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# “Pathological Gamblers” and “Sovereign Consumers”: National Gambling Regulation and the Challenges of European Integration and Digitization in Germany, 2004–2018

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## Abstract

This study examines the interrelationship between national sovereignty and individual consumer sovereignty in the age of a global liberal economy and digital markets by analyzing Germany’s gambling regulations. As gambling policies were codified and liberalized from 2004 to 2018, gambling addiction quickly became the key issue in legal and political quarrels over regulation. The article will shed light on the differing interests at play in the controversy and discuss how discourses on addictive gambling behavior affected political disputes over gambling liberalization. It explores contemporary German gambling regulations in the context of European integration and the digitization of the gambling market, which posed crucial challenges to national sovereignty. I argue that Germany’s claim for national autonomy over gambling regulations was deeply intertwined with the question of individual consumer sovereignty because it relied on the pathologization of certain types of gambling consumption and gamblers. The emergence of the “pathological gambler” can be understood as the manifestation of a new socioeconomic and political order in which risks emanating from liberalized markets are dealt with as individual consumer addiction issues.

## Introduction

Since the gradual liberalization of gambling beginning in the 1960s, the global gambling market has grown remarkably. Since 2000, gambling has increased rapidly, mostly online. Between 2006 and 2016, land-based gambling increased by one-third; during the same period, online gambling tripled its gross revenue from 15 billion euros in 2006 to 40 billion in 2016, doubling its market share.<sup>1</sup> As gambling has commercialized, awareness of gambling-related health problems has grown, specifically of gambling addiction.<sup>2</sup> The development of knowledge of gambling addiction is indeed quite recent. Perception of gambling addiction as a national and individual health risk emerged at the same time as the liberalization of gambling reached its first peak in the United States at the end of the 1970s.<sup>3</sup>

<sup>1</sup> Sven Jung, Jan Kleibrink, and Bernhard Köster, *Die Digitalisierung des Glücksspiels* (Dusseldorf: Handelsblatt Research Institute, 2017), 54–55.

<sup>2</sup> Gerda Reith, “Gambling and the Contradictions of Consumption: A Genealogy of the ‘Pathological’ Subject,” *American Behavioral Scientist* 51, no. 1 (2007): 35.

<sup>3</sup> One example of the rising perception of gambling addiction as a public health issue would be the National Council on Problem Gambling (NCPG), which was founded in 1972. It represents the biggest American organization that aims at raising the public awareness on gambling risks and gambling addiction: see National Council on Problem Gambling (<https://www.ncpgambling.org/>).

Although addiction was mentioned before gambling was commercialized, it was relatively rare compared to today. Only when pathological gambling (PG) was included in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)* in 1980 did a specific type of excessive gambling behavior enter official classifications of psychiatric disorders.<sup>4</sup> Since the integration of pathological gambling into *DSM-III*, the “pathological gambler” has become omnipresent in public as well as scientific discourses on gambling.<sup>5</sup>

In West Germany, the commercialization of gambling started in the mid-1970s, when numerous new casinos opened in larger cities and semi-electronic gambling machines increasingly appeared in casinos, gambling halls, restaurants, and bars. From the late 1990s onward, this development gained pace in all of unified Germany through the internet revolution and technological developments such as the computerization of gambling machines. But gambling addiction received increased public attention only when the Federal Constitutional Court ruled in 2006 that the state monopoly on sports betting was unconstitutional and incompatible with the fundamental right to occupational freedom. Such a monopoly was declared to be constitutional only insofar as it was consistently geared “to the goal of combating the dangers of addiction.”<sup>6</sup> The federal states had ratified the Interstate Lottery Treaty (*Lotteriestaatsvertrag*, *LottStV*) in 2004. This formally established the state monopoly on public gambling for lotteries and sports betting, though this monopoly had already existed *de facto*.<sup>7</sup> Although lawmakers stated that sports betting harbored particular risks, if offered by private operators, they declared state-run lotteries and sports betting necessary to satisfy citizens’ purportedly natural play instinct.<sup>8</sup> The federal states thus issued a new Interstate Gambling Treaty (IGT) (*Glücksspielstaatsvertrag*) in 2008 as a reaction to the Federal Constitutional Court’s judgment.<sup>9</sup> But instead of ending the regulatory process, the treaty further fueled ongoing public controversy over the pros and cons of a possible liberalization by explicitly prohibiting online gambling and reaffirming the state monopoly on sports betting.<sup>10</sup>

At first glance, the German public debate on gambling liberalization seems to have focused on gambling addiction because of “naturally” growing fears about increasing gambling opportunities.<sup>11</sup> A closer examination, however, reveals that the omnipresence of gambling addiction in the public controversy over gambling liberalization resulted from the altered economic, political, and social circumstances of the debate. The “pathological gambler” is not a natural category; it was created in scientific and public discourses. According to sociologist Gerda Reith, the addicted or “pathological gambler” is a “distinct historical subject” who was socially constructed and shaped historically in the context of the commercialization and the contested liberalization of gambling.<sup>12</sup>

<sup>4</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-III* (Washington, DC: APA Publishing, 1980).

<sup>5</sup> Alan F. Collins, “The Pathological Gambler and the Government of Gambling,” *History of the Human Sciences* 9, no. 3 (1996): 69–70.

<sup>6</sup> Bundesverfassungsgericht (BVerfG), Judgement of the First Senate of 28 March 2006—1 BvR 1054/01—para. 1–162 ([http://www.bverfg.de/e/rs20060328\\_1bvr105401en.html](http://www.bverfg.de/e/rs20060328_1bvr105401en.html)).

<sup>7</sup> *LottStV*, §2, June 22, 2004 (<https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Rechtssprechung/Lotteriestaatsvertrag.pdf>).

<sup>8</sup> *LottStV*, 19–22.

<sup>9</sup> The definition of gambling here being the sale of a chance of winning in a public game, of which the outcome totally or predominantly depends on uncertain future events: *GlüStV*, §3, January 1, 2008 (<https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Staatsvertrag/GlueStV.pdf>).

<sup>10</sup> *GlüStV*, §4, §10.

<sup>11</sup> See Mark Griffiths, “Internet Gambling: Issues, Concerns and Recommendations,” *CyberPsychology & Behavior* 6, no. 6 (2003): 557–68; Kurosch Yazdi and Karin Yazdi, “Glücksspiele im Internet—Neues Gefahrenpotenzial?,” *Psychiatria Danubina* 26, no. 4 (2014): 389–393.

<sup>12</sup> Reith, “Gambling and the Contradictions of Consumption: A Genealogy of the ‘Pathological’ Subject,” 33, 38–39, 51; Gerda Reith, “Techno Economic Systems and Excessive Consumption: A Political Economy of ‘Pathological’

This study examines how the figure of the “pathological gambler” emerged in the post-2006 German political debate on gambling liberalization within the context of Germany’s attempt to exert sovereign control over its gambling market under the conditions of European integration and digitization. To show how debates around liberalization created certain tropes around individual behavior within market economies, I relate the “pathological gambler” to the concept of the “sovereign consumer,” who has been described as the key figure and a main driving force in the making of the contemporary “neoliberal political paradigm.”<sup>13</sup> Following the perspective of changing practices of “subjectivization,” I show that these two figures are diametrically opposed, but complementary and co-constituted opposites, which deeply influenced the public controversy over potentially liberalizing federal gambling regulations.<sup>14</sup> The important role of the discourse on gambling addiction inside the public liberalization debate reveals how the German state reacted to the challenges of new technological and economic developments in the gambling market and to the pressures of supranational jurisdiction. European nation-states voluntarily compromised parts of their sovereignty by signing the EU treaties, agreeing to the terms and conditions of the EU single market and allowing supranational institutions to exercise authority over their territories. But states still aspired to reclaim that sovereignty when it seemed in their interest to do so.<sup>15</sup> Scholars described the European nation-states’ pursuit of national policy agendas within a borderless economic system as the “paradox of neo-liberal democracy.”<sup>16</sup> This study holds that the global liberalization and digitization of gambling, as well as European integration, effectively undermined Germany’s sovereignty over its domestic gambling market. They compromised what Stephen Krasner has called the state’s “domestic” as well as “interdependence sovereignty,” by undermining the ability of German authorities to control gambling activities within the borders of the state effectively and to control trans-border flows of gambling commodities and revenues.<sup>17</sup> The lack of effective control also weakened the state’s authority over national gambling legislation because many of its policies were subverted by the actual gambling market and were delegitimized by EU jurisdiction.

More broadly, I show how control became the central element at stake in the public debate over gambling regulations, connecting the gambling consumer’s individual sovereignty with Germany’s state sovereignty. The article first argues that pathologizing a certain type of gambling behavior fundamentally questioned individuals’ consumer sovereignty by curtailing their autonomy and freedom of choice. Second, it claims that the opponents of liberalization pursued their political agenda by developing a different conception of the “pathological gambler” than advocates of liberalization. These different conceptions led to different legitimization strategies for future gambling regulation. Whereas proponents of liberalization legitimized their policy agenda by emphasizing gamblers’ ability to control their gambling consumption and insinuated that “pathological gamblers” were individually responsible for gambling addiction, anti-liberalization advocates argued that gamblers could not control their behavior in a market economy with unlimited competition from

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Gambling,” *The British Journal of Sociology* 64, no. 4 (2013): 717–38; Brian Castellani, *Pathological Gambling: The Making of a Medical Problem* (New York: Suny Press, 2000), 145.

