



Structural Comparative Analysis of the Legal Definition of Gambling

Kumar Kavramının Hukuki Tanımının Yapısal ve Karşılaştırmalı İncelemesi

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Abstract

In this article the term gambling is defined via structural comparative analysis. The objective is to compare and contrast the legal definitions of gambling in the US and the EU and show that there are significant differences. An important finding of this analysis is that despite similarities in the primary components, which are chance, stake and prize, used in defining what gambling is, there are also differences in how these three concepts are defined. In addition, via implementation of specific exclusions and differential treatment of certain activities, the variations of definitions of gambling and the discrepancies among national legislation increase, making the concept of gambling particular to each nation.

Keywords: Gambling, online gambling, EU Law, US Legal System, public morals

Özet:

Bu makalede kumar kavramı yapısal ve karşılaştırmalı bir metodla incelenmiştir. Amaç AB hukukunda ve ABD hukukunda kumar kavramının tanımlarını incelemek ve karşılaştırmak suretiyle farklılıkları ortaya çıkarmaktır. Bu incelemenin önemli bir bulgusu kumarın tanımının temel unsurları olan şans, riske edilen katılım payı ve ödül kavramlarının tanımlarının dahi farklılık göstermekte olduğudur. Bunlara ek olarak kanunda öngörülen istisnalar ve risk içeren belli aktivitelerin farklı sınıflandırılması sebebi ile kumara ilişkin ulusal düzenlemeler arasındaki farklılıklar artmaktadır. Böylece, kumar kavramını her ülkenin kendilerine has hukuki düzenlemelerle farklı tanımladığı ortaya çıkmaktadır.

Anahtar Kelimeler: Kumar, İnternet Kumarı, AB Hukuku, ABD Hukuku, toplumsal ahlak

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1. Introduction

Farmville, Candy Crush, Pet Rescue and a list of other social games have all become household names around the globe in the last eight years. In 2013 roughly 11% of the world's population that is more than 750 million people are estimated to play them every month¹. Participation in these games is typically free of charge, there is no monetary pay out and they are commonly referred to as social games characterised by the social network platforms they have been offered at, such as Facebook and Google+². Soon after their appearance in 2007, games that are traditionally played to gamble, primarily poker and casino games took their place among them and they have reached 173 million users per month.³ As of September 2015, no laws or regulations had been enacted that refer specifically to social gaming neither in the EU nor in the US⁴. They are simply available for anyone who has access to a digital distribution network⁵.

While the national authorities remain undecided as to whether any sector specific regulatory oversight is necessary, this industry has reached extensive number of participants across seven continents and even expanded to mobile platform via mobile specific applications (Krafčik 2013).⁶ The reluctance of regulators to act brings the experience with online gambling to mind. In 1994, the forerunners of online gambling companies emerged and the online

1 Please see Online Games Presentation at 15 May 2013 meeting of Pennsylvania Gaming Control.

2 There are a number of definitions. According to Casual Games Sector Report of 2012 by Casual Games Association, social network games are “games that run on a social network, require player to be online, run embedded in the social networks pages and use social features as deeply integrated gameplay elements”. In their recent work, Schmid, Talos and Aquilina lifted the platform restriction embedded in this definition and developed a more comprehensive one to include other digital communication platforms that social games have started to be offered at. According to this a social game is “a game with symbolic rewards and freemium access via an established distribution network account that requires the players permission and use of player links to a social graph for promotion, retention and game play” Günter Schmid, et al. (2013). Social Gaming in Europe. Vienna, Lexis Nexis Verlag ARD Orac GmbH & Co KG

3 Please see ‘Social Gaming: Click Here to Play’ (2012) Morgan Stanley Research

4 In the EU, both at union level and at national levels, there are directives and regulations that have been enacted to regulate information society services in general, which are also applicable to social games. Among them are: E-Commerce Directive, Consumer Rights Directive. Günter Schmid, et al. (2013). Social Gaming in Europe. Vienna, Lexis Nexis Verlag ARD Orac GmbH & Co KG. Also, some national gambling regulators (i.e. ARJEL in France) are considering passing sector specific regulations. In the US, there have not been any news of similar attempts. Please see GELLATLY, A. 2012 and Europe, US At Different Speeds On Social Gaming Regulation Gambling Compliance [Online]. Available: <http://www.gamblingcompliance.com/node/50212> [Accessed 24 September 2013].

