of any harmonisation in the sphere of betting and gaming, in the present state of development of European Union law there is no obligation of mutual recognition of authorisations issued by the various Member States' [40].

8 This view is equally shared by the Commission, which has systematically excluded gambling from its legislation; for example in para 25 of the Preamble to the Services Directive: 'Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection'; DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market.

Where his thesis (which this is) is less persuasive is, as he clearly recognises in the Epilogue, that 'their case law cannot substitute for responsible gambling regulation. This is the task of the legislator, be it at a regional, national or European level' (p. 293). This is, of course, entirely correct. If it is the case that legislators and governments have yet fully to grasp and to use the findings of the now abundant and robust empirical research concerning the consumer's decision to commence and then to continue gambling in the face of repeated losses, then it is very unlikely that the judicial branch will, even where it is willing to undertake such an exercise, in practice be in a position to judge the proportionality of a Member State's selected methods of control.

The book begins with a very brief summary of the history, fun and downsides of gambling, followed by the three chapters of Part I. These comprise an exposition of the basic principles of EU law: the five Treaty freedoms, the Court's application of the principle of proportionality and its development of the doctrine of the margin of appreciation. This last is discussed in the context of its origins in civilian national law and of the similarities and differences in its application by the European Court of Human Rights (ECHR). Chapter 4 deals in more detail with 'further relevant provisions for EU gambling law', comprising summaries of EU primary law and of its secondary law (the Directives on, for example, the information society, distance selling, anti-money laundering, unfair commercial practices, e-commerce, and services). Part I concludes (as does each chapter) with 'Results'. These are helpful; but for those familiar with EU law, Part I can probably simply be treated as a refresher. Apart from a very brief section (pp. 11-12), there is little discussion of how commercial gambling might be regulated or of the core parameters of that regulation.

Part II commences with three substantial chapters dealing with the application of EU law to gambling. Starting from the basic proposition, initially confirmed in *Schindler*, that national restrictions on the supply of cross-EU gambling facilities constitutes a breach of Treaty freedoms (typically, of establishment and of services), chapter 6 identifies and comments on the reasons that the Court recognises as justifying such breach. Planzer makes two critical points here. The first concerns the Court's traditional ambivalence about the plain fact that apart from any claimed, but not, he suggests, evidenced benefits relating to public order and consumer protection, many of the regulatory monopolies that Member States have sought to protect have generated considerable public revenue. The Court is clear that a fiscal justification alone is no justification; but as Planzer later argues at greater length (pp. 174-186), it is questionable whether the notion that alongside restrictive regulation the state may advertise other forms of gambling as a means of 'channelling' the gambler's wish to gamble away from more harmful products is either conceptually or empirically sound.[9]

His second point, which, again, he later elaborates, is that the Court has uncritically accepted what can only be described as an unreconstructed view of gambling as being of questionable morality. He argues that the Court has insufficiently distinguished deontological from consequentialist reasons for the assumption of its critical stance on gambling (pp. 77-81), with the result that its invocation of a moral case against gambling as a justification for national regulation either ignores or confuses any objective evidence concerning its effects on players or society at large. It is certainly the case that there continue to be those who object to commercial gambling (and to its expansion) on moral grounds: that it is an empty transaction that is parasitic on valued work and labour but yields nothing of value of itself, and that the values it does promote are antithetical to those of industry, thrift and reward. Planzer notes the Court's disdainful view of the financial benefits that flow from gambling, for example, from the ubiquitous European national lotteries. There is a fair point to be made here: national lotteries might well be regarded as inconsistent with any aspirations for the planned and progressive redistribution of wealth,

9 In the *Markus Stoss* case, C-316/07, (8 September 2010), which dealt extensively with the position of advertising, the Court was perhaps more robust in its views, concluding (at the risk of being over-selective in the following quotations), that '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' [103], and that in such a case, the 'national court may legitimately be led to consider that such a monopoly is not suitable for guaranteeing achievement of the objective for which it was established, of preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner' [107(iv)].

since they permit large and, by definition entirely random, accumulations of capital. Ether here, or in later sections where he addresses gambling addiction, the reader would be better informed had Planzer drawn on the extensive sociological literature that has emphasized gambling's various functions within a capitalist economy: providing socially legitimate opportunities for increasing and accumulating wealth; delineating, and in some cases blurring distinctions between work and leisure; and facilitating an alternative life choice for the dispossessed and the disengaged. Reflecting post-modern writing, gambling has also been analysed as a culturally defined and socially managed form of risk taking behaviour: of the conscious use of chance as a means by which we come to terms with an uncertain world.

