

ROYALLY FLUSHED: WHY EUROPE'S ONLINE POKER PLAYERS SHOULD HAVE THE RIGHT TO PLAY WHOEVER THEY WANT

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I. INTRODUCTION

In June 2010, poker players on the French online poker website Pokerstars.fr staged the first ever mass online poker sit-out.¹ Unsatisfied with the site's high "rake" structure, hundreds of players took seats at virtual tables, then "sat out" en masse.² With no players active at the designated tables, Pokerstars.fr could not deal any hands nor collect rake—the portion of each pot the website keeps as a fee.³ The protest put an infinitesimal dent into the world's biggest poker site's profit, but the message was clear: French poker players were unhappy with their Parliament's enactment of legislation that required online gambling sites to apply for expensive state licenses to access the millions of players in the French market. The licenses' cost and the exorbitant taxes on revenues gained from the gaming they allowed were then passed on to players through the rake.⁴ Consequently, players found it increasingly difficult to earn a profit on the site because they now had to win more money per hand to keep pace with the site's higher fees.

Though Pokerstars.fr responded to the protest by slightly lowering its rake,⁵ the incident highlights a number of problems with the current online poker regulatory scheme in the European Union.⁶ This Note will

1. See lolzzz_321, *French Poker Players Boycott Pokerstars.fr*, FLOPTURNRIVER.COM (July 6, 2010), <http://www.flopturnriver.com/blogs/french-poker-players-boycott-pokerstars-fr-12763>.

2. See *id.* For a screen capture of the protest, see <http://img534.imageshack.us/img534/922/sanstitre3yp.jpg>. Image taken by twoplustwo.com poster Pokouz.

3. See lolzzz_321, *supra* note 1.

4. See *id.*

5. See *PokerStars.fr Rake Reduces the Cash Tables*, GAMBLEJACK GAMBLING BLOG (July 20, 2010), <http://www.gamblejack.net/blog/pokerstars-fr-rake-reduces-the-cash-tables> (describing the lower rake fees Pokerstars.fr instituted as a result of the player sit-out).

6. The European Union is a supranational group of twenty-seven European countries intent on increasing political and economic cooperation among its members. See *generally Basic Information on the European Union*, EUROPA.EU, <http://europa.eu/about-eu/basic-information/>

argue that unlike other casino gambling games, poker's characteristics demand that the European market be opened up to allow players from across the European Union to play each other.⁷ First, this Note will provide a history of poker and online poker. Next, it will offer an overview of the European Union's current law on gambling. Third, it will explain why online poker in the European market should be treated differently from other casino games under the law. Finally, it will propose a harmonized approach to online poker in which European players can play anyone in the European Union on a single regulated site while still allowing E.U. member states to collect taxes.

II. BACKGROUND

A. *Poker's Evolution from a Cheater's Game to a National Pastime*

The modern game of poker—during which players are dealt cards only they can see and then bet that their cards' combined value is higher than their opponents'⁸—is the descendant of a variety of games played

index_en.htm (last visited June 17, 2012) (providing an overview of the European Union).

7. This Note consciously disregards the fact that most of the push toward liberalization and harmonization of online poker in Europe is driven by the gambling sites themselves who argue that they have a right to provide online gambling services to citizens throughout Europe. See Anastasios Kaburakis, *European Union Law, Gambling, and Sport Betting: European Court of Justice Jurisprudence, Member States Case Law, and Policy*, in *SPORTS BETTING: LAW AND POLICY* 62 (P.M. Anderson et al. eds., 2012). Laws limiting the games and stakes necessarily limit the revenue sites bring in. Furthermore, tailoring individual sites to each country's unique regulations is not only complicated, but also expensive. If the European Court of Justice (ECJ) continues to find that state monopolies and regulatory schemes are driven more by revenue streams than by protecting citizens from the potential pitfalls of gambling, then the entire online gambling industry—poker included—may be harmonized. See *id.* at 29.

Additionally, implementation of the proposed system is beyond the scope of this Note. There are a number of complex legal issues related to implementation, including whether an E.U. member state can prevent companies in other member states from advertising in that state, the determination of jurisdiction in online gambling disputes, which laws should be applied in online gambling disputes, and methods of cross-border enforcement of judgments in online gambling disputes. These issues relate more to the difficulties of supranational unions than to the policy behind gambling regulation.