5 As mentioned above, social games are no longer exclusively offered at social network sites *ibid*.

6 Please see Social Gaming White Paper by GamblingData (2012) Available at. <http://www.gamblingdata.com/files/SocialgamingDataReportOct2012.pdf>.

gambling market quickly reached an extensive size⁷. It became a global industry before the state authorities realized it was necessary to establish national control mechanisms due to moral, economic and customer protection related concerns. The delayed attempts of states to implement protective measures were further delayed by international confrontations among competing public and private interests both at national and supranational⁸ levels. The changing process of gambling regulations was still ongoing while the social gaming phenomena emerged and spread. The two markets are related as the social games are generally permissible to the extent that they do not classify as games of chance or gambling (Günter Schmid, Thomas Talos et al. 2013: 111).⁹ Should the national regulators decide that social gaming also requires sector specific regulations and national control mechanisms, even if they do not classify as a gambling activity, we are very likely to witness another high scale international controversy. In this context, how gambling is defined by law is an important factor in how judicial and political presumptions are formed regarding its cross-border trade. It has become evident in the online gambling related disputes that even the states that have established liberal gambling regimes within their borders have been rightfully concerned about its cross-border provision.¹⁰ The definitions are significant as they are constructed to reflect the states

7 Although the market value of social gambling (1.7 billion US Dollars in 2012) is not very high compared to the market value of online gambling (35 billion US Dollars for 2012); the 173 million social gamblers per month raise hopes for high potential for value growth, when compared to 50million real-money gamblers. Please see Social Gaming: Click Here to Play⁷ (2012) Morgan Stanley Research

8 Within this article the World Trade Organization (“WTO”) and the European Union (“EU”) and their bodies are referred to as supranational entities in order to emphasize their supranational aspects, with reference to the definition provided by Amitai Etzioni. He had defined three elements, each of which can denote supranationality to an organization which are: “(1) Decision making power on significant issues by a body that is not composed of national representatives (even if they are appointed by member nations they do not act under their instruction), that does not receive instructions from national governments and that follows its own rules, policies and values. (2) Not only the member states but also their citizens and other legal entities (such as corporations and labor unions) are legally obliged to comply with the decisions of the body without the need for a separate decision by national governments. (3) Some sort of direct enforcement power on individuals or other private parties. Etzioni, A. (2001). Political Unification Revisited: On Building Supranational Communities, Lexington Books. In this framework the some aspects of WTO and its dispute resolution body possesses the second element. The EU Institutions and bodies possess at least one and in some cases three of these elements.

9 In social games, typically, there is no monetary prize and in most cases no consideration to participate in the game. In the absence of either of the two, an activity is not considered gambling and escaped the strict control mechanisms.

10 In defence for preservation of the national regimes they emphasized the particularity of their moral values and the importance of national control for implementation of the public policies, each of which have been recognized as legitimate justifications. In the WTO structure, the individual state’s right to regulate the supply of services within its territory in order to meet national policy objectives has been specifically recognized. Please see Preamble, GATS. In the much more integrated EU structure, the priority in regulating a public morals area is again under the authority of each EU member states unless it can be clearly established that there is need to act at the EU level. Moreover, in both jurisdictions derogation from treaty objectives can

concerns and policies. Therefore the information provided in this article is significant in understanding the extent of divergences among jurisdictions as reflected in their definitions of gambling and whether Internet gambling requires a distinct definition.

The proliferation of cross-border provision of gambling services had led to increased volume of interactions among the states, mostly in the form of conflicts. The central themes these interactions have been the differences among public policies and national regulations within the context of international trade obligations. However the gambling concept, both in definition and scope, has regularly escaped the limelight. The primary reason behind the lack of interest in this topic has likely been that range of games preferred by the online gambling service providers were games that have been traditionally considered gambling, such as casinos, betting and poker. As a result of this, coupled with the assumption that everyone knows what gambling is¹¹ the definition of gambling has rarely been contested in gambling related disputes at the supranational level.

In this article, initially, the definitions of *gambling* and internet gambling are introduced. The three fundamental features of gambling, chance, prize and stake¹² follow, in the third section. There is hardly any disagreement on whether traditional games such as lotteries, sports betting and casino games are gambling. On the other hand, new types of games are introduced frequently, some in the form of social gaming, and their classification depends on the prescribed definitions. There are also activities that do possess all three features but are traditionally not considered gambling and are thus specifically excluded from gambling legislation.¹³ The final analysis section consists of a comparison of land-based and online gambling. This issue will be analysed from the perspectives of the states and the supranational courts separately.

be justified on public morals and several public policy grounds.

