

This article was downloaded by: [Universita' di Trento]

On: 22 June 2011

Access details: Access Details: [subscription number 778410541]

Publisher Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Journal of European Public Policy

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713685697>

Stakes and states: gambling and the single market

Vincent Della Sala

Online publication date: 06 December 2010

To cite this Article Della Sala, Vincent(2010) 'Stakes and states: gambling and the single market', Journal of European Public Policy, 17: 7, 1024 – 1038

To link to this Article: DOI: 10.1080/13501763.2010.499244

URL: <http://dx.doi.org/10.1080/13501763.2010.499244>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.informaworld.com/terms-and-conditions-of-access.pdf>

This article may be used for research, teaching and private study purposes. Any substantial or systematic reproduction, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

Stakes and states: gambling and the single market

Vincent Della Sala

ABSTRACT The paper argues that institutional accounts are useful but incomplete in providing an understanding of the dynamics of the completion of the internal market. This is because they do not leave enough room for ideas and norms, which have been central to the gambling story. The paper argues that prevailing norms about gambling, which have associated it with *inter alia* charities, criminal activity, public health and public order, have worked to mitigate the desire for a single market and arguments about the efficiency of market liberalization. Gambling is a useful case to illustrate that there is ambivalence about market building that tries to reconcile possible efficiency gains that come with enhanced competition with an aversion to promoting risk.

KEY WORDS Gambling; institutions; morality claims; norms; single market.

INTRODUCTION

The path to the creation and completion of the internal market has seen its share of detours, and even dead-ends; but political elites have expressed few doubts that it was the right road leading to a desired destination. Whether it was to create lasting peace in Europe or simply to provide European consumers with more choices at more competitive prices for goods and services, there has been an almost unshakeable belief that opening up national borders is efficient and ultimately the right thing to do. Obstacles to the internal market have been presented in terms of the defence of national, particular interests or stemming from some fault in the institutional architecture of the market completion process. The normative terrain was given up as a battlefield as the internal market was seen as not only the expression of the imperatives of economic liberalization globally but also as the vehicle to achieve political objectives such as political union. Challenges to market integration – from fears of regional imbalances to those of the legendary Polish plumber – could be dismissed as mere particularistic interests not on the same normative plain as the broader objectives of European integration.

This contribution aims to use the case of gambling in the European Union (EU) to argue that we need to probe more deeply into the normative claims of the single market. This means exploring a case where it could not be taken for granted that greater integration was necessarily the right thing to do.

Gambling goes to the heart of the dilemma of the single market; that is, how to reconcile promoting competition and encouraging risk after nearly a half-century in which European societies have tried to manage or limit both. Despite European Court of Justice (ECJ) decisions that seemed to uphold Treaty provisions for the free movement of services and the Commission that has looked to gambling as a service worthy of inclusion in the Services Directive, many member states have been able to protect national monopolies and domestic markets. They have done so largely on the basis of claims of threats to public order and public health. Moreover, the underlying basis of the single market project – that markets are inherently efficient tools and the completion of the internal market a desirable objective – has been questioned. Even in the face of clear market efficiencies and Treaty provisions, completing the internal market is not always a sure or desirable outcome. This raises questions of trying to assess when and how normative and morality claims trump appeals to market-building and efficiency.

NORMS AND MARKET-BUILDING

While contending narratives of the internal market have clashed on the question of the relative roles of institutions and interests, they have diverged less on the question of the normative foundations of the single market. Institutionalism and intergovernmentalism, each coming in various guises, have provided compelling and interesting accounts of the dynamics of market creation in the EU but they have accepted an underlying logic of consequences. Markets are built because there is an interest that results from an institutional configuration and/or rent-seeking behaviour. For instance, Simon Bulmer's historical institutionalist account of the single market highlights the important role played by the ideas and values related to market integration (Bulmer 1998). The values associated with economic liberalism emanated from the regime established by the single market, a regime that was created to promote common interests. However, there is no way to account for a case, such as gambling, where the presence of institutions and arguments in favour of liberalization have not been able to create an internal market.