Finally, this Note does not consider the relevance of arguments against gambling made on purely moral or religious grounds. These arguments, which have existed nearly as long as gambling itself, are no longer considered viable in today's more secular Europe. See *id.* While many of the arguments legislators set forth in favor of restrictive legislation—such as protecting against the corruption with which gambling is often associated and against addiction which can affect entire families—are similar to these older arguments, such modern justifications are more nuanced.

8. Players use five cards to make the best possible hand. LOU KRIEGER & SHEREE BYKOFKY, *THE RULES OF POKER: ESSENTIALS FOR EVERY GAME* 99–102 (2006). In descending order, the ranking of hands is straight flush (five cards of the same suit in sequence), four of a kind, full house (three of a kind and a separate pair), flush (five of the same suit),

throughout Europe during and after the Renaissance, including brag (played in England), *mus* (Spain), *poch* (Germany), and *poque* (France).⁹ Eighteenth-century French settlers in the Louisiana Territory brought *poque* with them, and as the game spread, first to the east and then to the north, the game and its name were tweaked to their modern forms.¹⁰ By 1850, the game's rules had been standardized.¹¹ Five years later, a *New York Times* editorial referred to poker, and not “base-ball,” as America's “national game.”¹²

Poker first earned its reputation as the “cheating game” on the steamboats of the Mississippi River, where players frequently rigged games in their favor.¹³ Despite attempts to eradicate poker because of its reputation as a cheater's game,¹⁴ poker continued to thrive throughout the United States before it returned to Europe.¹⁵ Around the turn of the twentieth century, social clubs that offered members other forms of gambling banned poker, forcing upper-class citizens who still wanted to play the game to establish upscale card clubs where they could play in peace.¹⁶ Soon, in the United States, poker had become an accepted pastime in suburbia, where nonprofessional poker players would play for lower stakes among friends, while illegal games for considerably higher stakes ran in backrooms throughout the country.¹⁷

In the 1930s, a group of Texan roadside gamblers began to play a new game, No Limit Texas Hold ‘Em (Hold ‘em) (then called “Hold Me Darlin”), well before the game made its way to Las Vegas in 1963.¹⁸

straight (five in sequence), three of a kind, two pair, one pair, and no pair. *See id.* (providing a ranking and explanation of possible hands).

9. *See* JAMES MCMANUS, *COWBOYS FULL: THE STORY OF POKER* 49 (2009) (explaining the history of poker).

10. *See id.* at 50–51. The first known use of the word “poker” in print occurred in 1836. *See id.* at 67.

11. *See id.* at 55.

12. *See* Editorial, *The National Game*, N.Y. TIMES, Feb. 12, 1875, at 4, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F4081FF73C59117B93C0A81789D85F418784F9> (“[W]e are forced to the conclusion that the national game is not base-ball, but poker”).

13. *See* MCMANUS, *supra* note 9, at 69.

14. Indeed, cowboy Wild Bill Hickok was famously murdered in 1876 while playing poker. The hand he held at the time of his death—two pair, aces and eights—has since been known as the “Dead Man's Hand.” *See* JOSEPH G. ROSA, *WILD BILL HICKOK, GUNFIGHTER: AN ACCOUNT OF HICKOK'S GUNFIGHTS* 160–63 (2003).

15. *See* MCMANUS, *supra* note 9, at 161.

16. *See id.* at 160.

17. *See id.* at 159–60, 166 (describing the high-stakes backroom games and the period that lasted roughly from 1890–1930 during which poker “finally migrated to genteel suburbia”).

18. *See id.* at 245–46 (crediting Felton “Corky” McCorkindale as the first person to introduce Texas Hold ‘Em (“Hold ‘em”) to Las Vegas in 1963). In Hold ‘em, players are dealt two “hole” cards face down, then bet on the strength of their hand. Three community cards,

Hold 'em offered players more action than the other contemporary popular variants of poker, and quickly became popular among professional players, who appreciated that it rewarded aggressive play.¹⁹ In 1970, with poker's popularity waning—there were fewer than fifty poker tables in all of Las Vegas's casinos combined—a group of players decided to host the first-ever World Series of Poker.²⁰ Over the next thirty years, No-Limit Texas Hold 'Em spread among poker players around the world.²¹