<sup>13</sup> Niklas Olsen, *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (London: Palgrave Macmillan, 2019), 7–9; Reith, “Gambling and the Contradictions of Consumption: A Genealogy of the ‘Pathological’ Subject,” 39–41.

<sup>14</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, ed. Michel Senellart (Basingstoke, England: Palgrave Macmillan, 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, ed. Michel Senellart (Basingstoke, England: Palgrave Macmillan, 2010); Wiebke Wiede, “Subjekt und Subjektivierung,” *Docupedia-Zeitgeschichte*, October 26, 2019 (<http://dx.doi.org/10.14765/zf.dok-1707>); Nikolas Rose, *Governing the Soul. The Shaping of the Private Self* (London and New York: Free Association Books, 1989).

<sup>15</sup> See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 9.

<sup>16</sup> Colin Crouch, “Economic Patriotism and the Paradox of Neo-liberal Democracy” (paper presented at the first Economic Patriotism Workshop, Warwick University, 2008), 13–14; Ben Clift and Cornelia Woll, “Economic Patriotism: Reinventing Control over Open Markets,” *Journal of European Public Policy* 19, no. 3 (2012): 308.

<sup>17</sup> Krasner, *Sovereignty*, 4.

private gambling operators and stated that all gamblers could fall victim to gambling addiction under these circumstances. Third, the article shows how regulators deployed the “pathological gambler” in their intent to reclaim control over the national gambling market and to regain authority over national gambling legislation. It argues that federalism was one of the reasons why this intent was ultimately unsuccessful.

Analytically, the article builds on Sytze Kingma’s suggestion that the social phenomenon of the “pathological gambler” conforms to a “risk model” of regulation. In his analysis of the history of gambling policies in the Netherlands, Kingma states that along with the liberalization and expansion of gambling from the 1980s, the risk model of gambling regulation gradually superseded the “alibi model” of the welfare state. Whereas gambling had been highly controversial in the 1960s and thus severely restricted or prohibited, in the “risk society,” gambling became a legitimate form of entertainment and was mainly regulated through risk assessments to prevent and combat its external effects—first and foremost the risks of gambling addiction and crime. Like Kingma, I understand the profound involvement of society with potential addiction risks as a modified policy strategy in need of a historical explanation.<sup>18</sup>

In the following, I will first explain how gambling was regulated up until the Federal Constitutional Court’s judgment in 2006 and which factors led to a change in regulation. Second, I will illuminate how the emerging “pathological gambler” opposed the concept of the “sovereign consumer.” Third, I will examine differing economic and political interests in the public liberalization controversy and ask how the figure of the “pathological gambler” shaped the ongoing debate over gambling regulations. Finally, I will address which strategies the German government and federal states pursued in order to achieve autonomous regulation in the face of European integration, multinational companies, and digitization. The gambling liberalization debate reveals how the question of national sovereignty is connected to the issue of increasing individual responsibility over global societal risks in free-market economies.

### **The National Gambling Monopoly, 2004–2008, and the Psychiatric Concept of Pathological Gambling**

At first glance, the aim of the first national gambling treaty was twofold. On the one hand, legislators intended to simplify and harmonize the heterogeneous gambling policies, which were implemented by the federal states. The 2004 Interstate Lottery Treaty (LottStV) created a homogeneous legal framework for all states. On the other hand, legislators wanted to codify the state monopoly on lotteries and sports betting, which had existed *de facto* since 1949 but had been questioned by recent judicial decisions.<sup>19</sup> In the so-called “Gambelli Decision” of 2003, the European Court of Justice (ECJ) had ruled that a state monopoly on sports betting was constitutional only on the condition that it protected consumers and preserved public order by successfully limiting and decreasing the supply of bets offered. A state monopoly on gambling could not be justified in the interest of public order if the authorities of a member state incited and encouraged gamblers to participate in games of chance “to the benefit of the public purse.” Such a monopoly was judged to restrict the so-called “freedom of establishment” which, according to the treaty that set up the European Community, allowed citizens to do business in other member states.<sup>20</sup> Before the trial, the Italian government had filed a criminal lawsuit against Gambelli and other defendants, who had collected

<sup>18</sup> Sytze Kingma, “Gambling and the Risk Society: The Liberalisation and Legitimation Crisis of Gambling in the Netherlands,” *International Gambling Studies* 4, no. 1 (2004): 48–50.

<sup>19</sup> LottStV, 19.

<sup>20</sup> ECJ, Judgment of the Court, 6 November 2003, para. 57, 59, 61–63, 69 (<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=24EFFC34198680770CC9337A60556099?text=&docid=48383&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10907905>).

and transmitted betting data in Italy from a British online bookmaker and had offered his betting services in Italy. As in Germany, however, gaming and betting activities were subject to restrictive regulations and reserved for the Italian state and state-licensed agents.<sup>21</sup> The “Gambelli Decision” judged that such a gambling monopoly was essentially unconstitutional and justified only if tied to strict conditions of consumer protection. This set the course for further court rulings that dealt with the challenges caused by a “borderless” online gambling market within the European single market, which was composed of sovereign nation-states with differing gambling legislations. The growing competition of an international online sports betting market led to new conflicts of interest among national governments, the gambling industry, and supranational institutions. In Germany, increased competition not only came from foreign online gambling companies, but also from German online sports betting and gaming businesses possessing licenses from the German Democratic Republic, such as Digibet, Interwetten, and Bwin. Various federal state court decisions had ruled in favor of or against these private operators, who argued that the Unification Treaty of 1990 guaranteed their licenses’ validity throughout Germany.<sup>22</sup> The 2004 treaty standardized different legal regulations and formally established the nationwide monopoly on sports betting and lotteries, which included a prohibition of online gambling. But the treaty was also a defense against growing competition from private, transnational, online sports-betting companies.

Protecting the state monopoly on the sports betting market from private competition seemed all the more important because the state could not compete with the winning rates of private bookmakers or betting exchanges. The state company Oddset levied a basic charge for public funds on the money customers placed on bets. This levy considerably diminished the possible winnings compared to those offered by private operators. The fee disproportionately reduced the winnings for customers who placed lower bets [or wagers].<sup>23</sup> Moreover, private sports betting companies offered more attractive betting products. For example, the company Bwin launched its live bet product in 1998, enabling gamblers to place online bets on live sporting events. Placing real-time bets increased the gamblers’ excitement, enabled immediate winnings, and heightened the chance of winning because following bets placed via livestream made predicting game events and outcomes far easier. With the state monopoly anchored on sports betting, the federal states thus intended to eliminate competition from private online companies, which attracted customers through much more enticing betting products and winning odds. Therewith, the states hoped to secure the important amount of taxes levied on sports bets and lotteries.<sup>24</sup>

Yet, after the Gambelli decision, the Federal Constitutional Court judged the state monopoly on sports betting to be incompatible with the basic right of occupational freedom in 2006. This left German legislators with two options. They could either liberalize the gambling market by lifting the ban on online gambling and the restrictions for private gambling companies, or they could adhere to the state monopoly on sports betting and the prohibition of online gambling, if they met the requirements of the court decision by consequently reorienting the gambling policies toward consumer protection and the fight against addiction risks. As the Interstate Gambling Treaty of 2008 (GlüStV) demonstrates, the federal states chose to secure the state monopoly and to ban all forms of online gambling.

Developments in psychiatry laid the foundation for the Federal Constitutional Court’s decision. In 1980, the American Psychiatric Association (APA) included the psychiatric

<sup>21</sup> ECJ, Judgment of the Court, 6 November 2003, para. 2, 7–8.

<sup>22</sup> Merten Haring, *Sportförderung in Deutschland. Eine vergleichende Analyse der Bundesländer* (Wiesbaden: Verlag für Sozialwissenschaften, 2010), 75.

<sup>23</sup> “Oddset Quoten,” *Bild Sportwetten*, 2020 (<https://sportwetten.bild.de/oddset-quoten/#:~:text=Oddset%20Auszahlungsquoten&text=Hinzu%20kommt%2C%20dass%20bei%20Oddset,bei%20jeder%20einzelnen%20Wette%20ab>).

<sup>24</sup> Since the global expansion of commercial gambling, the amount of collected taxes on gambling has risen considerably, surpassing the amount of tax moneys levied on alcohol by far. For the amount of tax moneys levied on alcohol, see “Alkoholsteuer,” Federal Ministry of Finance (<https://www.bundesfinanzministerium.de/Web/DE/Themen/Zoll/Verbrauchssteuern/verbrauchssteuern.html>).

category of pathological gambling into the *DSM-III*. This enabled the Federal Constitutional Court to stipulate that the protection of consumers and the fight against gambling addiction could justify state intervention in the market. Once a specific kind of excessive gambling behavior was recognized officially as a mental disorder, policymakers, legislators, the media, as well as affected gamblers and their families started to perceive the fight against the “spread” of the gambling disease as a matter of public health.