Neo-functional and neo-institutional approaches to the building of markets are useful but incomplete in that they do not take into account that actors and organizations have different cognitive and normative maps of the same terrain. Fligstein, Stone Sweet and others have provided a dynamic interpretation of the mutually constituting roles of markets and institutions (Armstrong and Bulmer 1998; Bulmer 1998; Caporaso and Stone Sweet 2001; Fligstein and Stone Sweet 2002; Stone Sweet *et al.* 2001). The European market is the result not only of the dynamism of firms but of a 'feedback loop' (Fligstein and Stone Sweet 2001, 2002). Firms engaged in cross-border activity use the Treaty of Rome to pierce through national borders and resort to litigation as well as lobbying at all levels to promote their interests. European institutions respond by providing new legislation and policies that give impetus to further sectoral

activity and so on. The institutionalist account is useful in that it points out the ways in which the presence of market-enhancing institutions – such as the ECJ and the Commission – can begin to shape the demands and the interests of market actors (Egan 2001). The process is driven by an underlying position that views market integration as a good thing for either economic (more efficient allocation of resources) or political (market integration will lead to closer political integration) reasons. However, there is little to help us understand when the process does not lead to greater integration even in the presence of all the elements identified by institutional accounts.

Although gambling remains regulated at the national level, it provides plenty of grist for the neo-functional and neo-institutional mills. It is an activity that lends itself readily to ‘spillover’ to the European level, especially as technology allows Europeans to wager through computers, television or mobile phones. It travels easily in whatever form it takes as there are relatively few social or cultural barriers. This seems to have set in motion the dynamic of the institutionalist account mentioned above. Gambling operators have lobbied European institutions, sought legislation and pursued litigation. There have been at least six major ECJ rulings dealing specifically with restrictions to gambling across European borders (Laara, Zenatti, Schindler, Gambelli, Placanica and Bwin Liga), all of which have pointed in one form or another in the direction of the legal basis for a single market in gambling (Littler 2007). Institutionalism also would be encouraged by the role of the ECJ and the Commission, which have continued to press member states to open up their markets and respect the free movement of services (in Schindler, the Court ruled that gambling clearly constituted services as defined by Article 60 of the Treaty). The Commission has tried to push forward the argument for a single market since the early 1990s, producing two major reports in 1991 and 2006 (European Communities 1991; Swiss Institute of Comparative Law 2006). Moreover, it has sought recourse through the courts and pressured national governments to comply with Treaty provisions, especially Article 49.

Whilst useful and convincing, the institutionalist account is incomplete and faces a number of issues. First, like neo-functional spillover, it presents an almost teleological account of market formation. While authors such as Bulmer deny that they see a pre-determined endpoint of the integration process, there is no way to account for an outcome that does not enhance market integration once the process has been set in motion (Bulmer 1998). It does not help us with a case like gambling, which seems to sustain the ‘institutional logic’ of market formation. Yet, European gambling markets remain highly fragmented and national, often with strong monopolies. Second, and consequently, institutionalism does not account sufficiently for differentiation amongst policy areas. In the case of market-building, there have been some areas where there has been more friction than others. We need to understand why it is that we can have some cases where the factors that should favour the single market, highlighted by institutional accounts or the presence of social pressures and interests in the case of neo-functionalism, have failed to

produce the expected result. The presence of institutions and/or sectoral interests does not, *a priori*, determine outcomes if the same institutions or interests produce different results in another policy area.

We can begin to address this gap by arguing that how markets develop and operate are strongly affected by widely shared and understood ideas and norms about what constitutes appropriate activity and behaviour. The same institutional configuration can, over time, allow for different forms of behaviour to emerge. It may very well be the case that markets are driven by 'animal spirits' and the need to tame them, but even members of the animal world have a sense of what they should do in different contexts. It is ideas that provide cognitive maps as to what form of regulation is most appropriate (markets, hierarchies, etc.) as well as the normative frame (for example, efficiency) that legitimates how activity and behaviour is regulated.

The single market, then, is first a normative and cognitive map and the basis upon which decisions are made. Neo-institutional accounts provide only a minor role for ideas and norms in the shaping of policy outcomes; ideas do not exist independently of institutions; indeed they emerge from institutions and provide direction on how to strengthen governance regimes. However, simply adding in 'ideas' as a consequence of institutions (or interests) does not really add much to our understanding of policy changes (Blyth 1997). It may be useful to look to ideas as setting parameters as to what is possible and what should be achieved. It may be the case that the Single European Act (SEA) created a new enthusiasm for economic liberalism; but it butted up against prevailing norms that have been important filters if not barriers to market liberalization. In fact, in the case of gambling, arguments about the efficiency of a European market can be counter-productive as they provoke fears of accentuating its social costs with few marginal benefits. Trying to make the case that an internal market will provide greater access for consumers and produce European operators able to compete at the global level will only strengthen the position of those who argue that more is not necessarily better.