Poker did not gain mainstream popularity until the release of the movie *Rounders* in 1998.²² It gained further prominence in 2002, when the World Poker Tour began to allow viewers to see tournament players' "hole," or facedown, cards as the hand unfolded.²³ When ESPN used the same "hole-cam" technology in its 2003 World Series of Poker broadcast, the audience held its collective breath as novice Chris MoneyMaker²⁴ became the improbable champion and winner of \$2.5 million after bluffing intimidating professional poker player Sammy

called the "flop," are then dealt face-up in the center of the table and can be used by all players to make their best five-card hand and another round of betting occurs. A fourth community card, called the "turn," is then dealt face-up before another round of betting occurs. Finally, a fifth community card, called the "river," is dealt and a last round of betting occurs. If more than one player has held on to his hand throughout the betting, the two hole cards are then turned face-up and the player with the best hand wins the pot. The game can be played with limits that dictate how much a player can bet or raise on each round of betting, or with "no limit," in which any player can bet some or all of his money on the table (reaching into one's pocket for more money mid-hand is not allowed) at any time. See KRIEGER & BYKOFKY, *supra* note 8, at 158–63 (providing the rules of Hold 'em). No limit Hold 'em is by far the more popular of the two versions today. *Id.*

19. See MCMANUS, *supra* note 9, at 247 (quoting a 1968 article in *Life* magazine as attributing the popularity of Hold 'em to "the huge play it gets at the table").

20. See *id.* at 266. The tournament has been tweaked periodically, including increasing the buy-in from \$5,000 to \$10,000 in 1972. *Id.* at 267.

21. In 1997, twelve of the twenty-one World Series of Poker events were won by non-U.S. citizens. *Id.* at 306.

22. In the movie, Mike McDermott, a young law student played by Matt Damon, loses all of his money playing Hold 'em in a private club before earning it back in dramatic fashion. See Review of *Rounders*, ROTTEN TOMATOES, <http://www.rottentomatoes.com/m/1083659-rounders> (last visited June 17, 2012) (providing a synopsis and reviews of the movie).

23. See MCMANUS, *supra* note 9, at 249 (quoting English poker player and author Anthony Holden as saying, "The resulting explosion of poker on cable television turned the leading players into celebrities"). In 1998, after watching an "incredibly boring" ESPN broadcast of the World Series of Poker, television producer and recreational poker player Henry Orenstein invented a poker table with cameras built into it to allow viewers to see the players' cards. *Id.* at 248. The first televised poker game to allow viewers to see the players' hole cards was a British show called *Late Night Poker*. *Id.*

24. MoneyMaker was, at the time, a twenty-seven-year-old accountant from Tennessee who won his \$10,000 seat in the World Series of Poker by winning a \$39 online tournament. See Jodi Wilgoren, *A Player Called 'Money' Wins World Poker Title*, N.Y. TIMES (May 25, 2003), <http://www.nytimes.com/2003/05/25/us/25poker.html>.

Farha.²⁵ Had viewers watching at home not been able to see Moneymaker's cards, they would never have known that Moneymaker was bluffing.

B. *The Next Generation: Online Poker*

Soon viewers wanted to do more than just follow along with the players they saw on television; they wanted to learn to play the game themselves.²⁶ With the advent of online poker, players no longer had to herd like-minded friends into their garages or trek to a casino to find a game. Instead, people could simply download a program, deposit some money using a credit card, and play anytime they wanted.²⁷ At first, one of the main attractions of playing online was the free or cheap tournaments, called "satellites," that allowed players like Moneymaker to risk a small amount of money in hopes of winning a seat into the \$10,000 main event in Las Vegas.²⁸ The World Series of Poker's main event burgeoned with online qualifiers as the number of participants in the event ballooned from 839 in 2003,²⁹ the year in which Moneymaker won, to a staggering 8,774 in 2006.³⁰

Like many revolutionary developments, online poker—now nearly a \$5 billion market³¹—had an inauspicious beginning. In 1988, before most people had even heard of the Internet, a Finnish programmer named Jarkko Oikarinen set up Internet Relay Chat, a rudimentary site on which tech-savvy players could play each other for fake money.³²

25. See MCMANUS, *supra* note 9, at 321–22; see also Wilgoren, *supra* note 24. After Moneymaker won the tournament, ESPN analyst Norman Chad famously exclaimed, "This is beyond fairy tale—it's inconceivable." Danny Aller, *A Life So Inconceivable, It's Beyond Fairy Tale*, ESPN POKER (Jan. 29, 2008), http://sports.espn.go.com/espn/poker/columns/story?columnist=bluff_magazine&id=3220228.