11 In 1978 this approach was articulated by Lord Rothschild in the Final Report of the Royal Commission on Gambling, UK Government: "Almost everyone knows intuitively what gambling is—buying the chance of making money; taking a calculated risk because of potential reward; engaging in an action or series of actions resulting in a favourable, unfavourable or neutral outcome and so on...."

12 Stake is also referred to as *consideration*.

13 One commonly referenced example is day-trading in stock market.

2. Relevant Terminology and Definitions

Gambling is very broadly defined as staking or risking money, or anything of value, on the outcome of something involving chance.¹⁴ Legislators often adopt a version of this definition with the intention of covering all traditional and new types of gambling that did not exist at the time of the legislation. Therefore, participating in a lottery, betting and all types of casino gambling are intended to be included in this term.

Indeed, in the EU, E-Commerce Directive, the term gambling refers to games of chance, betting and lottery transactions which involve wagering a stake with monetary value.¹⁵ According to the Services Directive the primary features of gambling are chance and stake with economic value. It is specifically mentioned that this definition includes all types of gambling including lotteries, gambling in casinos and betting transactions.¹⁶ The Audiovisual Media Services Directive also uses a similar language defines chance, stake –representing a sum of money- as the fundamental features. It specifically points out that the definition is intended to include online games, lotteries, betting and other forms of games of chance. The definitions are very broad because these directives have prescribed these definitions to exclude gambling services from their scope. In case a directive that regulates any aspect of gambling services is enacted, a more detailed definition would be necessary to define its scope. There are examples in national legislations as well as federal legislation such as IGBA §1955(b)(2) in the US. It first defines the term gambling to include pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances but then defines a number of exclusions to define the scope of the legislation,

As the examples above also show games of chance and gaming are the two other descriptors most commonly used interchangeably¹⁷ with gambling. Sometimes the term *gaming* is also used to differentiate certain types of gambling from others. For example, in US usage *gaming* refers to engaging in gambling activities that are legally allowed (Humphrey 2012). In Article

14 Online dictionary 2009, Random House, viewed 5 February 2009, <http://dictionary.reference.com/browse/gambling>

15 It excludes promotional competitions or games the purpose of which is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services. Please see Preamble Paragraph 16 and Article 1 of Directive on E-Commerce.

16 Article 2(2)h Services Directive

17 Preamble and paragraph 22 of the Audiovisual Media Services Directive.

6 of Gambling Act 2005 of UK, *gaming* is used for games of chance and the definition of games of chance excludes betting and lotteries.¹⁸ In the international courts these nuances in terminology are sufficiently insignificant that they have not obstructed communication thus far. The courts generally refer to the national legislation defining these concepts, as they usually seek to address a number of nations whose native languages differ.

Internet Gambling

As for the definition of online gambling, it is commonly agreed by the WTO and the EU Courts that the use of the Internet as a medium should not affect the laws that apply to gambling services provided via more traditional means.¹⁹ Therefore, there is uncertainty as to whether a separate definition is necessary for Internet gambling for judicial or legislative purposes. Nevertheless, a definition has been proposed by the European Commission in has proposed a definition:

Online gambling services are any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means at the individual request²⁰ of a recipient of the services.²¹

In the US, there is not a definition of online gambling that corresponds to the definition above. However, Section 102 of the Unlawful Internet Gambling Enforcement Act of 2005 (UIGEA) amends the Wire Act of 1961 to make sure that the use of the Internet to facilitate gambling activities that are otherwise prohibited by state laws is likewise prohibited by law.²²

Illegal Gambling

Another term, the definition of which is of importance, is “illegal gambling”. In the US, the

18 In this article the term gambling will be used to define both legal and illegal gambling and it will cover all activities of gambling including betting, lotteries, casino games, slot machines, and so on.

19 Please see section 4.3.

20 A footnote at the same definition emphasizes that “at a distance” and “at the individual request” means “a direct on-line request from the recipient to the Internet gambling operator without any reliance on any intermediaries such as shop staff working at a point of sale. To the extent that the distance transaction takes place through a network of natural persons acting as intermediaries using electronic means it is not intended to be contained in the above definition.”