Interestingly, this new public health concern correlated with the rapid commercialization of gambling and the first peak of gambling liberalization in the United States. As Gerda Reith observed, this correlation was not a coincidence. Given that the diagnostic criteria for pathological gambling indicate loss of control and irrationality as key symptoms differentiating “pathological gamblers” from their “healthy” counterparts, the figure of the “pathological gambler” represented the negative ideal of the “sovereign consumer.”<sup>25</sup> Scholars argued that the figure of the “sovereign consumer” justified neoliberal economic theories’ idea of a deregulated economy without state intervention in the market.<sup>26</sup> According to neoliberals, the “sovereign consumer” regulates free markets through the principle of freedom of choice, keeping supply and demand in balance and guaranteeing economic growth by making rational, informed, and self-interested consumption choices.<sup>27</sup> As an antithesis to the responsible, self-controlled “sovereign consumer,” the authors of the *DSM* and *ICD* (International Classification of Disorders) manuals essentially characterized “pathological gamblers” as irrational consumers, who had lost control over their consumption choices, and subsequently, their lives. They identified them by their failure to control or resist impulses to gamble, “despite [their] inability to pay mounting debts, or despite other significant social, occupational or legal problems that the person knows are exacerbated by gambling.” The manual described their behavior as “uncontrolled,” impulsive comportment without any reasonable motivation.<sup>28</sup> Drawing on the conception of the “sovereign consumer,” APA psychiatrists conceived of “social gambling” and “professional gambling” as “rational” and controlled gambling, juxtaposing it with the mental disorder of pathological gambling: “Social gambling typically occurs with friends or colleagues, and lasts for a limited period of time, with predetermined acceptable losses. In professional gambling risks are limited and discipline is central.”<sup>29</sup> In contrast to the sovereign consumer mode of consumption, the “irrational” consumption of the “pathological gambler” was incompatible with the neoliberal logic of market optimization because the failure to manage his or her freedom of choice threatened social and economic stability. The *DSM* thus appears to have pathologized uncontrolled consumption in an economy with a deregulated gambling market.<sup>30</sup> This process of medicalizing gambling behavior, beginning in 1980, denied consumer sovereignty and the freedom to make autonomous choices to a specific kind of excessive gambler, who became viewed as problematic by public authorities in the new socio-economic order of neoliberalism.

The new medical distinction between “pathological gamblers” and social or professional gamblers arguably helped to legitimate the latter by delineating inappropriate gambling behavior in a neoliberal economy.<sup>31</sup> By establishing distinctions between the irrational,

<sup>25</sup> Reith, “Gambling and the Contradictions of Consumption: A Genealogy of the ‘Pathological’ Subject,” 41–45.

<sup>26</sup> Olsen, *The Sovereign Consumer*; Karsten Witt, *Wohlfahrt und Freiheit. Eine Kritik an der Rechtfertigung freier Märkte* (Frankfurt/Main: Campus, 2012), 66.

<sup>27</sup> Roberta Sassatelli, *Consumer Culture. History, Theory and Politics* (London: Sage Publications 2007), 57–60; Jason L. Saving, “Consumer Sovereignty in the Modern Global Era,” *Journal of Private Enterprise* XXII, no. 1 (2006): 107.

<sup>28</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-III-R* (Washington, DC: APA Publishing, 1987), 312.31; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV* (Washington, DC: APA Publishing, 1994); Horst Dilling, Werner Mombour and Martin H. Schmidt, ed., *Internationale Klassifikation psychischer Störungen, ICD-10* (Bern: Huber 1993), 237–38.

<sup>29</sup> *DSM-IV*.

<sup>30</sup> See Reith, “Gambling and the Contradictions of Consumption: A Genealogy of the ‘Pathological’ Subject,” 41.

<sup>31</sup> See Alex P. Blaszczynski and Neil MacConaghy, “The Medical Model of Pathological Gambling: Current Shortcomings,” *Journal of Gambling Behavior* 5, no. 1 (1989): 43.

unbridled “pathological gambler” and other gamblers, non-pathological gamblers became viewed as “rational,” self-controlled consumers of a “normal” leisure activity. The pathologization of “irrational,” gambling behavior legitimized gambling liberalization at a time when moral concerns around commercial gambling were still widespread and the limited supply of state-controlled gambling facilities was justified by the collection of profits as a means to achieve welfare goals.<sup>32</sup>

In the German post-2006 political controversy over gambling liberalization, policymakers and judiciaries mostly talked about gambling addiction or addicted gamblers, instead of using the psychiatric term *pathology*. Although APA psychiatrists conceptualized only uncontrolled gambling as a “behavioral addiction” in 2013, renaming the disease gambling disorder. Moreover, the ICD manual did not use this new concept but, instead, adhered to the former category of pathological gambling as an impulse control disorder.<sup>33</sup> There is, in fact, an important conceptual difference between an impulse control disorder and a behavioral addiction with regard to the key characteristic, loss of control. A behavioral addiction equates the disorder with an addiction to psychoactive substances and assumes that the “sick” gamblers suffer from anomalies in the neurochemical pathways or changes in the reward center of the brain. This makes them victims of the “urgent need to keep gambling” unless the opportunity is completely abandoned.<sup>34</sup> Consequently, the idea of an addiction to gambling insinuates that the affected gambler cannot control his or her behavior and cannot be held accountable for behavior that is *uncontrollable*. Defining pathological gambling as an impulse control disorder, by contrast, implies that the diagnosed gambler fails to control his or her behavior because of individual personality deficiencies that impede the “pathological gambler” from resisting a strong urge or desire to gamble.<sup>35</sup> The mental disorder of pathological gambling thus invokes an *uncontrolled* rather than an uncontrollable behavior. Depending on the perspective taken, the “pathological gambler” can either be considered responsible for the “irrational” behavior or helpless in the face of addiction. Nevertheless, the term *addiction* became prevalent in German public discourses on problematic gambling. This is because psychiatrists have found neither a physiological cause nor origin of the impulse control disorder Pathological Gambling, nor the behavioral addiction of gambling disorder. Despite all research efforts to find an assumed underlying biological cause, psychiatrists, cognitive psychologists, and neurologists have not succeeded in tracing the disorders to a biological dysfunction.<sup>36</sup> In the 1980s, the APA assumed that this scientific deficiency would be solved by researchers in the near future.<sup>37</sup> Consequently, pathological gambling and gambling disorder rely on the merely provisory description of ascribed characteristics as diagnostic criteria, though these gradually changed from one DSM version to the next and remain controversial among many scientists.<sup>38</sup>

<sup>32</sup> Kingma, “Gambling and the Risk Society,” 55, 64–65.

<sup>33</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (Washington, DC: APA Publishing, 2013); John E. Grant et al., “Impulse Control Disorders and ‘Behavioral Addictions’ in the ICD-11,” *World Psychiatry* 13, no. 2 (2014): 125–26.

<sup>34</sup> DSM-5, 58–56.

<sup>35</sup> “Associated features” of “pathological gambling” named in *DSM-IV* include, for example, individuals with “distortions in thinking (e.g., denial, superstitions, overconfidence, or a sense of power and control)” or individuals, who “are overly concerned with the approval of others” or are “energetic, restless and easily bored.”

<sup>36</sup> DSM-5, 20. See, for example, D. E. Comings et al., “The Addictive Effect of Neurotransmitter Genes in Pathological Gambling,” *Clinical Genetics* 60, no. 2 (2001): 107–16; J. F. Navarro and Carmen Pedraza, “Pathological Gambling: Biological Aspects,” *Psicologia Conductual* 6, no. 1 (1998): 157–64.

<sup>37</sup> DSM-III-R, x–xi.

<sup>38</sup> See, for example, Eric R. Maisel, “The New Definition of a Mental Disorder: Is it an Improvement or Another Bizarre Attempt to Name a Non-existing Thing?,” *Psychology Today*, July 23, 2013; Thomas A. Widiger and Lee Anne Clark, “Toward DSM-V and the Classification of Psychopathology,” *Psychological Bulletin* 126, no. 6, (2000): 946–63; Dusan Kecmanovic, “The DSM-5 Definition of Mental Disorder,” *Australian and New Zealand Journal of Psychiatry* 47, no. 4 (2013): 393–34; Grant et al., “Impulse Control Disorders and ‘Behavioral Addictions’ in the ICD-11,” 125–26.