26. This boost in interest is referred to in the poker community as the "Moneymaker Effect." See MCMANUS, *supra* note 9, at 323.

27. Pokerstars.com boasts, "There's a tournament starting at PokerStars every second, which means you'll never have to wait to find action." *Tournaments*, POKERSTARS.COM, <http://www.pokerstars.com/poker/tournaments> (last visited June 17, 2012).

28. 2004 World Series of Poker main event champion Greg Raymer, who, like Moneymaker, won his seat to the main event online, said "Online poker's micro limits and free money games helped introduce a whole new group of people to the game, who didn't want to spend a lot of money learning how to play." Chasse Rehwinkel, *History of Online Poker Part II: From Boom to Bust*, CHICAGONOW (Apr. 22, 2010), <http://www.chicagonow.com/blogs/windy-city-rounder/2010/04/history-of-online-poker-part-ii-from-boom-to-bust.html>.

29. Wilgoren, *supra* note 24.

30. MCMANUS, *supra* note 9, at 323.

31. See *At War with Luck*, ECONOMIST, July 10, 2010, at 5 (noting that H2, a gambling consultant firm, estimated the online poker market to be \$4.9 billion).

32. See Sean Lind, *The First Online Poker Room: IRC Poker*, POKER TECH BLOG (Oct. 15, 2009), <http://www.pokerlistings.com/blog/the-first-online-poker-room-irc-poker>.

Gambling for actual currency online was not possible until 1994, when the island nation of Antigua and Barbuda passed the Free Trade and Processing Zone Act.³³ This act allowed potential online casino sites to apply for licenses.³⁴ The first real money online poker site, PlanetPoker.com, launched January 1, 1998.³⁵

By 2001, other sites such as Pokerstars, Ultimate Bet, Paradise Poker, and Party Poker had sprung up to meet the seemingly insatiable demand of players wanting to play poker online.³⁶ These sites allowed players to learn the game cheaply and, more importantly, quickly. While a player in a casino participates in approximately forty hands per hour, an online player sitting at four virtual tables plays between 250 and 400 hands each hour.³⁷ The ability to play multiple virtual tables any time of day from the convenience of a player's home has allowed younger players to gain experience more quickly than players from previous generations, thereby revolutionizing the game in the process.³⁸

The extremely profitable games of the post-Moneymaker boom began to wind down in September 2006, when the U.S. Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).³⁹

33. See Free Trade and Processing Zone Act (Act. No. 12/1994) (Ant. & Barb.), available at <http://www.laws.gov.ag/acts/1994/a1994-12.pdf>.

34. See Chasse Rehwinkel, *History of Online Poker Part I: The Primert*, CHICAGONOW (Apr. 20, 2010), <http://www.chicagonow.com/blogs/windy-city-rounder/2010/04/history-of-online-poker-part-i-the-primer.html>.

35. See *id.*

36. See *id.*

37. See PHIL GORDON, *LITTLE GREEN BOOK: LESSONS AND TEACHINGS IN NO LIMIT TEXAS HOLD'EM* 235 (2005). Some players, perhaps most famously professional player Hevad Khan, have been known to play at more than twenty tables concurrently. See Rick Dacey, *Talking Poker: Hevad Khan*, POKER PLAYER (Jan. 2008), http://www.pokerplayer.co.uk/poker-players/player-interviews/4206/talking_poker.html (noting that Pokerstars.com once banned Khan from playing because he was playing so many tables at the same time that the site thought he must have been a computer programmed to play poker, also known as a "bot").

38. Indeed, most successful online players have played many more hands in their three- to seven-year careers than legends like Doyle Brunson, who has been playing professionally for more than fifty years. See DOYLE BRUNSON, *THE GODFATHER OF POKER: THE DOYLE BRUNSON STORY* 59 (2009). When asked in December 2010 whether he thought he had played more hands than Brunson, twenty-three-year-old professional Andrew Lichtenberger (who plays under the screenname "LuckyChewy" online) replied "Yeah, by a long shot. I don't even think it's close." See TheWPT, *5 Diamond s9 Day 4 Andrew Lichtenberger*, YOUTUBE (Dec. 6, 2010), <http://www.youtube.com/watch?v=zKMX3qDupco>.