Discussions about market-making and liberalization take on a different hue when dealing with activities which touch upon moral issues such as prostitution, alcohol and gambling. Paulette Kurzer's examination of moral regulation in the EU highlighted the importance of moral norms in providing 'clues on how to regard and solve questionable private activities' (Kurzer 2001: 7). She found that, when looking at Swedish and Finnish drinking regulations, Dutch drug policy and abortion in Ireland, morality claims were moving towards some sort of European standard despite the fact that they were largely shielded from European law and institutions. Drawing from constructivist and institutionalist logics, she demonstrates a shift in ideas and norms in the four countries. Individual Europeans, exploiting the opportunities afforded by the single market, are important agents of change in morality norms, perhaps even more important than institutions. She argues that, '[O]nce individuals begin to engage in massive deception, opponents deprived of access to policy process and decision-making procedures exploit this strange phenomenon to

contest the narrative of the morality framework and to question its overall utility for society' (Kurzer 2001: 25). Kurzer points out how the consequences of a single market – such as the movement of people – changed normative maps, even in policy areas that were not directly affected. She makes a convincing case for how even morality norms can be caught up in the dynamics of market building and can be affected by European pressures. Her account highlights that the needs for a wider consensus on what is appropriate before institutional changes can be brought about.

Gambling presents a different case from those examined by Kurzer. It is widely practised (some of it illegally) throughout the EU, with at least 27 regulated and legal gambling markets. Member states differ on the sorts of activities they allow, as well as how they regulate them; but unlike say, drugs, all allow for some form of gambling within their borders. Unlike the case of abortion examined by Kurzer, citizens would not have to travel to place bets as they could do so from home. Changes in technology allow for gambling services to be delivered across borders easily so that European citizens could, if barriers were removed, have the choice of a vast array of activities and providers. More importantly, unlike the areas examined by Kurzer, there has been a concerted attempt by the Commission to create a single market for some gambling activity along with a series of European Court decisions which have tried to find a balance between different morality claims across the Union and the logic of the internal market. What is striking is that while Kurzer found that market forces, and not active institutional actors or rent-seeking positions, were changing morality norms, this has not been as evident in the case of gambling as morality claims continue to serve as a barrier to the opening up of a single market. This is because concerns about public health and criminal activity continue to be seen as national responsibilities.

GAMBLING IN EUROPE

While estimates differ on the size of the gambling market in Europe, few would challenge the figure that over €50 billion changes hands in some sort of legal gambling activity in the EU each year (Swiss Institute of Comparative Law 2006: 1014).¹ Gambling employs hundreds of thousands of Europeans in a range of industries from hospitality to information and communications technologies. It seems to have all the elements for the development of a single market: an activity that travels well, rules that favour cross-border activity, favourable ECJ decisions, an energetic Commission and an active and organized lobby. It has been legalized in recent decades in nearly every jurisdiction throughout the industrialized world (and beyond), including all 27 member states of the EU. Although a service that can easily cross borders and can be delivered anywhere through information and communication technology, gambling markets remain largely national for most member states. It is the case that most, if not all, member states are opposed to ending national monopolies of

lotteries and many have limited the number of operators in other forms of gambling (Verbiest and Keuleers 2003).

These positions cannot be explained entirely by the desire to protect rent-seeking positions of monopolies or domestic firms as revenue positions of member states could be enhanced by an expansion of the European gambling market. The European Commission continues to claim that a single market in gambling would be more efficient at providing consumers with greater choices at more competitive prices. According to a major study conducted on behalf of the Commission, the demand for gambling is very elastic and removal of legal barriers could lead to greater revenues (Swiss Institute of Comparative Law 2006: 1008). The report speaks of an under-supplied market that could provide increased revenues for Treasuries if broadened, along with some economies of scale. A single market might also facilitate the emergence of competitive European firms able to become major players in an increasingly global industry. The fact that gambling now accounts for up to 5 per cent of total government revenues in some member states would seem to provide a compelling explanation for why they would want to maintain national monopolies. However, if states are intent simply on ensuring an easy revenue stream, restricted domestic markets may no longer be the answer. Research carried out for industry operators indicates that lottery revenues increase as the amount of prize money increases (Europe Economics 2004). A European-wide lottery, or at least one that involved numerous member states – some already exist – could ensure a larger pool of players and hence possibly greater revenues. It is also the case that member states with more liberalized gambling sectors have larger markets, internationally competitive firms and greater potential for government revenues (Department of Justice 2007). Additionally, the advent of new technologies offering trans-border gambling need not also hit state revenues as there are forms of regulation and taxation that could, if projections about the continued strong growth for online gambling bear out, provide significant new revenues. Clearly, revenue projections from all forms of gambling depend on a range of factors, from taxation levels to regulatory structures, and are a source of some debate. The important point for our discussion is that many of the same market-building arguments that stress efficiency gains offsetting potential revenue losses for member states which were successful in other policy areas were countered by morality claims in the case of gambling.