The public use of the phrase “gambling addiction” does not reflect a conscious choice to define gambling as a behavioral addiction. Rather, it reflects the broad societal adoption of rather vague psychiatric concepts. The lack of an etiology supports the view that instead of medical categories, these are malleable social constructs mirroring the societal values of the contemporary socioeconomic order. Because they are social constructs and involve an unaddressed ambiguity regarding the attribution of responsibility for gamblers’ supposed loss of control, the question of responsibility for gambling addiction becomes a matter of interpretation. In fact, the unclarity over whether “pathological gamblers” engage in an uncontrolled or an uncontrollable activity has had repercussions for how participants in the German public debate on gambling liberalization have subsequently construed “sick” gamblers.

### **The “Pathological Gambler” as Pivotal Figure in the Liberalization Debate, 2006–2018**

The figure of the “pathological gambler” assumed a central role in the public debate on gambling regulation, which started right after the judgment of the Federal Constitutional Court in 2006 and continues today. The main lines of argument against liberalizing gambling emerged during the 2006 trial itself, when the Federal Ministry of Justice, federal state governments, and delegates of the Association for Gambling Addiction (*Fachverband Glücksspielsucht*), which was composed of psychiatrists, psychologists, therapists, and self-help groups for those diagnosed as “pathological gamblers,” took a stance against the constitutional complaint in question.<sup>39</sup>

The complainant, a bookmaker running a sports betting office in Munich, had filed suit against prior decisions of the Higher Administrative Court and the Federal Administrative Court, ruling that the existing unrestricted prohibition on the private organization and arrangement of fixed-odds betting did not violate the right to occupational freedom laid down in the Basic Law.<sup>40</sup> These judgments were made on the grounds that a state monopoly on sports betting was a necessary means to protect the mental health and the financial stability of gamblers from the dangers of a commercial exploitation of their gambling passion.<sup>41</sup> The complainant, however, argued that the prohibition of commercial betting was unsuitable to avoid those dangers, because German gamblers had access to numerous opportunities for gambling offered by foreign bookmakers on the internet. Moreover, she argued that the state did not control or monitor gambling-related risks any better than private operators, because state-organized betting primarily pursued financial interests rather than acting on “motives of regulatory law.”<sup>42</sup> In her view, the prohibition of private sports betting operations was therefore unconstitutional and violated the right to occupational freedom.<sup>43</sup>

During the trial, state representatives unanimously agreed that the constitutional complaint was unsubstantiated on the grounds that commercial gambling differed fundamentally from state-run gambling enterprises regarding the pursuit of profit. Private gambling companies, they maintained, exploited the “natural play instinct” of the population by expanding the range of games of chance, and thus inevitably augmented the risks of gambling addiction. They claimed that the prohibition of gambling together with the state monopoly on sports betting reduced overall gambling offers and thus the risk of addiction. The fight against severe threats to public health was raised as a legitimate reason to

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On the “descriptive” approach of the *DSM-III*, see George E. Vaillant, “The Disadvantages of *DSM-III* Outweigh Its Advantages,” *Journal of American Psychiatry* 141, no. 4 (1984): 542.

<sup>39</sup> BVerfG, para. 49–55.

<sup>40</sup> BVerfG, para. 31, 39.

<sup>41</sup> BVerfG, para. 28.

<sup>42</sup> BVerfG, para. 41.

<sup>43</sup> BVerfG, para. 39.



penalize gambling and to justify the existing state monopoly on sports betting. According to the Bavarian government, the city of Munich and the Federal Ministry of Justice, the state's task was to offer a limited number of "low-risk" gambling opportunities as a means to restrict gambling enticements that would otherwise be unleashed in an environment of free competition between profit-oriented providers.<sup>44</sup>

In the opinion of state representatives, an unregulated gambling market necessarily seduced gamblers into uncontrolled consumption and led to addiction. The Bavarian government even declared gambling to be an undesirable economic activity, claiming that the gambler does not make economically rational choices but lets fate decide his future. The economic logic of optimization through competition could not be applied to gambling because players were engaging in an activity that unmistakably caused addictive and, thus, irrational behavior.<sup>45</sup> The representative of the Bavarian government thus implicitly argued that the neoliberal concept of the "sovereign consumer's" freedom of choice could not function with regard to gambling consumption in a liberal market because of the consumer's necessary irrationality in the face of it. In the same vein, the city of Munich emphasized the negative impacts of an unregulated sports betting market based on free competition. Because private sports betting companies aimed primarily to maximize profit, they would financially exploit their customers' gambling passion. This in turn would cajole the gambler into transgressing the elusive boundary between responsible and compulsive play.<sup>46</sup> According to the Federal Ministry of Justice, sports betting was especially prone to gambling addiction because those placing bets were emotionally very involved and under the illusion of controlling the outcome of their bets due to their sports knowledge. In reality, though, sports betting was essentially uncontrollable. Bettors suffered from "emotional misjudgment" and became addicts.<sup>47</sup>

A comparison of the state representatives' position with other stakeholders' argumentations in the trial shows that arguments around gambling addiction became an instrumental rhetoric to achieve other goals. Unsurprisingly, the Association for Gambling Addiction also argued that an increase in gambling opportunities was inextricably linked to the spread of addiction and problematic gambling behavior. However, the association emphasized the similarity of all gambling, regardless of game played or game operator (state companies or private businesses).<sup>48</sup> This demonstrates that state representatives used the risks of someone becoming a "pathological gambler" to their advantage, to support their agenda of maintaining the status quo and legitimizing the state monopoly on sports betting. They cited a state-commissioned expert study to support their claim that sports betting was particularly risky.<sup>49</sup> Interestingly, in an earlier study, the same experts had argued that sports betting harbored much less addictive potential than slot machines and casino gambling.<sup>50</sup> By considering sports betting a general danger to public health, state officials insinuated that any average gambler could fall victim to addiction if the sports betting market were liberalized and dominated by private companies. Because in the logic of state officials pathological gambling was the inevitable consequence of a deregulated gambling market and a public health risk, government intervention in the market was a necessary measure to protect public health. The German Sports Association (*Deutscher Sportbund*), on the other hand, emphasized its need for financial support from gambling profits and did not mention the risks of

<sup>44</sup> BVerfG, para. 49–55.

<sup>45</sup> BVerfG, para. 53–54.

<sup>46</sup> BVerfG, para. 64.

<sup>47</sup> BVerfG, para. 49, 64.

<sup>48</sup> BVerfG, para. 71.

<sup>49</sup> BVerfG, para. 58; Gerhard Meyer and Tobias Hayer, *Das Gefährdungspotenzial von Lotterien und Sportwetten. Eine Untersuchung von Spielern aus Versorgungseinrichtungen* (Düsseldorf: Ministerium für Arbeit, Gesundheit und Soziales des Landes Nordrhein-Westfalen, 2005).

<sup>50</sup> BVerfG, para. 100; Tobias Hayer and Gerhard Meyer, "Die Prävention problematischen Spielverhaltens," *Journal for Public Health* (2004): 293–303.

addiction at all.<sup>51</sup> Hence, the participants in the trial used the discourse on addicted gamblers only when it served their interests.

Yet, emphasizing the risks of gambling addiction not only served the proponents of a monopolistic organization. It also bolstered the argument of those strongly opposed to the state monopoly and who supported the liberalization of gambling regulations. In a public consultation with the North Rhine-Westphalian state parliament, representatives of the gambling industry criticized the Altered Interstate Gambling Treaty (*Glückspieländerungsstaatsvertrag*, GlüÄStV) that had to be enacted in 2012. The CEO of mybet, an online casino and sports betting company, argued that legalizing online gambling was actually a necessary requirement to protect gamblers effectively. The only possible way to safeguard gamblers, and especially underage gamblers, was to hand out licenses to companies and control legal online gambling.<sup>52</sup> During the same consultation, Peter Güllmann, the head of corporate and infrastructure finance of the NRW-Bank, claimed that to fight gambling addiction, more gambling halls were needed in urban centers rather than in the peripheries. He stated that especially in the center of cities, where the number of addicted gamblers was highest, a sufficient number of gambling offers was necessary to “channel” gambling addiction.<sup>53</sup> Similarly, the delegate of the gaming machine business Robert Hess protested against the restrictive regulations on gambling. He argued that it was counterproductive to weaken companies that actively committed themselves to consumer protection by investing in employee educational programs on the responsible handling of “pathological gamblers.”<sup>54</sup> Supporters of legalizing online gambling thus argued that a liberalized gambling market protected players and that liberalization was necessary to fight gambling addiction.

As the debate continued beyond the trial, pro-liberalization politicians developed this argument further by recommending measures to implement an effective consumer protection policy. In 2015, the Liberal Democrats in North Rhine-Westphalia and Bremen, both governed by a coalition of the Social Democrats and Alliance 90/The Greens, criticized the quantitative restrictions on sports betting licenses and the ban on online gambling. They advocated for legalizing online poker and casino games, as well as for a policy of unlimited sports betting concessions. The latter should comprise qualitative rather than quantitative permission criteria to protect players, which meant that instead of limiting the number of licensed companies, the license criteria themselves should be reformed.<sup>55</sup> Two years later, the governmental parties of the State of Hesse, the Christian Democrats and Alliance 90/The Greens, proposed a list of guidelines in a motion of high priority that was meant to solve Germany’s gambling regulation problem. Like the Liberal Democrats in Bremen and North Rhine-Westphalia, they advocated the principle of qualitative criteria and the legalization of online gambling. They announced that it was of utmost importance to permit an unlimited number of gambling operators in order to achieve a gambling policy that was “seriously” oriented to protect gamblers. While anti-liberalization advocates argued for prohibiting or quantitatively restricting certain types of gambling, these politicians required that all types of gambling were legalized and that merely their consumption was

<sup>51</sup> BVerfG, para. 70.