39. See Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006). The statute, which "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law," was added to a bill covering port security just before that bill passed. I. Nelson Rose, *Prohibition 2.0: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, GAMBLING & L. (Dec. 13, 2010), <http://www.gamblingandthelaw.com/articles/286-prohibition-20-the-unlawful-internet-gambling->

The statute, which prohibited financial institutions from accepting deposits or payouts to or from online gambling sites, caused all poker sites except Pokerstars, Full Tilt Poker, and one other site, to withdraw immediately from the U.S. market.⁴⁰ Prior to the enactment of the UIGEA, the U.S. Department of Justice (DOJ) had declared all forms of Internet gambling to be illegal under the Interstate Wire Act of 1961;⁴¹ however, in 2002, the U.S. Court of Appeals for the Fifth Circuit held that the law only applied to online sports betting.⁴² In late 2011, the DOJ changed its position to be in line with the Fifth Circuit's opinion, issuing a legal opinion stating that "[i]nterstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside the reach of the Wire Act."⁴³

The UIGEA's passage chilled the amount of online poker played by amateurs, many of whom believed that playing online poker was illegal and did not seek an end-run around the law.⁴⁴ This new status quo during which the UIGEA chilled player's conduct lasted roughly five years, until April 15, 2011, when the DOJ indicted Pokerstars.com, AbsolutePoker.com, and FullTiltPoker.com on a litany of bank fraud, gambling, and money laundering charges.⁴⁵ In addition to charges against the sites' owners, the DOJ accused the sites' owners of engaging in an elaborate scheme to circumvent the UIGEA's restrictions on banks processing transactions from their sites.⁴⁶ Additionally, the DOJ sought

enforcement-act-of-2006-analyzed.html (stating that the law "was rammed through Congress by the Republican leadership in the final minutes before the election period recess").

40. *UIGEA Effect*, WHICHPOKER.COM, <http://www.whichpoker.com/stats/UIGEAEffects> (last visited June 17, 2012).

41. See 18 U.S.C. § 1084 (2012); see MATT DOEDEN, LEGALIZED GAMBLING: REVENUE BOOM OR SOCIAL BUST? 130 (2010).

42. *In re Mastercard Int'l*, 313 F.3d 257, 262–63 (5th Cir. 2002).

43. Whether Proposals by Ill. & N.Y. to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1 (2011).

44. See BlueFirePoker, *A Kid's Game: The Story of Online Poker*, POKERSTATIC.COM (Mar. 29, 2011), <http://www.pokerstatic.com/static-tv/a-kids-game-the-story-of-online-poker>. One professional online poker player stated, "[Weak players] were mostly under the impression that poker had become illegal in the United States. The amateur players had mostly been playing on PartyPoker and when PartyPoker closed they thought 'This is it; online poker's over' and didn't really look into the alternatives." *Id.* at 61:63. Another said, "A lot of these recreational players, they just want to put their credit card on and make it easy, and it's not easy anymore." *Id.* at 60:53.

45. See Press Release, U.S. Attorney for the S. Dist. of N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions on Illegal Gambling Proceed (Apr. 15, 2011).

46. *Id.*

\$3 billion in civil money laundering penalties and forfeitures.⁴⁷ Finally, and most significantly to players, Full Tilt Poker's licensor, the Alderney Gaming Commission, froze all Full Tilt Poker accounts, preventing players not only from playing, but also from withdrawing the money in their accounts.⁴⁸

Despite the law suits, Pokerstars, which is licensed in the Isle of Man, began to pay American players seeking to withdraw money and continued to operate regularly outside of the United States.⁴⁹ Nonetheless, it soon became apparent that Full Tilt Poker would be unable to reimburse its players even when their accounts were unfrozen.⁵⁰ This led to the suspension—and ultimately revocation—of Full Tilt Poker's license by the Alderney Gambling Control Commission.⁵¹ Without a license, Full Tilt Poker was forced to shut down worldwide.⁵²