While there might be solid economic arguments that indicate a single market for gambling would be beneficial both to consumers and for government revenues, there is ambivalence about accepting the principle that 'more gambling is better'. Despite attempts to rename it 'gaming', gambling has not been totally disassociated from its recent past as an illegal activity. There are fears that too much access could lead to undesired social outcomes and costs, such as addictive behaviour, increased personal bankruptcies, gambling among youth, and so on. Although moral and ethical positions on gambling have relaxed enough to allow governments to legalize most forms, they have not

eased enough to allow policy-makers to look to it unambiguously in terms of social utility (Swiss Institute of Comparative Law 2006: 1009). Member states have sent out mixed signals by legalizing and promoting gambling but at the same time expressing doubts about its utility and even its moral legitimacy. Gambling, then, presents an interesting case of rival normative claims – economic efficiency versus moral positions – that may shape how the internal market evolves. It captures the dilemma inherent with the Single Market of having to reconcile a widely diffused principle that more competition and risk are inherently good with a desire to manage competition and risk which characterized post-war Europe (Binde 2005).

Gambling is not a single activity and its various forms are dealt with differently within and between member states. Lotteries have been, and continue to be, largely national monopolies or run by national charities. Some member states, such as the United Kingdom, have decided to contract out the national lottery to a private operator, while others choose to have a government agency run the lottery. Lotteries are governed differently throughout the Union with respect to questions such as allocation of resources and regulatory structures. In some member states, lottery proceeds are dedicated to specific sectors such as cultural, education or non-profit activities; while in other cases, lottery funds and taxation go into the general government revenues.

A much more complex picture emerges with other forms of gambling, especially sports betting, which has spread rapidly in recent decades. In this case, there are a number of large European firms, such as Ladbrokes and Unibet, which have pushed to open up national markets. They have been aided significantly by the emergence of internet gambling, which makes it easier to reach punters anywhere. A recent European Parliament study on online gambling has divided governance into four different categories of member states. States which actively allow or prohibit online gambling have legislation that provides for online gambling (such as the UK and Malta) or those that provide an outright ban (such as Germany and the Czech Republic). The intermediate category of passively allowing (e.g., Ireland and Hungary) or prohibiting (e.g. the Netherlands and Slovenia) refers to cases where legislators have not taken a position either way on the issue and have relied on existing legal and regulatory regimes to govern the new phenomena (European Parliament 2009: 19). Differences remain even within the categories. For instance, Italy allows for online gambling but this is restricted to licensed sites. Punters' access to other sites is blocked by Internet service providers and financial institutions are restricted in handling payments to non-licensed sites. Of the 20 states that allow for online gambling, 13 have some form of regulated market; and some states take measures to ensure that operators have a local presence. Six of the remaining seven (Denmark, France, Hungary, Luxembourg, Spain and Sweden) have maintained regional or local monopolies, while Austria has opted for a private monopoly. Sweden also allows non-profits associations to run lotteries and for the horse racing association to take bets online (European Parliament 2009: 21, 27).

Differences in the regulatory regimes may be explained largely by a desire to protect domestic positions and operators. However, this does not tell the entire story. Some member states generally inclined to support market liberalization principles, such as the Netherlands and the Czech Republic, have aimed to limit the spread of gambling and have argued that it is a matter left at the domestic level. Even states with important European and global operators, such as Austria, home to a private monopoly in BWIN Interactive Entertainment, have not supported moves to liberalize trade and open up their own markets by including gambling in the Services Directive (Euractiv 2005). Some states actively promote online gambling but restrict cross-border operators, expressing the same concerns about the spread of gambling as those that actively prohibit it (Trucy 2006). One way to explain these apparent contradictions is that positions on the single market seem to be shaped by the normative starting point of whether market efficiency is a desirable goal to be pursued. While European societies and member states have generally accepted legalized gambling, there is little consensus that an activity that is associated with risk-taking should be largely regulated by a mechanism that enhances competition and risk; that is, the market.

The wide variety in the legal and regulatory regimes is fuelled not only by governments jealously protecting an important source of government revenue but also by the widespread sense that lotteries contribute to important 'social' (and therefore national) projects and objectives such as education, sport associations and healthcare. While the ECJ has ruled that the social utility of gambling proceeds cannot justify restrictions, it has served as a brake on the Commission's pursuit of a European lottery market. The Commission has been more aggressive in trying to open up a second gambling sector, sports betting and online gambling.