Chapter 8 comprises, firstly, a summary of the factors that the ECHR has considered when developing (Planzer calls the process 'steering') the margin of appreciation in relation to crime, health and public morality, and, secondly and by comparison with the ECHR and the Court of Justice of the European Free Trade Association States (the EFTA court), the Court's application of the margin in respect of gambling. The story is one of significant differences. Where both the ECHR and the EFTA court have sought to limit the margin, the history of the Court's application in the case of gambling can be shortly summarised: no limit, some limit, no and some limits. This is a history that will be very familiar to practitioners, and is one to which Planzer later returns. In short, the EU's adoption of the 'peculiar nature' of gambling meant that the Court initially (*Schindler* and *Laara*[10]) was prepared to grant an unlimited margin to national legislation. In *Gambelli* by contrast, and as noted earlier in this review, the Court adopted a more critical stance, in particular of the incompatibility of a Member State encouraging ('channelling') consumers to gamble to the benefit of the public purse while simultaneously asserting public order reasons to reduce possible addiction as the justification for that encouragement. Later, the picture is mixed: the Court's judgement in *Placanica* appears aligned with *Gambelli,* but in *Liga Portuguesa*, it reverts to the early case law. Planzer's thesis is that the Court's abdication of any serious responsibility for the measured application of the margin of appreciation or of the reasoned application of the proportionality review both stem from the EU's initial stance on gambling. That abdication (the 'peculiar' or 'special' nature of gambling) in turn forecloses both a critical understanding of national legislation and an understanding of what is meant by 'gambling addiction'. The epidemiology and prevalence of gambling is the subject matter of Chapter 9. The international literature on 'gambling disorder' is vast, and it is not necessary to review it here. Suffice to say that Planzer does a good job of summarising the key points about DSM IV (now DSM V), prevalence rates across western societies, co-morbidity, dependency triggers, and the development of gambling disorder in individuals (pp. 125-156). He says little about their treatment, but this does not detract from his central point. This is that for the Court there has traditionally been no empirical testing and therefore no possibility of reasoned proportionality review, of the questions, first, what impact the choice of regulatory control has upon the development of gambling disorders, for example of monopoly or sector licensing, or, secondly of competition for gambling markets. In either case the Court's reliance on the notion of 'channelling' as a means of directing players away from more harmful gambling is reliance on 'an empty shell' (pp. 157-170).

By contrast, there is some empirical support for the Court's requirement that any controlled expansion of advertising must (as with any other controls) be conducted in pursuit of a consistent and systematic policy (pp.171-186), as there is for the impact of gaming machines on the player, albeit Planzer's analysis here is both understated and rather bland. It may be true that causality between machine play and gambling disorder is elusive (p. 189), but there is strong correlational evidence of a connection. In contrast to terrestrial gambling internet gambling presents both greater dangers but also the possibility of greater regulatory control. Recognising, first, that 'remote' gambling comprises both placing bets by means of the internet or telephone on such real events as the outcome of World Cup football games or a horse race, and playing a virtual game such as on-line poker or a lottery (a distinction that Planzer does not sufficiently make), gambling on real events does pose serious concerns particularly with regard to children and young persons, but when appropri-

10 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State*), Case C-124/97 (21 September 1999).

ately regulated, does not commonly generate issues concerning consumer protection. By contrast, gamblers who risk money on virtual games are especially vulnerable to exploitation, not least from the fact that they have no means of verifying the results of the game since its determination takes place entirely within that virtual world. This information deficit is aggravated by their vulnerability to any number of scams once they have advised the operator of their credit card details, and where the operator is located in a jurisdiction beyond their legal or practical reach, the absence of any redress where there is fraud or the non-payment of winnings. These are matters addressed by the EC's proposed high level of consumer protection across the EU,[11] and that the Court has, if, as Planzer says, 'relatively lately' (p. 190), also addressed. He makes the proper distinction between being addicted to the internet and being addicted to internet gambling – not the same epidemiology – but could draw attention to the much greater opportunities for controlling dysfunctional play that the internet offers. These particularly include player tracking, whereby players who, by definition, have identified themselves when logging onto the website, may be warned about their expenditure and time of play, be provided with self-exclusion facilities, or have their session of play discontinued where they have exceeded any self-limitations. All of this is directly relevant to the Court's concerns about addiction, but it has to date failed to acknowledge these possibilities.

In the final sections of Chapter 9 (pp. 217-251) Planzer advances his explanations for the Court's generally undemanding approach to the margin of appreciation and to proportionality review when compared with such cognate areas as substance addictions and internet services touching on public health. These explanations fall into two broad groupings. The first is located in the historical-political setting of fluctuations in the strength of the EU's drive towards 'ever greater union' and in the Court's normative stance on the doubtful morality of gambling. His argument is that, prompted in part by some Member States' reservations about the wider economic impact of German reunification, the 1990s saw a shift in political discourse from a deeper union in favour of national sovereignty and of the complementary principle of subsidiarity. This shift coincided with the Court's first engagement with gambling (*Schindler*),whose decision was, Planzer argues, fundamentally driven by Advocate General Gulman's acceptance of this discourse as the proper context in which to frame the Court's approach. This was, and continues to be, that 'it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling', which locates and privileges regulatory control at the national level. The consequence of this approach, coupled with the Court's uncritical notion of 'gambling fever', has been, Planzer argues and as the review noted earlier, an almost complete disregard of the empirical evidence around gambling disorders. He notes (p. 235) that In *Lindman* the Court remarked that the case file disclosed 'no statistical or other evidence' to support the case for control; but this was a lone and not to be repeated dictum.[12]

The second explanation concerns the functioning of the Court, its personnel and relationship with national courts. Because its view is that the regulation of gambling is best dealt with at a national level, the margin of appreciation, applied at that level, must inevitably accommodate a wide range of culturally dependent forms of regulation. The test of proportionality is also best undertaken by national courts, but as they have varied in their approach so the Court has been content to remark upon and to validate the referring courts' own understanding or reservations; without, save occasionally, giving any further guidance on reviewing the proportionality of national measures. This is what Planzer calls the 'judicial vacuum', a deficit that, apart from its intellectual and legal incoherence, fails to serve the interests of consumer protection (p. 292).

Planzer offers readers familiar with the Court's jurisprudence a different and a challenging take on its tired formula on whose basis national regulation may justifiably be in breach of Treaty freedoms. For those unfamiliar with this area, his book is a useful introduction to a complex aspect of the Court's jurisdiction. The question for both sets of readers is whether the Court is effectively performing its role, alongside national governments, in ensuring that national regulation does indeed serve all those who have an interest in a crime-free, fair and non-exploitative commercial gambling market: Member States, operators, regulators and consumers.

11 *Supra*, n. 1.

12 *Diana Elisabeth Lindman*. Case C-42/02 (13 November 2003).