21 Article 2.1. of the Green Paper

22 The definition of “communication facility” in §1081, paragraph (5) of the Wire Act was amended in Section 101 of the UIGEA to mean “any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, radio, or an electromagnetic, photoelectronic or photooptical system, or other like connection (whether fixed or mobile) between the points of origin and reception of such transmission”.

illegal gambling business has been defined at the federal level under the Illegal Gambling Business Act (IGBA) §1955(b). That definition encompasses any gambling business that violates the law of a state or political subdivision in which it is conducted, involves 5 or more persons in its operation and has been in operation for more than 30 days or exceeds a certain amount of gross revenue in any single day. The precondition of the violation of the state law is of utmost significance, as federal legislation leaves it to each state to determine its gambling laws and therefore the term's definition and scope. Years later, in 2010, a similar definition of unlawful gambling was proposed by the Council Working Group in the EU. That group held that gambling services operators must comply with the laws of the countries where they offer their services and those national laws must be compliant with relevant EU legislation. Within this framework, if gambling services are operated without a licence, or outside of compliance with the laws of the relevant country, they may be considered unlawful.²³

The definitions of illegal gambling signify recognition of the authority of individual states in determining their gambling regimes, initially in a federal setting and then in an economic and political union. Therefore, beyond the state level it is relatively easy to reach an agreement on the definition of illegal gambling compared to gambling itself.²⁴

3. Fundamental features of “gambling”

The definitions of gambling are almost always based on three concepts: chance, stake and prize. In legislations, these overarching definitions are almost always accompanied by exceptions to exclude activities not traditionally or legally considered gambling, such as, in the US, financial market activities including purchase or sale of securities, derivative instruments, and any contract of indemnity or guarantee.²⁵ In the UK spread betting is similarly exempted.²⁶

²³ ‘Conclusions on the framework for gambling and betting in the EU member states’ adopted by the Council of the European Union at 3057th Competitiveness (Internal Market, Industry, Research and Space) Council meeting. Brussels, 10 December 2010. Council document 16884/10.

²⁴ The analysis of fundamental features of gambling will show how the three concepts that define gambling could be interpreted differently from one jurisdiction to another.

²⁵ Section 5362 UIGEA

²⁶ Article 10 UK Gambling Act 2005. This legislative exclusion does not necessarily impose on the views of health organizations and other non-governmental organisations dedicated to supporting individuals who are not unable to control their gambling habits. For example, a majority of such organizations recognize compulsively “playing” on the stock market as a form of gambling addiction Segal, J., et al. (2008) *Gambling Addiction and Problem Gambling*. 2009,

In this section these three features and a few possible interpretations are explored. Differences in interpretation stem from the distinct historical experiences, social policies and moral values of each state. Differences hinder communication and constitute a major obstacle for agreement among states on common rules for gambling services.

3.1. Chance

Chance is the absence of any cause of events that can be predicted, understood, or controlled.²⁷ It is the source of gambling's attraction and also of the reaction against it. It is also the factor differentiating games of chance from other games the result of which is determined by skill,²⁸ such as chess. In the EU and the US, there is a common understanding that when an amount is wagered on the result of something that is purely determined by chance, as a rule that activity is gambling and shall be subjected to gambling related legislation.

In this regard one very important issue causing differences among jurisdictions is how they prefer to classify activities the outcomes of which are determined both by chance and player skill, such as poker and backgammon. Some states, including the UK²⁹, consider the mere existence of chance sufficient to classify an activity as gambling while others, including the majority of US states, Germany, Italy and France have started to apply a predominance test to see whether skill or chance is the dominating factor in determining the result of a game. Indeed, until recent years, the prevailing approach was to consider the mere existence of chance, via a randomizing mechanism such as the throw of dice or draw of cards, sufficient to classify an activity as gambling. However, it has become clear that in some games, in the long run, the more skilful players always prevail over less skilled ones. Therefore, the predominance test has begun to be used to determine whether a game is one of skill or of chance.

In *In re Allen*, 377 P.2d 280 (Cal. 1962), the California Supreme Court defined the elements of a game of skill in the context of the game of bridge, which it upheld as a game of skill. It was

resolved that "it is the character of the game rather than a particular player's skill or lack of it

²⁷ Online dictionary 2009, Random House, viewed 5 February 2009, <http://dictionary.reference.com/browse/chance>

²⁸ This differentiation is very important because as a rule games of skill are excluded from the scope of laws that regulate gambling.