<sup>52</sup> Landtag Nordrhein-Westfalen, “Ausschussprotokoll. Ausschuss für Arbeit, Gesundheit und Soziales,” APr 16/30, September 6, 2012, 50 (<https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMA16-30.pdf>).

<sup>53</sup> Landtag Nordrhein-Westfalen, “Ausschussprotokoll. Ausschuss für Arbeit, Gesundheit und Soziales,” APr 16/30, September 6, 2012, 24–25.

<sup>54</sup> Landtag Nordrhein-Westfalen, “Ausschussprotokoll. Ausschuss für Arbeit, Gesundheit und Soziales,” APr 16/30, September 6, 2012, 37.

<sup>55</sup> Bremische Bürgerschaft, “Antrag der Fraktion der FDP. Glücksspielstaatsvertrag im Sinne des Jugend- und Spielerschutzes demokratisieren,” Drucksache 19/121, October 26, 2015 (<https://www.bremische-buergerschaft.de/dokumente/wp19/land/drucksache/D19L0121.pdf>); Landtag Nordrhein-Westfalen, “Antrag der Fraktion der FDP. Glücksspiel und Sportwetten EU- und Verfassungsrechtskonform gestalten,” Drucksache 16/10294, November 24, 2015 (<https://fdp.fraktion.nrw/sites/default/files/uploads/2016/04/28/mmd16-10294.pdf>).

regulated. To achieve that goal, they recommended a fixed limited maximum amount of losses and the establishment of opportunities for self-limitation, such as self-exclusion from gambling websites.<sup>56</sup>

Although pro-liberalization parliamentary parties constituted a minority, the plea for limiting losses and especially for self-limiting measures marked a turning point in the debate on gambling regulations from a focus on state profits to a focus on managing gambling risks. It broke with “traditional” consensual regulations involving direct state intervention in the market that had been codified by the Interstate Gambling Treaties. Instead, this regulatory model was geared toward the regulation of the negative external effects of a liberal gambling market. According to the advocates of liberalization, regulatory efforts should not be aimed at the market, but at the modes of consumption of “pathological gamblers,” who allegedly did not control their behavior in an environment of commercialized gambling.<sup>57</sup> To limit addiction risks and to manage addicted gamblers, they suggested maximum limits on financial losses coupled with compiling registered data on gamblers in specific databases (OASIS). Together, these measures were designed to block gamblers temporarily from games if they lost more than 1,000 euros per month. In addition, they proposed the possibility of higher limits on losses, if gamblers provided proof of sufficient income and the installment of blocking software that enabled self-limitation or self-exclusion from online gambling platforms.<sup>58</sup>

Crucially, both sides of the argument drew on very different conceptions of the “pathological gambler.” Pro-liberalization advocates constructed pathological subjects, ones who essentially failed to limit themselves to “rational” gambling; this logic placed responsibility for inappropriate behavior with the addicted individual gambler and construed gambling as an activity that individuals could in principle control through self-regulation. Consequently, they conceived of problematic gambling behavior as *uncontrolled* behavior and of gambling as a legitimate commodity that was perfectly safe if consumed responsibly. In their logic, it was not the unregulated market that led to addictive behavior, but the gamblers themselves who did not manage to play rationally. The advocacy for self-limitation as a regulatory principle thus entailed a perception of gamblers who were individually responsible for the loss of control that led to “problematic” gambling behavior. This perception led to a shift of addiction responsibility away from state and economic structures toward the gambler as “sovereign consumer.” Moreover, the recommendation for limits on losses and the proposed exemption from those limits for gamblers with a sufficient income level reflect that pathological gambling and gambling disorder are psychiatric concepts, targeting the external effects of supposed mental illnesses on the lives of gamblers, and not concepts that define the “illness” itself. Implicitly, they are psychiatric conditions that diagnose those gamblers who can’t afford high losses and, as a result, ruin their lives, rather than mental disorders causing an irrepressible desire for the feeling of a “high,” as the psychiatric definition of a behavioral addiction indicates. In line with the underlying social values that these disorders convey, promoters of liberalization essentially understood the “pathological gambler” as the negative counterpart to the “sovereign consumer.” While the latter’s rationality legitimized the (neo-)liberal doctrine of the right to freedom of choice for the controversial economic activity of gambling, the “pathological gambler” strengthened that legitimacy by representing the medical separation between the rational and the irrational gambler, who would not make controlled consumption choices.

By contrast, supporters of the status quo constructed a pathological subject who inevitably became an addict because of external factors, first and foremost because profit-oriented

<sup>56</sup> Hessischer Landtag, “Dringlicher Antrag der Fraktionen CDU und Bündnis 90/Die Grünen betreffend Scheitern des Zweiten Glücksspieländerungsstaatsvertrag,” Drucksache 19/5769, December 12, 2017 ([https://www.gluecksspielwesen.de/wp-content/uploads/2018/01/2017-12-12\\_Hessen\\_2GlueSt\\_Drs19-5769.pdf](https://www.gluecksspielwesen.de/wp-content/uploads/2018/01/2017-12-12_Hessen_2GlueSt_Drs19-5769.pdf)).

<sup>57</sup> See Kingma, “Gambling and the Risk Society,” 49–50.

<sup>58</sup> “Enderbericht des Landes Hessen zur Evaluierung des Glücksspielstaatsvertrags,” April 10, 2017 ([https://innen.hessen.de/sites/default/files/media/evaluierungsbericht\\_des\\_landes\\_hessen\\_zum\\_gluecksspielstaatsvertrag.pdf](https://innen.hessen.de/sites/default/files/media/evaluierungsbericht_des_landes_hessen_zum_gluecksspielstaatsvertrag.pdf)), 41–42.

private companies had vastly expanded gambling opportunities. The gambler became an addict because of structural problems, not individual psychological failings. Opponents of liberalization conceived of addictive gambling as an *uncontrollable* activity to which a liberalized gambling market exposed gamblers. In this line of argument, the state needed to take the responsibility for gambling activities that gamblers could not control. Hence, most federal states tried to legitimize state intervention in the market by using the pathologization of gambling to their advantage. By suggesting that consumers would inevitably suffer from uncontrollable excessive behavior and could therefore not act as “sovereign consumers” when gambling was liberalized, they tried to maintain the idea that gambling was a socially undesirable commodity and an illegitimate market activity.<sup>59</sup> They thus shaped individuals’ lack of sovereignty to freely gamble into a state’s claim to sovereignty over gambling policies. As a reaction to the judgments of the Federal Constitutional Court and the European Court of Justice, the majority of federal states tried to defend the former national autonomy over gambling regulation against a risk model of regulation, which considered state intervention in the gambling market ineffective and unlawful.

The vagueness of the DSM and ICD definitions of pathological gambling and gambling disorder as well as their lack of etiology left room for interpretation and paved the way for the concepts’ varying political instrumentalization. The participants in the German debate on gambling liberalization used two different conceptions of gambling addiction in their arguments—uncontrollable and uncontrolled—each resulting from different conceptions of legitimate gambling consumption and serving differing political and economic interests. While advocates of liberalization regarded gambling as a legitimate leisure activity generating economic growth and entrusted it to the autonomous, responsible consumer, safeguards of the “welfare state model” of gambling regulation conceived of commercialized gambling as a social evil that the state needed to channel and tightly regulate. It is therefore striking that the same psychiatric subjectivization that denied consumer sovereignty to a specific gambling subject, clearly demarcating the “sick” irresponsible gambler from the “sovereign consumer” and thereby legitimizing gambling as a harmless recreational pastime, also generated the “pathological gambler” of liberalization’s opponents. It provided the basis for German anti-liberalization policymakers to try to maintain authority over the domestic gambling economy by arguing that, in a liberal gambling market, *all* gamblers were potentially incapable of being “sovereign consumers.” So why did both sides in the debate need to argue about the risks of addiction to legitimately pursue their political agenda and economic interests?