SEEKING CLARITY FROM THE EUROPEAN COURT OF JUSTICE

The fragmented and closed nature of the European gambling market has not escaped judicial review, and the ECJ has acted to transmit the implicit view in the Treaties that more market integration is a desirable objective (Euractiv 2006). European operators have looked to the ECJ to unlock national markets, while national courts have looked to it for guidance in an attempt to balance Treaty provisions with the clear signals sent by the Council and national governments that gambling remained a domestic concern. Six major decisions in less than a decade indicate that market actors, national governments and courts have seen gambling as an important question in the internal market debate. However, the steady stream of ECJ judgments in recent years has only partially addressed the normative ambiguity and legal uncertainty surrounding gambling, not clarified it.

In the 1999 Laara decision, the Court did not question the monopoly position of the Finnish state with respect to the operation of slot machines. However, restricting competition could be justified only on the grounds that

it aimed to limit the spread of gambling, prevent the infiltration of organized crime and ensure that the proceeds (or parts) would go to socially useful projects. These principles were upheld in the Zenatti decision (also 1999), with the exception that the Court ruled that using the funds raised from gambling for social purposes did not constitute on its own a reason to restrict the provision of gambling services. Protecting consumers from fraud was legitimate but national courts had to determine whether every step possible was taken to regulate operators. The Zenatti ruling pointed out that public and moral health concerns were acceptable reasons for limiting access to national markets. It introduced a proportionality clause, which stated that the measures introduced to address these concerns had to be proportional to the aims established. The Court was beginning to address the tension expressed between domestic promotion of gambling and restrictions placed on European competitors.

The Laara and Zenatti rulings raised hopes within the industry that the ECJ was putting in place the legal instruments to create a European market, expectations tempered somewhat by the 2003 Gambelli ruling. The plaintiffs were charged with unlawfully taking bets under provisions of the Italian criminal code when they acted on behalf of the British betting firm, Stanley Leisure. They claimed that the Italian law, including its application to internet sports betting, contravened Treaty provision for freedom of establishment and movement of services. Advocate General Siegbert Alber issued an opinion which seemed to agree with the plaintiffs, in that he pointed to recent attempts by Italian authorities to liberalize their domestic gambling market as reason to believe that restrictions on foreign operators were discriminatory and could not be justified on public health grounds. The ECJ decided to rein in part of Alber's opinion, stating that the Italian government did have the right to restrict cross-border betting activity provided that certain tests – those established in Zenatti – were met. It would be the national courts to decide whether government measures to restrict trade in gambling services were proportionate or not, especially with respect to national laws aimed at limiting fraud and the presence of organized crime. The Court did not close the door on the creation of a European market nor did it kick it down with Gambelli; it merely kept its foot in the doorway, which was enough for some European operators.

European operators continued to look to the Court to push past national borders. The Gambelli decision was used by a Dutch court in 2004 to rule that the highly commercial nature of the Dutch gambling market made it hard to justify restrictions on public order and health grounds. Governments could not, on the one hand, promote domestic gambling and, on the other, keep out European operators on the basis of claims of wanting to limit the social effects of gambling or the presence of organized crime. In the Placanica ruling in 2007, the Court reiterated that restrictions on gambling for moral, cultural or public health reasons were justifiable but needed to be proportionate. The ruling, however, left it to the national courts to decide whether this was the case and whether national restrictions in the sector contributed to greater control of the public health and order costs associated with gambling. It

stated clearly that member states could not use criminal proceedings in instances where national and Community law were at variance. The Court also ruled that member states could not keep out licensed European operators while at the same time promoting and expanding gambling within their own borders. The Planica decision was seen as another major step in the creation of a European market but its effects were not felt immediately. For instance, despite clear jurisprudence that said otherwise, the French government requested in October 2007 the extradition from the Netherlands of Petter Nylander, the CEO of the Swedish online gambling site, Unibet. Reflecting tensions within the French government on the issue, Finance Minister Woerth recognized that the arrest warrant stood on dubious legal grounds and did not reflect the position of the government (Wood 2007). It is an indication that member states are not always coherent, monolithic actors driven by a unified normative position.

More recently, the long-awaited ECJ decision in the case between *Bwin Liga vs. Santa Casa*, pitting the Austrian operator and its partner the Portuguese football association against the country's lottery monopoly, was handed down in September 2009. In October 2008, Advocate General Yves Bot argued that so long as gambling was not considered an economic activity seeking to maximize profit, it could be subject to monopoly positions under Community law. The ECJ, in '*Bwin Liga*' (Case C-42/07), reflected this opinion and argued that the moral, cultural and religious differences on the question of gambling between member states remained and were important. It claimed that mutual recognition was subject to the values of member states and not simply to the logic of market integration. If Portugal felt that its citizens were better protected from criminal elements through a state monopoly, it had every right to do so. The broader impact of the decision remains unclear and it may not be as precedent-setting as feared by the industry. It is an interesting decision in that it highlights that different cultural interpretations of integrity, threat and risk were taken into account in supporting the Portuguese position.