²⁹ The Gambling Act 2005 of UK is one of the newest gambling acts of the world. In Article 5, games of chance is defined to include games that involve both an element of chance and an element of skill, games that involve an element of chance that can be eliminated by superlative skill, and games that are presented as involving an element of chance.

that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game". Also, in *USA v. Lawrence Dicristina*³⁰ the New York District Court ruled that poker qualifies predominantly as a game of skill.³¹

The idea of applying a predominance test seems fair and logical. However, the available methods and their application have proved more complicated than initially assumed (Borm and Genugten 2001). This test ordinarily relies for its results on the average player. The next step is to observe a number of repetitions of a game such as an average player would play. Then a final calculation is made to find out whether the number of games won is sufficient to find that skill outweighs chance. In their critical analysis of the predominance test, Fiedler and Rock, who found poker to be a skill game, argued that, the test had too many variables and that even the applied time horizon persisted as a question of subjectivity (2009). Today, in various jurisdictions, despite many cases pending in the courts, the rules that govern gambling are indifferent toward poker and backgammon considering them forms of gambling (Kelly, Dhar and Verbiest 2007).

At the supranational level, these differences present a difficulty for service providers, which are looking to provide their services across-borders. In previous sections, it has been pointed out that service providers are expected to comply with the laws of the state(s) to which they are providing their services. In that case, if a game is considered a skill game in one jurisdiction and a game of chance in the other, the service providers will be subject to two different regimes regarding the same service. The laws of the state they are providing their services from will not be relevant.

3.2. Stake and Prize

A stake, also referred to as a wager, bet or consideration, is one of the three defining elements of gambling. It is something of value, in most cases of material or monetary value that is risked upon the result of a game or the occurrence or outcome of any uncertain event, venture, and so on.³² The stake allows the player to participate in the game, the goal of which is to win the prize which is the third defining element of gambling and is also simply defined

30 *USA v. Lawrence Dicristina*, 11-CR-414, NYLJ 1202568480608, at *1 (EDNY, Decided August 21, 2012).

31 Therefore poker does not fall under the scope of the IGBA.

32 Online dictionary 2009, Random House, viewed 13 February 2009, <http://dictionary.reference.com/browse/stake>.

as anything of value. The test for determining whether there is a prize under the meaning of gambling legislation is usually whether an ordinary person would believe it has value, even if small (Csoka 2008). In this section, the stake, the prize and the purpose of the game will be examined in relation to one another.

As mentioned above, the stake is compulsory for participation in gambling activities. In some games the amount of the stake and the prize are correlated; in some they are not. In the case of lotteries or slot machines, the amount the player may win is unaffected by the amount staked. In roulette, on the other hand, the prize is calculated as a multiple of the amount of the stake (Abt, Smith and Christiansen 1985:41-42).

The incidental expenses or inconveniences necessary to enter a contest or a promotional activity are generally not deemed a consideration. Two common examples of incidental expenses are buying a stamp to send in entrance documents and/or items or paying Internet access fees to facilitate participation in games offered online. The outcome of this prevailing approach is not always obvious, and its application may be confusing at times. For example, if a player wins game credits from a free game, and wagers these game credits on a game of chance (to win a prize) that game of chance may constitute gambling under US laws, although no money was staked. Tempted by the opportunity to circumvent laws and regulations restricting the provision of gambling services, some gambling enterprises have formulated alternative staking methods which often do not escape the scrutiny of the courts or other review bodies (Csoka 2008).³³

Varying approaches to the stake concept have become central to the legal status of free draws.³⁴ Free draws are lotteries in which the entrants are not required to wager anything as consideration. The organization of these types of lotteries for promotional purposes, with no gambling license, is considered legal in many jurisdictions. One example may be a promotion organized by a particular brand of soda, where the vendor gives away world cup tickets to a certain number of customers. In order to participate, the customers are required to check the number on their can of soda, on the company's website. There is also the flexible-entry method, in which the entrant can either buy a ticket by risking a stake or simply fill out a form. In this case, many jurisdictions require equal opportunity to both types of entrants

33 Competitions and Prize Draws, (2009), UK Gambling Commission. Available: http://www.gamblingcommission.gov.uk/frequently_asked_questions_fa/competitions_and_prize_draws.aspx [Accessed 24 February 2009]

34 They are called sweepstakes in the US.

in order to deem such a non-gambling activity. The rules for these types of organizations become more and more complicated as the variety of examples increase year by year (Blakey 1984, Cabot and Csoka 2003-2004, Csoka 2008: 9-19).³⁵

In the recent years, in determining the legal status of social games provided via digital communication platforms, the absence of stake to participate in the game and the absence of monetary prize have become the deciding factors. Due to the absence of these factors these games escape oversight of state gambling regulators. The most common system for participation in these games is the “freemium” system. The players participate in the games with a limited amount of free chips they receive every day and the pay-outs for winners are with symbolic reward, often in the form of virtual currency. Typically, however, additional chips are available for purchase for players who would not like to wait for the next day to continue playing. In this case, the absence of a prize with monetary value becomes the primary factor that differentiates them from gambling.³⁶

This section has shown that significance of stake and prize in classifying a gaming service as gambling or not and the diverse approaches that national gambling legislators may adopt. Despite these terms being defined in very similar ways, gambling policies shape and re-define their interpretation and scope. This diversity in their definitions is another indication that the activities that the societies perceive as gambling may be particular to each nation.