Then, on September 20, 2011, the DOJ accused Full Tilt Poker of being a “global Ponzi scheme,”⁵³ and amended its complaint, alleging that members of Full Tilt Poker's board of directors had paid themselves nearly \$400 million since April 2007 using player deposit funds instead of profits.⁵⁴ The complaint also accused the site of continuing to allow U.S. players to deposit money in their accounts, despite the site's inability to access players' bank accounts as a result of the provisions of UIGEA.⁵⁵ Consequently, “[b]y March 31, 2011, Full Tilt Poker owed approximately \$390 million to players around the

47. See Julio Rodriguez, *A Closer Look at the Department of Justice Indictment*, CARDPLAYER (Apr. 9, 2011), <http://www.cardplayer.com/poker-news/11163-a-closer-look-at-the-department-of-justice-indictment>.

48. See Website Statement, Alderney Gambling Control Comm'n, Suspension of Full Tilt Poker (June 29, 2011), available at <http://www.gamblingcontrol.org/userfiles/file/Website%20Statement%20-%20FTP%20suspension%20290611.pdf>.

49. See *United States Players: Frequently Asked Questions*, POKERSTARS.COM, <http://www.pokerstars.com/usaplayers/faq> (last visited Dec. 26, 2011).

50. See Nathan Vardi, *Full Tilt Poker Makes Its Case for Why It Has Been Unable to Pay Back Players*, FORBES (Aug. 30, 2011), <http://www.forbes.com/sites/nathanvardi/2011/08/30/full-tilt-poker-makes-its-case-explaining-why-it-has-not-paid-back-players>. For its part, Full Tilt Poker has argued that it had millions of dollars stolen by a payment processor. *Id.*

51. *Full Tilt Poker's License Revoked*, ESPN (Sept. 29, 2011), http://espn.go.com/poker/story/_/id/7035637/full-tilt-poker-gambling-license-revoked-finances.

52. See *id.*

53. The DOJ's use of the term “Ponzi scheme,” see *id.*, is curious, when one considers that Full Tilt Poker had a viable and profitable business model, unlike true Ponzi schemes, which never actually make money.

54. See Press Release, U.S. Attorney for the S. Dist. of N.Y., Manhattan U.S. Attorney Moves to Amend Civil Complaint Alleging that Full Tilt Poker and Its Board Directors Operated Company As a Massive Ponzi Scheme Against Its Own Players (Sept. 20, 2011).

55. See *id.* at 3.

world, including approximately \$150 million to United States players. However, the company had only approximately \$60 million in its bank accounts.”⁵⁶ Finally, in September 2011, Full Tilt Poker announced that French business tycoon Bernard Tapie had agreed to buy the site—and its debts—and promised to pay outstanding player funds.⁵⁷

C. Gambling Regulation in the Europe Union

1. The Harmonization and Definition of Services in E.U. Law

Regulation of online gambling in the European Union is disharmonized and constantly changing, making it difficult for players and sites to comply with the law and for E.U. member states to enforce their laws.⁵⁸ The European Union’s founding document, the Treaty on the Functioning of the European Union (TFEU), explains the European Union’s main goal: to be a supranational organization with a federalist framework that allows for the free movement of goods and services across members’ borders.⁵⁹ Article 56 of the TFEU provides: “[R]estrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of member states who are established in a State of the Community other than that of the person for whom the services are intended.”⁶⁰ Furthermore, Article 57 of the TFEU defines “services” as those having a commercial or industrial character.⁶¹ These two articles work in concert to ensure that commerce among E.U. states is as free flowing as possible.⁶²

Until 1991, TFEU law was unsettled about whether gambling should be considered a protected service. In 1991, the European Commission—the European Union’s executive body which aims to further the objective of creating a single economic market in the European Union (known as the “Internal Market” objective)⁶³—

56. *Id.* at 2.

57. *See Failing Full Tilt Poker Web Site Bought by French Tycoon*, SPORTS ILLUSTRATED (Sept. 30, 2011), <http://sportsillustrated.cnn.com/2011/more/09/30/Full-Tilt-Poker-sale.ap/index.html>.

58. *See Commission Green Paper on On-line Gambling in the Internal Market*, at 3, COM (2011) 128 final (Mar. 24, 2011) [hereinafter *Commission Green Paper*].

59. Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2007 O.J. (C 306) 53 [hereinafter TFEU].