### **Attempts at National Reregulation, 2010–2018, under the Pressures of European Law and Digitization**

In 2010, the European Court of Justice judged the German monopoly on sports betting to be inconsistent with the right of establishment and the free movement of services as stipulated by the EC Treaty. It argued that the monopoly did not coherently and systematically limit the supply of gambling opportunities and consequently did not serve the fight against gambling addiction. The ECJ indicated the following grounds of justification: the state allowed private companies to offer bets on horse races and to operate automated gambling machines. In addition, it supported the expansion of the machine gambling and casino business, which the court regarded as posing higher addiction risks than sports betting or lotteries, and intensely advertised state-run sports betting companies. However, the court ruled that the monopoly on sports betting did not necessarily infringe on European law. State intervention in the fundamental rights of establishment and free movement of services could be justified by public policy objectives, such as protecting consumers and the social

<sup>59</sup> See also German Bundestag, Monopolkommission, Auszug aus Hauptgutachten XIX (2010/2011), Drucksache 17/10365, July 20, 2012, 48, [https://www.monopolkommission.de/images/PDF/HG/HG19/1\\_Einleitung\\_HG\\_19.pdf](https://www.monopolkommission.de/images/PDF/HG/HG19/1_Einleitung_HG_19.pdf).

order. In those cases, regulation could function according to diverse national value systems.<sup>60</sup> Like the German Federal Constitutional Court, however, the European Court of Justice held that such a monopoly needed to systematically and consistently serve the goal of addiction prevention. As opposed to consumer and public health protection, both courts ruled that fiscal interests did not count as valid public policy objectives and could thus not justify governmental intervention in the market: “The need to prevent the reduction of tax revenues [is not] among the overriding reasons in the public interest capable of justifying a restriction on a freedom instituted by the Treaty.”<sup>61</sup> The collection of taxes could only function as side effect of a monopoly, not as justification for it.<sup>62</sup>

Such issues were not unanticipated. The legislators of the 2008 Interstate Gambling Treaty (IGT) had planned to revise it in 2011 with a view to new gambling market developments. This indicates the doubts surrounding the treaty from its inception.<sup>63</sup> It represented a compromise between federal states, whose consensus on the national gambling monopoly was challenged by the rapid developments in the online gambling sector. But the ECJ ruling of 2010 effectively undermined national gambling regulations before the planned revision. After the ruling, Germany did not have a valid gambling legislation, and the reformed IGT that came into effect in 2012 did not achieve unanimous consent between federal states.<sup>64</sup> It was not signed by the Liberal Democrats and Christian Democrats governing the state of Schleswig-Holstein, which passed its own gambling law with unlimited licenses for online sports betting and online casino companies.<sup>65</sup> In contrast to the Schleswig-Holstein gambling legislation, the 2012 Interstate Gambling Treaty further upheld the general ban on online gambling, while state-run sports betting companies operated online without restrictions and were advertised both online and on television.<sup>66</sup> But the IGT of 2012 also included an experimental clause granting twenty concessions to private land-based as well as online sports betting companies for seven years.<sup>67</sup> The clause, which aimed to test a partial liberalization of the sports betting market, pointed toward the growing discordance between federal states supporting the monopolistic structure and those in favor of liberalization. But more importantly, it further destabilized heterogeneous and confusing gambling legislation by trying to uphold the state monopoly on lotteries and sports betting while simultaneously giving in to liberalization demands from politicians, who argued that the state kept losing an increasing amount of money due to the growth of illegal online gambling.

International comparison also spurred liberalization pressures from sports associations like the German Soccer League (DFL). These associations lobbied to legalize the private operation of sports bets because they aspired to keep up with other European football clubs, which were sponsored by important sports betting companies, such as Bwin or Betclix. Indeed, Germany was the only of the “Big Five” European football nations with a ban on private sports betting advertisements up until 2012.<sup>68</sup> In 2015, the ambiguous gambling

<sup>60</sup> ECJ, Judgment of the Court, 8 September 2010, para. 97, 100, 106 (<http://curia.europa.eu/juris/document/document.jsf?jsessionid=C5A2AC09A8B9DAC1E45FC94E582D1FDC?text=&docid=80772&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=5933319>).

<sup>61</sup> ECJ, Judgment of the Court, 8 September 2010, para. 105, 107.

<sup>62</sup> BVerfG, para. 109.

<sup>63</sup> See Martin Stadelmaier, “Das Glück, seine Regulierung und die Länder,” in *Multidisziplinäre Betrachtung des vielschichtigen Phänomens Glücksspiel. Festschrift zu Ehren des 65. Geburtstags von Prof. Dr. Tilman Becker*, ed. Andrea Wöhr and Marius Wuketich (Wiesbaden: 2019), 336.

<sup>64</sup> GlüÄndStV, July 1, 2012 (<https://www.berlin-suchtpraevention.de/wp-content/uploads/2016/12/Gluecksspielaenderungstaatsvertrag.pdf>).

<sup>65</sup> “Gesetz zur Neuordnung des Glücksspiels (Glücksspielgesetz),” October 10, 2011 (<https://www.gesetze-rechtsprechung.sh.juris.de/jportal/?quelle=jlink&query=GISpielG+SH&psml=bsshoprod.psml&max=true&aiz=true>).

<sup>66</sup> GlüÄndStV, §4.

<sup>67</sup> GlüÄndStV, §10a. “Land-based” gambling refers to gambling in physical spaces, as opposed to online/virtual gambling.

<sup>68</sup> Daniel Reiche, “The Prohibition of Online Sports Betting: A Comparative Analysis of Germany and the United States,” in *European Sports Management Quarterly* 13, no. 3 (2012): 305.

regulation of the IGT resulted in several private sports betting companies filing a suit against discretionary licensing procedures. Subsequently, the Hesse Administrative Court, the Federal Administrative Court, and the ECJ declared these regulations to be unconstitutional and against EU law due to discriminatory methods and the lack of transparency.<sup>69</sup>

These rulings transformed the German sports betting regulation into an unregulated legal gray area. The verdicts of the Federal Constitutional Court and the ECJ not only rendered the German gambling legislation obsolete, but also effectively levered out the state monopoly on sports betting. With the state monopoly juridically delegitimized again, the discord between federal states around liberalization grew and they could not find an agreement on the third Interstate Treaty on Gambling.<sup>70</sup> Meant to be enacted in 2018, the treaty wasn't ratified by the states of Hesse, North Rhine-Westphalia, and Schleswig-Holstein, which demanded a wide-ranging liberalization of the gambling market, leaving the state with no valid gambling regulation at all.<sup>71</sup>

However, EU jurisdiction was not the only factor that challenged the national regulation on sports betting. Rapid developments in the online gambling sector undermined the "slow" national legislation of online gambling, which had first prohibited online gambling altogether and had then restricted it to state-run sports betting companies and a selection of licensed private companies in 2012. Although most digital gambling operations remained legally banned, they nevertheless continued and even expanded significantly during the years of the regulatory debate, exposing the state's loss of regulatory control over the domestic online gambling market. This was already undermining the juridical authority of the Interstate Gambling Treaties. The prohibited online poker and casino market grew by 46 percent from 2013 to 2015 alone, and in 2015 the illegal online gambling market made up 86 percent of the total online gambling economy.<sup>72</sup> In fact, the state had failed to enforce an effective ban on online gambling. The federal states started to shut down private betting offices that offered digital sports wagering in 2008, but the illegal online market still flourished.<sup>73</sup> The state of Hesse mainly blamed the inefficiency of policies to stop payment flows.<sup>74</sup> The more drastic policy option of IP address blocking remained highly controversial during the German debate on gambling regulation and was eventually not enacted because of technological difficulties and legal objections around data protection. Policymakers tried to meet the demand for casino and poker games with brick-and-mortar gambling sites, thereby hoping to secure tax revenues from domestic gambling operators. But in the meantime, an increasing number of private online gambling companies operating mostly from such offshore tax havens as the Isle of Man and Malta offered more and more gamblers access to illegal online gambling websites.<sup>75</sup> German consumers were not found guilty of

<sup>69</sup> BVerwG, Judgment 15 June 2016—8 C 5.15 (<https://www.bverwg.de/150616U8C5.15.0>); VGH Hessen, Judgment October 16 2015—8 B 1028/15 (<https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Recht/8B1028-15.pdf>), 5.

<sup>70</sup> "Entwurf zum Zweiten Staatsvertrag zur Änderung des Glücksspielstaatsvertrages," October 28, 2016, [https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Start/Entwurf\\_2\\_Staatsvertrag.pdf](https://gluecksspiel.uni-hohenheim.de/fileadmin/einrichtungen/gluecksspiel/Start/Entwurf_2_Staatsvertrag.pdf).

<sup>71</sup> Hessischer Landtag, "Dringlicher Antrag der Fraktionen CDU und Bündnis 90/Die Grünen betreffend Scheitern des Zweiten Glücksspieländerungsstaatsvertrag," Drucksache 19/5769, December 12, 2017 ([https://www.gluecksspielwesen.de/wp-content/uploads/2018/01/2017-12-12\\_Hessen\\_2GlueSt\\_Drs19-5769.pdf](https://www.gluecksspielwesen.de/wp-content/uploads/2018/01/2017-12-12_Hessen_2GlueSt_Drs19-5769.pdf)), 1; Harald Büring, "Von Glücksspielrittern und Outlaws. Online-Glücksspiel aus rechtlicher Sicht," *c't—Magazin für computertechnik* 13 (2018): 164; "Entwurf zum Zweiten Staatsvertrag zur Änderung des Glücksspielstaatsvertrages," 2.