4. The differences of Internet Gambling from Land Based Gambling

The gambling games offered via the Internet and other digital communication platforms are usually very similar probably because the service providers prefer to reach customers residing in jurisdictions other than the ones they are established in, with products they are familiar with. The difference stems from the consequences of the use of digital communication platforms which impacts the ease and frequency of consumers reach to cross-border gambling services. If we take into account that before the utilization of the Internet, the gambling regulators have not deemed consumption of gambling services abroad, when their residents travelled to these

35 Please also see footnote 85.

36 Please see Social Gaming: Click Here to Play’ (2012) Morgan Stanley Research. Also for further information please see pages 11-114 of Social Gaming in Europe Schmid, G., et al. (2013). Social Gaming in Europe. Vienna, Lexis Nexis Verlag ARD Orac GmbH & Co KG

jurisdictions to consume those services, a cause for international dispute; the significance of the differences of Internet from land based gambling becomes apparent.

4.1. The Gambling Industry Perspective

The gambling industry has always been among the first to utilize advances in new technologies. The invention of the printing machine, the increased speed of communication via postal service by train, telegram, telephone, television and finally the Internet have all been utilized by the industry soon after their invention. Most of these advances have created grey areas in existing legal systems and provided prospective service providers with new opportunities to circumvent the laws in force. Each time, the exploitation of the new technologies for such purposes triggered newer control measures, as expected. There are two striking examples of this phenomenon from the US.

The first example relates to the utilization of the postal services to facilitate, first, interstate and second, off shore lottery ticket sales. In the late 1800s, the Serpent, a lottery operated by the Louisiana Lottery Company, became extremely popular especially after other states prohibited their own lotteries. By 1877, Serpent tickets were sold in every state and ninety three percent of the Serpent's gross revenue was from out-of-state sales (Roberts 1996-1997, Graham 2002). After a fraud scandal,³⁷ the Serpent's license was revoked in 1890, and the US Senate passed laws prohibiting lottery advertising and operation via the postal services in order to avoid similar incidents (Britz 2000:25-6). The Serpent then moved its operations to Honduras. In response, in 1895, Congress prohibited the importation of foreign lottery materials. This last Congressional measure ended the operations of the infamous Serpent (Schwartz 2005:24) and of lotteries in the US for seventy years. The Serpent's conduct obliged federal government intervention in an area previously considered to be exclusively under state control in an effort to stop the Serpent and to avoid similar future attempts.

The second example relates to gambling via telegram. The telegram was utilized to facilitate intrastate and international betting, initially on horse races and later in other sports competitions. In the late 1890s, places called poolrooms provided betting pools on remote races and were connected to racetracks and one another via an information line called the race wire. The race wire was initially provided by Western Union, the telegraph monopoly

37 This scandal implicated 23 of the state's senators.

of that time. Operations later came into the hands of the criminal organizations, and despite allegations of highly corrupt practices, continued thus until the passage of the Wire Act in 1951, which prohibited the use of wire communication for betting businesses (Schwartz 2005-40).³⁸ Years later, this Act has become the centre of discussions related to the legality of cross-border provision of online gambling services to the US when the US Department of Justice (DOJ) interpreted it as prohibiting all forms of online gambling, although the Federal Court limited that interpretation to sports betting.³⁹

Especially in the second example, the use of telecommunication technologies for gambling purposes shows how quickly and efficiently technological advances have been utilized by the gambling industry and how difficult it is for legislators to foresee and formulate timely and effective solutions for contemporary problems in the absence of a strong policy. The Internet gambling industry was not very different in utilizing a new technology much quicker than the states realized the potential outcomes of the use of this media.