The ECJ, then, has sent mixed messages reflecting the tensions between the principles of market-building and concerns with different moral and normative positions within member states. The proportionality principle is seen as one way to find the balance but it remains an elusive reference point. The ECJ has recognized that national sensitivities to an activity that has been associated with criminal activity and public health concerns cannot be trumped easily by the arguments of market efficiency and consumer choice. What is striking about the Court decisions is that they have recognized that member states may be ambivalent about promoting greater forms of risk that could result from market liberalization.

A COMMITTED COMMISSION

There can be little doubt that the driving force for the opening up of a single market for gambling has been the Commission, especially the Directorate-General for the Internal Market under the stewardship of Charlie McGreevy (Laffey 2008). Its interest in gambling is not new, as it had commissioned a

major study of the gambling market in 1991 and exploring the possibility of harmonization of gambling legislation as part of the internal market initiative of the early 1990s. The effort came to a halt at the Edinburgh summit in 1992, when the Council decided that gambling was best left to national legislation. It was to return to the question roughly 10 years later as new technologies, ECJ decisions and the widespread legalization of gambling amongst member states created pressure to explore the issue again (Vlaemminck and Wael, 2003).

The Commission staked a great deal of its effort to extend the market to gambling in its inclusion in the Services Directive. Spurred on by ECJ decisions that defined gambling as subject to Treaty provisions on services and by complementary directives such as that on electronic commerce, the Commission saw an opportunity to have member states open up their markets. Gambling was included in the draft directive that was sent to the European Parliament in 2004, and the Commission made it quite clear in its working documents that it was looking for ways to harmonize the sector and to dismantle national monopolies (Commission of the European Union 2004a, 2004b). The broader instruments of the draft directive, such as the country of origin principle and the right to receive services from other member states, would go a long way towards ensuring that European punters would not only have more choices but also would help create a framework to deal with third-country operators.

The initial Commission plan was for gambling, along with cash-in-transit services and judicial recovery of debts, to be exempt from the country of origin principle; but it gave a specific date for the lifting of this exemption for the latter two while it simply stated that the Commission would assess possible additional harmonization instruments for gambling one year after the directive came into effect. The Commission was willing to make some concession to the country of origin principle in areas where there was a perceived level of risk, such as that to public health, but it did not see this as compelling enough not to look for other ways in which to free up the European gambling market.

The attempts to include gambling in the Services Directive were short-lived. Despite indications that it was the source of long and heated debates in the Council, between parliamentary groups and within the Commission itself, gambling was dropped from the directive. In the Council, the strongest supporters were Malta and the UK, home to most of European internet gambling sites and some of Europe's largest firms. Opposition was not limited to those member states inclined to take a more restrictive view of the single market and economic liberalization in general. The Czech Republic, for instance, one of the proponents of the more liberal elements in the Directive, did not want to have gambling included. It cited the reasons expressed by the other opponents of including gambling in the Directive; that is, that while it was a service there were overriding public health and security concerns. Moreover, reflecting the arguments expressed at the Edinburgh summit in 1992, which effectively said that gambling was best left to the member states, opponents of inclusion in the Services Directive emphasized that different normative positions on gambling expressed important cultural differences.

Defeated in the Services Directive battle, the Commission has returned to the charge by looking to use sanction procedures through the ECJ. It has threatened legal action against numerous member states that have refused to open up their markets. This has been mostly with respect to other forms of gambling, not lotteries. It has done so with some mixed success. In June 2006, after receiving replies from France and Sweden to letters of formal notice, the Commission requested that the two member states adjust their legal regimes for gambling. Both have taken subsequent steps to bring their legislation in line but not entirely to the satisfaction of the Commission. It has launched a string of infringement proceedings against member states in recent years, with the second Barroso Commission inheriting seven at the second opinion stage (France, Germany, the Netherlands, Sweden, Denmark, Finland and Hungary) (Brunden 2009). The first Barroso Commission often saw Commissioner McGreevy applying pressure for an opening up of markets and a majority, led by President Barroso, resisting. The divisions within the Commission reflected the tension within and between member states on how to reconcile arguments about market efficiency with moral ambivalence in promoting more gambling choices and access for consumers.