<sup>72</sup> "Endbericht des Landes Hessen zur Evaluierung des Glücksspielstaatsvertrags," 11, 40; See also Christian Adam, "Glücksspiel. Sportwetten am Wendepunkt," in *Moralpolitik in Deutschland. Staatliche Regulierung gesellschaftlicher Wertekonflikte im historischen und internationalen Vergleich*, ed. Christoph Knill, Stephan Heichel, Carline Preidel and Kerstin Nebel (Wiesbaden: 2015), 195.

<sup>73</sup> Reiche, "The Prohibition of Online Sports Betting," 302.

<sup>74</sup> "Endbericht des Landes Hessen zur Evaluierung des Glücksspielstaatsvertrags," 40.

<sup>75</sup> See Des Laffey, Vincent Della Sala, and Kathryn Laffey, "Patriot Games: The Regulation of Online Gambling in the European Union," *Journal of European Public Policy* 23, no. 10 (2016): 1429.

infringement because those online companies possessed EU licenses, and thus were protected by EU law and the requirements of the internal market.

As these developments show, Germany's authority over the regulation of gambling was challenged by a combination of several entangled factors: the discord among federal states regarding gambling regulation, the digitization of gambling, the EU's supranational authority, the requirements of the EU internal market and its liberal economy, and the expansion of multinational online gambling companies. These factors compromised Germany's domestic sovereignty and interdependence sovereignty on several levels.<sup>76</sup> Not only were these two aspects of national sovereignty weakened by the intervention of the European Court of Justice, but they were also compromised by the German federal government's inability to enforce a legal prohibition on online gambling companies and by its failure to control cross-border payment and commodity flows by preventing foreign companies from operating gambling websites within the national territory.

There were several reasons why it proved impossible for the German government to enforce the ban on online gambling. Because illegal online gambling companies had their seat in foreign countries, German authorities could not prosecute these operators. Another possibility for the German gambling supervisory board (*Glücksspielkollegium*) to proceed against illegal online gambling was "financial blocking." The 2008 and 2012 Interstate Gambling Treaties empowered the gambling supervisory board to forbid payment providers to transfer money from German customers to illegal online gambling companies and assigned the state of Lower Saxony the task of enforcement.<sup>77</sup> Illegal online gambling companies collaborating with German banks and with payment providers operating in Germany such as VISA, Paypal, or Klarna justified this by claiming that the prohibition of their online gambling operations was not consistent with EU constitutional law.<sup>78</sup> Their statements demonstrate that the permanent change of national gambling regulations due to ECJ rulings had undermined the authority of the Interstate Gambling Treaty. As for German gambling authorities, they did not enact their right to block illegal cash flows. When public pressure on the gambling agency of Lower Saxony increased in 2014, the agency announced that payment blockings would be coming up soon. But the announcement triggered a backlash from several institutions, including the Association of the Internet Industry, questioning the appropriateness of the announced measures regarding potential infringements of data protection. The Independent Center for Privacy Protection issued a response declaring that neither were gambling authorities entitled to gather data for the identification of illicit money transfers nor were internet service operators entitled to hand over identifying data to financial institutions or authorities. This would leave the state with no effective means to oblige payment providers to "financial blocking."<sup>79</sup> However, the political reasons as to why German authorities did not manage to stop illegal payment flows up until that date were probably of greater importance because other countries, such as Italy, Belgium, or Denmark, managed well to stop illegal cash flows through "financial blocking."<sup>80</sup> Since 2010, the state of Lower Saxony, governed by a coalition of Liberal Democrats and Christian Democrats, aimed to liberalize the gambling market. The liberal minister for economic affairs, Jörg Bode, responsible for the gambling sector, demanded a change of the 2008

<sup>76</sup> "Interdependence sovereignty" refers to the scope of activities over which states can effectively exercise control.

<sup>77</sup> GlüStV, §9; GlüÄStV, §9.

<sup>78</sup> Philipp Eckstein, Jan Lukas Strzyk, and Benedikt Strunz, "VISA zieht sich offenbar zurück," *tagesschau.de*, May 26, 2020 (<https://www.tagesschau.de/investigativ/ndr/gluecksspiel-visa-101.html>).

<sup>79</sup> Tilman Becker, "Warum scheitert die Regulierung des Glücksspielmarktes?," *European Journal of Gambling Law* 6, no. 15 (2015): 414.

<sup>80</sup> Becker, "Warum scheitert die Regulierung des Glücksspielmarktes?," 415–16. On why legal concerns around data protection probably don't constitute the main reason for governmental inaction, see also Jan-Philipp Rock: "Cutting the Cash Flow: Mit Bankrecht gegen illegal Glücksspielanbieter," *European Journal of Gambling Law* 3–4, no. 20 (2018): 24.

Interstate Gambling Treaty to permit private sports betting companies as well as online casinos.<sup>81</sup> It is thus highly probable that the political will to proceed against illegal gambling operators was simply missing. Letting online gambling companies continue to operate illegally despite the legal prohibition could have been deployed as a tactic to buy time and to further delegitimize the already weakened restrictive gambling legislation. The fact that the state of Lower Saxony was to enforce the ban on illegal cash flows in the name of all federal states hamstrung German gambling authorities willing to act.<sup>82</sup> Hence, more than legal concerns surrounding data protection and technological difficulties, the discord between federal states around gambling liberalization prevented the effective control of cross-border commodities and payment flows.

Together with the ECJ juridical interventions, forcing German policymakers to comply with the EU single market rules, the state's loss of control over domestic gambling operations in the face of multinational online gambling companies eroded the national gambling legislation. German legislators had tried to reclaim the state's loss of sovereignty over gambling regulations by reforming the 2008 and 2012 Interstate Gambling Treaties, but in failing to reach conformity with constitutional law and a universal compromise among federal states, they had further compromised the federal government's legal authority.

The German government's efforts to reclaim sovereignty over gambling policies need to be understood in the context of European nation-states' agreement to allow supranational institutions to exercise authority over their territories for the sake of the EU single market. As Alan Milward argued, the integration in a single market served the goal of "rescuing" European nation-states' legitimacy by guaranteeing their continuous economic growth in a globalized economic system.<sup>83</sup> But states still aspired to reclaim their voluntarily abandoned sovereignty when it seemed in their interest to do so.<sup>84</sup> EU national governments pursued territorially bound economic interests, as the differing gambling policy strategies of European states seeking domestic economic benefits clearly demonstrate.<sup>85</sup> In choosing to protect specific sectors or companies considered high value for the national economy, governments follow a "value ordering where the homeland ranks higher than individual economic interests."<sup>86</sup> As the process of European integration advanced, the pursuit of national policy agendas within a borderless economic system proved more and more difficult. Wolfgang Streeck argued that beginning in the 2000s, the European Court of Justice had become the main driving force in the European liberalization project through international integration. In his view, European integration functioned as the "liberalization machine" of European national economies and left national governments and their citizens with fewer and fewer possibilities for resisting the process of liberalization.<sup>87</sup> Consequently, because the consolidation of a liberal market order during the EU market integration in the 1990s and increased EU transnational jurisdiction put pressure on available national regulatory instruments, governments were enticed to find creative and innovative regulatory strategies to protect specific territorially bound economic sectors or "insider" companies from external competition in open markets.<sup>88</sup>

In Germany, gambling regulation changed from a set of policies meant to ensure national economic benefits through taxes to a set of regulations meant to minimize the risk of gambling addiction and protect consumers. This change can be interpreted as a new strategy for what political scientists have labeled "economic patriotism" in an international order

<sup>81</sup> "Niedersachsen will Lockerung des Glücksspielstaatsvertrags," *Hannoversche Allgemeine*, August 4, 2010 (<https://www.haz.de/Nachrichten/Politik/Niedersachsen/Niedersachsen-will-Lockerung-des-Gluecksspiel-Staatsvertrags>).

<sup>82</sup> Becker, "Warum scheitert die Regulierung des Glücksspielmarktes?," 416–17.

<sup>83</sup> Alan S. Milward, *The European Rescue of the Nation State* (London: Routledge 1992).

<sup>84</sup> See Krasner, *Sovereignty*, 9.

<sup>85</sup> See Laffey, Sala, and Laffey, "Patriot Games," 1427.

<sup>86</sup> Laffey, Sala, and Laffey, "Patriot Games," 314.

<sup>87</sup> Wolfgang Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Berlin: Suhrkamp, 2013), 201–05.