Eager entrepreneurs have also taken advantage of the legal uncertainty created by the use of the Internet in the gambling industry, establishing themselves as out-of-state service providers to offer instant access to real-time betting, sport betting, casino games, lotteries and peer-to-peer games⁴⁰ without being subjected to the laws of the countries they provide their services to. Realizing that the states at the receiving end of their services are inclined to obstruct the provision, they have tried to establish the legitimacy of the industry they have created with intense lobbying efforts and aggressive litigation. In Europe, they have challenged the existing state laws within the framework of the EU member states trade liberalization commitments. An account of their efforts can also be observed in the number of lawsuits

38 The Wire Act was enacted with the intention of stopping illegal bookmakers from using wire communication for business purposes. The Congress thought that if these illegal bookmakers could not get the information they needed to fix the odds, inform their customers of the results and thus pay off, they would go out of business. Thus, the Wire Act prohibits the use of wire communication by those engaged in the business of interstate or foreign commerce of betting or wagering for the transmission of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.

39 The US Court of Appeals for the Fifth Circuit ruled in November 2002 that the Federal Wire Act prohibits electronic transmission of information for sports betting across telecommunications lines but affirmed a lower court ruling that the Wire Act does not prohibit non-sports Internet gambling. Please see Section 4.3.1. of in re: Mastercard International Inc. Internet Gambling Litigation, 313 F.3d 257 2002, for the position of the DOJ.

40 Casino games, peer-to-peer card games, especially poker, and betting are the three major gambling types offered on the Internet. Lotteries, except for bingo, have attracted comparably less demand, probably because instant access does not result in instant results.

they have filed. At the international level, Antigua and Barbuda (Antigua) have defended the right of such companies to continue providing their services to the US as per their trade liberalization commitments under General Agreement on Trade in Services (GATS). Also, there are proponents of legalization and taxation of these services in the US Congress who have proposed bills for that purpose over the years (Vallerius 2011).

Existing gambling service providers, on the other hand, were mostly cautious in utilizing the Internet in the beginning. As the customer base and the online gambling industry as a whole grew, in an effort to preserve revenues and market share, some existing service providers started to provide services online to the extent allowed by the jurisdictions they had been established in. Some examples are the UK National Lottery, MGM in Las Vegas, Mega Millions in the US⁴¹ and casinos in Lower Saxon, Germany⁴².

This section showed that from the gambling industries perspective, until recently, the Internet has been a convenient way to provide services by escaping heavy regulatory burdens and restrictions. The Internet is just one of the last technologies utilized for this purpose. Its effects on national and supranational policies are still in progress.

4.2. The States' Perspective

During the course of its history, the gambling industry has proved to be an industry, the strict controls of which are necessary to minimize consumer exploitation, tax evasion and other criminal conduct. The EU member states and the US states have authorized some forms of gambling in the confidence that their established systems were suitable to achieve the necessary control mechanisms. Their goals were not merely economically motivated. In most cases, their acknowledgment of the unavoidable public demand for gambling had motivated them to meet that demand in a safe and controlled environment, without increasing demand by allowing an actual competitive market. The local industries had been subjected to heavy restrictions, in order to enable the government to control its reach and its quality and also, to facilitate economic and social policies.

In that sense, the most important difference between online and land-based gambling for

41 Mega Millions is played in 42 states and the District of Columbia and the U.S. Virgin Islands. Please see History of the Game, Available: <http://www.megamillions.com/history-of-the-game> [Accessed 22 November 2011].

42 This liberal approach had since changed Hörnle, J. and b. Zammit (2010). Cross-Border online Gambling Law and Policy. Cheltenham, Edward Edgar Publishing Inc.

the states is that the states have to bear the negative consequences of the provision of online gambling services within their borders although they have neither the jurisdiction nor the enforcement power to claim remedies for any wrongdoing, such as tax evasion and conduct threatening to customers and the vulnerable. Moreover, they do not benefit from the positive outcomes intended by their public policies regarding gambling, such as allocation of its revenues to the funding of public projects or the employment opportunities that the sector provides. Indeed, one of the important positive outcomes of the national gambling markets has been the considerable sums they have placed at the disposal of the state via taxes levied on the industry. The taxation of online gambling operations has proved complicated, thus leaving large sums untaxed.