60. *See id.* art. 56.

61. *See id.* art. 57.

62. *See* Kristina Lagercrantz Varvne, Free Movement of Services and Nondiscriminatory Collective Action (Jan. 21, 2011) (unpublished LL.M. thesis, University of Gothenburg).

63. *See Internal Market*, EUROPA, http://europa.eu/legislation_summaries/internal_market/index_en.htm (last visited June 17, 2012) (“The internal market of the European Union is a single market in which the free movement of goods, services, capital and persons is ensured and in

produced a study analyzing the state of gambling and its potential for pan-European harmonization.⁶⁴ Based on the study, the European Council⁶⁵ decided in December 1992 “not to regulate gambling at the EU level, as it found that gambling is better dealt with at the national level.”⁶⁶ The European Court of Justice (ECJ), which is charged with interpreting the TFEU,⁶⁷ has largely upheld this interpretation in a series of cases. In *Her Majesty's Customs and Excise v. Schindler*,⁶⁸ a 1994 case involving a German company that wanted to offer lotteries to British citizens, the ECJ found lotteries and other gambling to fall under the umbrella of services covered by the TFEU.⁶⁹ Despite this interpretation, the ECJ decided to allow each E.U. member state to regulate lotteries, stating that member state regulation would be best suited to:

prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.⁷⁰

In short, the undesirable secondary effects of gambling were a sufficient justification for breaking from the general rule of not interfering with the free flow of services.⁷¹

Five years later, in *Questore di Verona v. Diego Zenatti*,⁷² the ECJ upheld an Italian state monopoly on sports betting, explaining that each E.U. member state understands its own cultural and societal attitudes

which European citizens are free to live, work, study and do business.”).

64. Philippe Vlaemminck & Pieter De Wael, *The European Union Regulatory Approach of Online Gambling and Its Impact on the Global Gaming Industry*, 7 GAMING L. REV. 177, 177 (2003).

65. The European Council refers to the official meetings of leaders of E.U. member states to determine the political direction and priority of the European Union as a whole. See *EU Institutions and Other Bodies*, EUROPA, http://europa.eu/abc/panorama/howorganised/index_en.htm (last visited June 17, 2012) (explaining that the European Council “sets the overall political direction” of the European Union).

66. See Vlaemminck & De Wael, *supra* note 64, at 177. The concept of allowing member states to determine how to regulate a specific industry or service is called subsidiarity. *Id.*; see also Matthew W. Mauldin, Note, *The European Union, State-Sponsored Gambling, and Private Gambling Services: Time For Harmonization?*, 36 GA. J. INT'L & COMP. L. 413, 418 (2008) (explaining the concept of subsidiarity).

67. See *EU Institutions and Other Bodies*, *supra* note 65.

68. Case C-275/92, *Her Majesty's Customs & Excise v. Schindler*, 1994 E.C.R. I-1039.

69. See JULIA HÖRNLE & BRIGITTE ZAMMIT, *CROSS-BORDER ONLINE GAMBLING LAW AND POLICY* 144 (2010) (providing a brief factual summary of the case).

70. *Schindler*, 1994 E.C.R. I-1039 ¶ 57.

71. See HÖRNLE & ZAMMIT, *supra* note 69, at 144–45 (explaining the ECJ's decision).

72. Case C-67/98, *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289.

toward gambling, and is therefore best suited to regulate it.⁷³ The ECJ, however, applied a proportionality test, stating that restrictions a) must be roughly proportionate to the ill they aim to cure and b) must not go beyond what is necessary to achieve the dual objectives of protecting consumers from fraud and gambling addiction.⁷⁴ Furthermore, the ECJ said that regulation of gambling is:

acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.⁷⁵

The Court's message was clear: the aim of gambling regulation had to be to control problem gambling, not to make money.