The overall record of the Commission's efforts has been mixed, with some markets bringing down barriers in recent years. For instance, Italy has slowly opened up different parts of its market to outside operators. Silvio Berlusconi's centre-right government from 2001 to 2006 took a much more restrictive position on gambling in general but especially on providing more outlets, both virtual and real. One of the first measures introduced in 2006 by the short-lived centre-left government of Romano Prodi was to reverse this and to look to ways in which to open up the Italian market. This included a procurement process to increase the number of licenses for betting shops and internet operators. The return of the centre-right to government in 2008 did not reverse this liberalization. It would be difficult to ascribe to the Commission's formal notices and threats of further action the entire responsibility for changes to the Italian position. Rather, recent Italian governments have also been internally divided between the arguments in favour of gambling and the broader moral or ethical issues that have been associated with more gambling. In the case of the centre-right from 2001 to 2006, the pivotal role in the coalition of the Catholic UDC and elements of right-wing National Alliance helped ensure that moral objections to gambling prevailed. The centre-left had many internal divisions but it was relatively free of key Catholic elements that would have opposed efforts to find more sources of government revenue. Berlusconi returned to power in 2008 with a solid majority and a coalition that did not include a Catholic party.

Despite a few success stories, the large number of infringement proceedings at the second opinion stage indicates that the Commission has not been able to change government policy throughout the Union and to open up national markets. Important and large markets, such as that in Germany, remain closed; suggesting that the Commission will either back down or further legal battles will ensue. The Commission has represented the position proclaiming

the virtues of market liberalization and the attendant efficiency gains. The success it encountered in other policy areas where it ran up against member states protecting national interests has not come in the face of the normative claims that have tried to limit access to games of chance.

CONCLUSION – STAKES AND STATES

All the elements seem to be in place for the creation of a European gambling market: a service that crosses borders easily, without great social or technological barriers, and carried out in pretty much the same way in all 27 member states; the possibility of enhanced government revenues as gambling demand has proven to expand each time restrictions have been lifted; a series of court decisions that have nudged forward the legal framework for the removal of restrictions that have nudged forward the legal framework for the removal of restrictions to cross-border activity; an active interest by the Commission to push the internal market agenda in the sector; major European firms looking to the European market as a way to become global players. Yet, an internal market is, perhaps, a destination to be reached only in the distant future. National monopolies remain firmly in place and European firms not only face great barriers entering into markets of member states, but their executive officers continue to face criminal persecution if they try to do so.

There are two primary and related lessons that may be drawn from the case of gambling. First, approaches that emphasize the role of institutions and national interests as the pillars of market building are of limited use. As mentioned above, the institutional dynamics central to the institutional account have been very much part of the gambling story. Firms have tried to open up markets, they have sought protection through the ECJ and the Commission, but to no avail. It would be a mistake to dismiss this as the simple result of member states protecting what has become an easy and valuable source of government revenue. Lifting national barriers to gambling could be a way to expand those revenues, as a larger pool of players would make some of the instruments of gambling an even more lucrative source for government funds. Institutions and interests, then, do not tell the entire story of market building.

Second, arguments used to understand changes in morality claims in the European Union as the indirect effects of market integration also do not seem to apply. Greater movement across borders, virtual or real, has not easily led to a change in prevailing concerns about public health and criminal activity. The frequent reference to proportionality in Court decisions suggests that there is a keen awareness that despite the fact that there are legal forms of gambling within member states, there has not been a corresponding shift in favour of pursuing market-enhancing and efficiency measures. Citizens actively engage in a wide range of gambling activities, possibly using technology that allows them to do so across borders without ever leaving their home. Yet this has not led to a change in the prevailing sense that they need to be protected from an activity that is too risky if it is not subject to some form of regulation and maybe even monopolies. A gambling market that provided more choice for

consumers at cheaper prices is not necessarily a desirable objective for policy-makers and large parts of the public as gambling is a tolerated but not necessarily desirable activity. This ambivalence about gambling, and many forms of risk, has only been heightened in the wake of the global financial crisis of recent years.

This leads to the third lesson: that is, that underlying assumptions and ideas about the role of risk in social life may tell us something about the prospects for market-building. Gambling, like the internal market, is about individuals and firms being ready to tempt fate without the certainty of managing the results. The ambivalence about the expansion of gambling reflects an inherent fear that too much risk-promotion could lead to social consequences that would be difficult to contain. Member states have shown a willingness to legalize gambling within their own borders but have balked at the prospect of providing too much access precisely because elasticity of demand is so great. They could justifiably argue that it would be national and subnational governments that would bear the responsibility for many of the social costs of enhanced access to gambling. The case of gambling and the single market is a reminder that there remains ambivalence about market-building that goes beyond simply protecting domestic firms or interests. It reflects the difficult shift from a form of social regulation that has been risk averse to one that is based on competition and the expansion of risk. The stakes are high and member states are slow to raise them higher.