In the US, the federal government took a stronger stance against online gambling companies and declared their activities illegal. Therefore, those companies could not voice their claims as strongly as in the EU, where it was more or less recognized that there was a grey area to be addressed. The contradicting claims of the online gambling industry and the EU state-licensed lotteries and Toto companies were expressed by the representatives of each at 2005 colloquium at the Faculty of Law, Tilburg University in the Netherlands.⁴³ In this confrontation, industry representatives argued that the harmonization of rules would be a more efficient method of meeting consumer protection and other public order objectives intended by national legislation. They also emphasized that the change was inevitable and that the EU should acknowledge that fact and play a decisive role (Arendts 2007:41-52). The counter argument defended by the legal spokesman for the European State Lotteries and Toto Association Mr. Tjeerd Veenstra, was that the preservation of existing monopolies and exclusive rights systems was in the best interest of EU citizens and that it would not be possible to establish efficient control mechanisms in a liberalized market (2007:53-67).

The two conflicting views show that online gambling companies are willing to compromise on profitability rates, pay taxes and comply with the rules prescribed in exchange for recognition and continued business despite general scepticism as to the feasibility of achieving similar policy goals in a liberalized market.

⁴³ Later the results of the colloquium, which was also a part of a research programme on the regulatory aspects of gambling in Europe, were published in a series of three books (The Regulation of Gambling, Crime, Addiction and the Regulation of Gambling and Economic Aspects of Regulation of Gambling), which constitute one of the most extensive studies of the gambling industry in the EU to date.

4.3. The Courts' Perspective

The comparison of the views of the WTO Dispute Settlement Body (DSB) and the ECJ regarding the differences between online and traditional gambling provide significant findings. The ECJ takes the view that EU member states are under no obligation to allow online gambling services of providers established in other EU member states. In relation to online gambling, the ECJ has observed that based on the “lack of direct contact between consumer and operator, games of chance accessible via the Internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games”.⁴⁴

However in relation to the question whether the Internet gambling market can be deemed separately from the sector as a whole, the ECJ has recently ruled that the Internet is only the platform through which betting services are offered and that the market should be considered in its entirety, independently of how and where the bet is placed.⁴⁵

In *US-Gambling*, the question of whether there is a difference between land based and online gambling appeared before the Panel and the Appellate Body in two different contexts. First, when interpreting the US's Schedule of Commitments, they had to assess whether those commitments excluded provision of services via the Internet or gambling services in general. The Panel referred to the technological neutrality principle, finding that “the cross-border supply” referred to in GATS includes all possible means of supply where the service provider is not present within the territory of the member state where the service is delivered. Therefore, if a WTO member state has made a full market access commitment under Mode 1⁴⁶ and unless otherwise specified its Schedule, provision via the Internet shall not be treated differently from other forms of delivery.⁴⁷ Later in its analysis of restrictive US measures specific to online gambling, the Panel decided that the different means of trade could trigger different public morals and public order concerns. Therefore, the US regulations regarding non-remote gambling services and the fact that the US has been a significant consumer of land based gambling services did not have to set a standard for measures regarding online

44 Please see paragraphs 69-72 *Bwin*, paragraph 101-3 *Carmen*, paragraph 79-81 *Zeturf*.

45 Please see paragraph 77 *Zeturf*.

46 Article 1(2)(a) GATS

47 Paragraphs. 6.281- 6.285 *US-Gambling* Panel Report

gambling⁴⁸. The AB also approved the Panel's reasoning.⁴⁹

Therefore, from the perspective of both the ECJ and the DSB, online gambling could trigger different policy concerns and thus require a different regime to tackle concerns specific to digital communication platforms.

5. Final Comments

In this article, the legal definition of gambling has been explored from various perspectives with the aim of discerning the key differences and commonalities in what is considered *gambling* in both the US and the EU. Definitions are significant both at the national and international levels, not only in defining legality and illegality but also in facilitating communication, whether in the form of disputes or negotiations or collaborations. The three concepts; chance, stake and prize have been the fundamental features of gambling in both jurisdictions. However, there are significant differences even in how these concepts are defined. In addition, via implementation of specific exclusions and differential treatment of certain activities, the scope of gambling activities and legal gambling activities differs further from state to state both within the US and within the EU. The grounds for these divergences are numerous, ranging from the historical, political, and economical to matter of tradition as well, which shall be explored further.

Nevertheless, the existence of a lucrative Internet gambling market serving an international consumer base, mostly with products which are traditionally considered gambling in both jurisdictions is also significant in showing that the peoples of these two areas have a shared taste for similar gambling activities and expect more or less similar range of services from gambling service providers. The shared consumer base can easily become a motivation in addressing consumer protection related concerns via collaboration among jurisdictions while retaining national control over other fragile concerns related to public morality.

48 Paragraphs. 6.498 and 6.521 *US-Gambling* Panel Report
49 Paragraph 313 *US-Gambling* Appellate Body Report.

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