<sup>88</sup> Clift and Woll, "Economic Patriotism: Reinventing Control over Open Markets," 308–11.



dominated by an “institutionalized hegemony” of market liberalization.<sup>89</sup> Although the Interstate Gambling Treaty of 2004 did not mention the fight against gambling addiction as an objective, both Interstate Gambling Treaties of 2008 and 2012 adjusted their goal-setting to the demands of the Federal Constitutional Court and the ECJ, and listed the need to prevent the spread of gambling addiction as a primary goal, omitting the 2004 Interstate Gambling Treaty aim to secure tax privileges for public interests.<sup>90</sup> Consequently, the state emphasized its mission to protect the consumer from the dangers of an open gambling market because the state could now deploy only limited political strategies to justify the protection of the domestic gambling industry against the potentially unlimited competition of global digital companies. The discourse on gambling addiction in the German public debate over gambling liberalization emerged as a strategic move in the context of a changed international economic order, where the protectionist economic regulation strategies of the welfare state had lost their legitimacy, and state intervention in the market could no longer be justified by public fiscal interests. The figure of the “pathological gambler” served the German government’s aim of preserving the highest possible degree of autonomous political control in spite of new juridical and economic pressures curtailing that autonomy. Germany’s strategy to regain control over domestic gambling policies relied on pathologizing a specific type of gambler who supposedly lost control over consumption. The sovereignty of the nation-state and the sovereignty of the individual consumer were thus intertwined through the negotiation of control over commercialized gambling. The state grounded its aim of regaining control over its gambling market on denying individuals’ ability to control their gambling behavior. But the unconstitutionality of the Interstate Gambling Treaties and discordance among federal states regarding liberalization ultimately thwarted the government’s aim to secure the national monopoly on sports betting. Sovereign control was thus the key element at stake for the nation-state, federal states, and the individual consumer in a socioeconomic and political context, in which liberalization pressures complicated the pursuit of territorially bound economic benefits and confronted the consumer with the new and “risky” commodity of online gambling.

## Conclusion

The pathologization and therapeutization of a specific type of gambling behavior, which led to social, financial, and personal problems, needs to be understood as a new form of dealing with societal, political, and economic challenges in economies with liberalized and globalized gambling markets. The welfare state model addressed gambling-related social problems by intervening directly in the market via regulations and prohibitions. By contrast, societies with liberalized gambling markets tried to manage “pathological gamblers” as public health risks emanating from these markets.

But the pathologization of risks is not specific to gambling. Other behavioral addictions, such as shopping, food, pornography, the internet, social media, or plastic surgery can also serve as examples of the pathologization of societal risks to the individual consumer. The pathologization of inappropriate gambling behavior thus needs to be seen as part of a broader dynamic of market liberalization and digitization. Although I think that the individualization of new consumption risks can serve as a form of legitimation for market deregulation, the case of gambling is unique in that gambling disorder is the only behavioral addiction included in the DSM. Other so-called behavioral addictions, such as shopping or internet use, are indeed discussed by the scientific community in the *Journal of Behavioral Addictions* (created in 2012) and are treated by clinicians, psychologists, and self-help groups.

<sup>89</sup> “Plaidoyer de Dominique de Villepin en faveur d’un ‘patriotisme économique,’” in *Le Monde*, July 27, 2005 ([https://www.lemonde.fr/societe/article/2005/07/27/plaidoyer-de-dominique-de-villepin-en-faveur-d-un-patriotisme-economique\\_675859\\_3224.html](https://www.lemonde.fr/societe/article/2005/07/27/plaidoyer-de-dominique-de-villepin-en-faveur-d-un-patriotisme-economique_675859_3224.html)); Streeck, *Gekaufte Zeit*, 201.

<sup>90</sup> LottStV, §1; GlStV, §1.

It has also become usual for shopping websites to warn their visitors to “shop responsibly.” But these “addictions” are not as yet officially accepted into the canon of psychiatric diseases. One reason for the singularity of the gambling disorder could be related to the ambiguous attitude toward the activity of gambling. Although gambling was morally condemned until well into the second half of the twentieth century, state-run gambling operations became a legitimate form of raising money for the welfare state in the postwar era with German state regulators claiming that gambling was a natural instinct inherent to human behavior. This reasoning offered the basis for a postwar state monopoly because it led to the conclusion that the supposedly universal urge to gamble needed to be channeled and managed by the state. With the change from state-organized and welfare-based to liberalized and commercialized gambling, the market thus required a new foundation of legitimacy. The controversial liberalization of gambling meant the commercial exploitation of a morally questioned economic activity in the socioeconomic and political order of the welfare state. This could only be justified by the fight against the dangers of illegal gambling. Proponents of liberalization argued that the state monopoly could not prevent illegal online gambling from expanding and could thus not stop increasing numbers of addicted gamblers. They demanded that consumers be protected by assessing and managing gamblers who engaged in inappropriate behavior. Whereas gambling has a history of both moral condemnation and state monopoly, shopping was never prohibited and, especially since the rise of the postwar consumer society, was rather encouraged. Other activities that are seen as potential addictions but are not officially recognized as such, including engaging in social media, surfing the internet, or online gaming, didn’t exist before the last third of the twentieth century, when digitization created new global markets along with new consumption risks. Although pornography and plastic surgery markets have a history of moral condemnation and prohibition, they have never been organized as state monopolies, partly because these activities were not stated to be naturally existing impulses in the population. None of these markets transformed from a state monopoly into a private, liberal market, which makes gambling a unique case in the contemporary history of market liberalization and pathologization.

In the German debate on the regulation of gambling, the discourse on “pathological gamblers” served both pro- and anti-liberalization causes. Gambling addiction became the central topic around which the controversial liberalization of gambling could be debated. The terms of the debate show that the state could no longer justify regulation through welfare state logics like the collection of taxes for public means. The ECJ jurisdiction delegitimized the model of a monopolistic gambling market of the welfare state and pressured German gambling legislation into compliance with supranational law, protecting the free movement of services and goods, and the right of establishment within the EU single market. Under these circumstances, the German government deployed an “innovative” strategy to claim sovereignty over its gambling regulation by playing the card of consumer protection. It deployed the traditional reasoning that the monopoly on lotteries and sports betting was a necessary means to control the “natural play instinct” of the population but adapted it to the ECJ jurisdiction by arguing that gamblers could not prevent themselves from becoming addicts in a liberalized market. It thus used the gamblers’ supposed loss of control over consumption to regain control over national gambling regulations. In other words, the gambler’s loss of consumer sovereignty served the purpose of reclaiming state sovereignty. This illustrates well how supranational, national, and individual sovereignty cannot be regarded as separate and fixed entities but need to be perceived as interdependent and contested concepts with shifting power relations.

The digitization of gambling intensified the “paradox of neoliberal democracy” by increasing the competition from private gambling companies and creating a transnational online gambling market. Germany sought to protect its domestic gambling market from increasing global competition. But private online gambling also created insecurities concerning the constitutionality of the state monopoly and amplified the discord among federal

states regarding liberalization. It effectively levered out the German state monopoly, and thus compromised the authority of the national gambling legislation. This, in turn, solidified the government's strategy to legitimize its "economic patriotism."

As a result, psychiatric concepts became key social constructs for political actors in this debate. They were used as discursive tools either to protect national domestic sovereignty over gambling regulations in the pursuit of "economic patriotism," or to promote gambling liberalization. Pathological gambling and gambling disorder were not precise medical categories, but rather social constructs carrying specific moral values that corresponded to the properties of the neoliberal "sovereign consumer" and fit into a broader political discourse. The emergence of the historical figure of the "pathological gambler" in the German liberalization debate at the beginning of the twenty-first century needs to be understood in the light of changing strategies available to support contentious political agendas—the liberalization of a traditionally and morally justified state-run economic activity, on the one hand, and the preservation of a national monopoly within the institutional structures of the European single market, on the other. As a consequence of the ECJ rulings, setting the boundaries within which a legal claim to gambling regulations could be made, opponents of liberalization instrumentalized "pathological gamblers" as much as the advocates; consumer protection had become the *only* possible legitimation strategy in the liberalization debate. Crucially, the individual had become the axis around which debate could turn. However, the vagueness of these psychiatric concepts left room for different interpretations concerning the "pathological gambler's" loss of control, which served incompatible political causes and economic interests. While proponents of liberalization claimed that addicted gamblers were responsible for their bad consumption choices and lack of self-control, opponents argued that it was not the individual gambler, but the liberalized market responsible for gambling addiction. In light of the recent ratification of a new Interstate Gambling Treaty, legalizing online gambling altogether as of July 2021, the concept of the self-responsible gambler as a "sovereign consumer" seems to have won the discursive battle around gambling addiction and regulation.

As liberal societies with globalized economies and digitized markets negotiate control, they have increasingly transferred responsibility for societal risks to the individual subject. This phenomenon is closely related to the negotiation over what constitutes contemporary sovereignty—as much the individual as the governmental—and to the question of who is entitled to decide this matter. Crucially, the question arises as to what extent it is acceptable that the sovereignty of the free consumer in liberal market societies is accompanied by disciplinary governing measures such as the exclusion of a specific group of consumers from "normal," accepted consumption behavior via psychiatric categorization and therapeutization. Liberal societies with digitized markets thus need to openly discuss the unresolved issue of the allocation of responsibility over transnational societal risks among the individual subject, federal states, the nation-state, and supranational institutions.

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