Biographical note: Vincent Della Sala is Associate Professor of Political Science at the University of Trento and Adjunct Professor at the Bologna Center of the Johns Hopkins' School of Advanced International Studies.

Address for correspondence: Vincent Della Sala, University of Trento, Faculty of Sociology, Via Verdi, 26, Trento 38122, Italy. email: vincenzo.dellasala@unitn.it

ACKNOWLEDGEMENTS

The author would like to thank David Howarth and the anonymous reviewers for their very helpful comments.

NOTE

- 1 The figure refers to the amount wagered minus winnings paid to gamblers, known as Gross Gambling Revenue.

REFERENCES

- Armstrong, K.A. and Bulmer, S.J. (1998) *The Governance of the Single European Market*, Manchester: Manchester University Press.
- Binde, P. (2005) 'Gambling, exchange systems, and moralities', *Journal of Gambling Studies* 21: 445–79.
- Blyth, M. (1997) 'Any more bright ideas? The ideational turn of comparative political economy', *Comparative Politics* 29: 229–50.

- Brunsdon, J. (2009) 'At odds with the gambling industry?', *European Voice*, 3 December.
- Bulmer, S.J. (1998) 'New institutionalism and the governance of the single European market', *Journal of European Public Policy* 5: 365–86.
- Caporaso, J.A. and Stone Sweet, A. (2001) 'Institutional logics of European integration', in A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalization of Europe*, Oxford: Oxford University Press, pp. 221–236.
- Commission of the European Union (2004a) 'Extended impact assessment of proposal for a directive on services in the internal market', *Commission of the European Union*, staff working paper, COM (2004) 2 final, Brussels.
- Commission of the European Union (2004b) 'Proposal for a directive of the European Parliament and of the Council on services in the internal market', *Commission of the European Union*, SEC(2004) 21.
- Department of Justice, EaLRCC (2007) *Regulating Gaming in Ireland*, Dublin: Stationary Office.
- Egan, M. (2001) *Constructing a European Market: Standards, Regulation and Governance*, Oxford: Oxford University Press.
- Euractiv (2005) 'Austria to look into value of sport to EU economies', 20 December.
- Euractiv (2006) 'Absence of EU rules on gambling generates national court cases', 23 February.
- Europe Economics (2004) *The Case for a Single European Gambling Market*, London: Europe Economics.
- European Communities (1991) *Gambling in the Single Market: A Study of the Current Legal and Market Situation*, London: Stationery Office Books.
- European Parliament (2009) 'Online gambling: focusing on integrity and a code of conduct for gambling', Economic and Scientific Policy, *European Parliament Policy Department*, IP/A/IMCO/ST/2008-13.
- Fligstein, N. and Stone Sweet, A. (2001) 'Institutionalizing the Treaty of Rome', in A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalization of Europe*, Oxford: Oxford University Press, pp. 29–55.
- Fligstein, N. and Stone Sweet, A. (2002) 'Constructing politics and markets: an institutionalist account of European integration', *American Journal of Sociology* 107: 1206–43.
- Kurzer, P. (2001) *Markets and Moral Regulation. Cultural Changes in the European Union*, Cambridge: Cambridge University Press.
- Laffey, D. (2008) 'Ethics or euros? Policy towards cross-border gambling in the European Union', University of Kent Business School working paper no. 165.
- Littler, A. (2007) 'The regulation of gambling at European level. The balance to be found', *ERA Forum* 8: 357–71.
- Stone Sweet, A., Fligstein, N. and Sandholtz, W. (eds) (2001) *The Institutionalization of Europe*, Oxford: Oxford University Press.
- Swiss Institute of Comparative Law (2006) *Study of gambling services in the internal market of the European Union, final report*, Brussels: European Commission.
- Trucy, F. (2006) 'Rapport d'Information sur l'évolution des jeux de hasard et d'argent', Sénat de la République, Session Ordinaire De 2006–2007.
- Verbiest, T. and Keuleers, E. (2003) 'Cross-border gaming: The European regulatory perspective', *Gaming Law Review* 7: 185–96.
- Vlaemminck, P. and Wael, P.D. (2003) 'The European Union regulatory approach of online gambling and its impact on the global gaming industry', *Gaming Law Review* 7: 177–84.
- Wood, G. (2007) 'France puts Mr Bookmaker prosecution on hold', *Gambling Compliance*, 17 December.