The ECJ has also held in *Liga Portuguesa de Futebol Profissional and Bwin International Limited v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*⁷⁶ that the justification for regulating Internet gambling is even stronger than it is for traditional gambling because the internet gambler does not have direct contact with the operator, making it harder for the gambler to assess the operator's integrity.⁷⁷

In 2000, nearly sixty years after the TFEU was ratified, the leaders of the European Commission determined that not enough progress had been made to ensure an internal market for services.⁷⁸ Consequently, the European Commission began an extensive assessment of the existing barriers to internal markets for services, which concluded with the passing of the "Directive on Services in the Internal Market" (Directive) (commonly referred to as the Bolkestein Directive) in 2006.⁷⁹ The Directive is a binding law that aims to remove red tape and barriers from the provision of services from one E.U. country to another.⁸⁰ It also "strengthens the rights of service recipients, in

73. See HÖRNLE & ZAMMIT, *supra* note 69, at 146–47 (providing a summary of the case and the ECJ's holding).

74. *Id.*

75. *Zenatti*, 1999 E.C.R. I-7289 ¶ 36.

76. Case-42/07, *Liga Portuguesa de Futebol Prof'l & Bwin Int'l Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 2009 E.C.R. I-13031.

77. See *Summary of Important Judgments*, EUROPEAN COMMISSION LEGAL SERV. (Nov. 2009), http://ec.europa.eu/dgs/legal_service/arrets/07c042_en.pdf (summarizing the case).

78. See *A Single Market for Services*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/top_layer/index_19_en.htm (last updated June 11, 2012) (explaining the impetus for the Bolkestein Directive).

79. Council Directive 2006/123, 2006 O.J. (L 376) 36 (EC).

80. See *A Single Market for Services*, *supra* note 78 (explaining the purpose of the

particular consumers, and should ensure easier access to a wider range of services.”⁸¹ After much debate during the legislative process, the drafters of the Directive decided to limit its scope to exclude a number of service industries, including gambling, disappointing those who hoped the Directive would lead to gambling harmonization throughout the European Union.⁸²

Given *Zenatti* and *Schindler*, which held that E.U. member states may only regulate gambling if their interest is to protect their own citizens, critics began to question regulatory schemes which, in their eyes, primarily existed to raise money for the government, rather than to protect citizens.⁸³ German regulations, for example, only allowed citizens to bet on sports and play the lottery through state-run monopolies.⁸⁴ Germany claimed such monopolies were necessary to allow the government to maintain control over gamblers’ habits.⁸⁵ The monopoly was heavily advertised throughout the country, leading to suits from online gambling companies who argued that the regulation was not narrowly tailored to cure the perceived ill it targeted.⁸⁶ Subsequently, in September 2010, the ECJ issued a series of opinions criticizing the German state monopoly on sports betting and lotteries.⁸⁷

Bolkestein Directive).

81. *Id.*

82. See Council Directive 2006/123, *supra* note 79, ¶ 25; see also *Quick Guide, The Service Directive*, EUROPEAN COMMISSION (last updated June 8, 2012), http://ec.europa.eu/internal_market/services/services-dir/guides_en.htm.

83. See *Online Gambling in Europe: A Stacked Deck*, ECONOMIST, July 18, 2009, at 62 [hereinafter *Online Gambling in Europe*] (noting the skepticism for the stated purpose of anti-online gambling laws).

84. *Id.*

85. Eric Pfanner, *E.U. Court Bats Down Germany’s Protection of Betting Monopolies*, N.Y. TIMES (Sept. 8, 2010), <http://www.nytimes.com/2010/09/09/business/global/09bet.html> (providing the details of the German state-run monopoly system).

86. See Niall O’Connor, *European Gambling Law: From Schindler to Engelmann*, BETTING MARKET (2012), <http://www.bettingmarket.com/eurolaw222428.htm> (providing summaries and analyses of ECJ cases).

87. See, e.g., Case C-46/08, *Carmen Media Grp. Ltd. v. Land Schleswig-Holstein*, 2010 O.J. (C 288) 8 (holding that when a public monopoly on sporting bets and lotteries had been established with the “objective of preventing incitement to squander money on gambling and of combating gambling addiction,” yet other types of games of chance were allowed to be run by private operations, “that national court may legitimately be led to consider that such a monopoly is not suitable for ensuring the achievement of the objective for which it was established by contributing to reducing the opportunities for gambling and to limiting activities within that area in a consistent and systematic manner”); Joined Cases C-316/07 *Stoß v. Kulpa Automatenservice Asperg GmbH*, 2010 O.J. (C 288) 7 (holding that German lottery monopolies could not advertise heavily if their justification for monopolizing was to reduce the risk of gambling addiction); Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, 2010 O.J. (C 288) 10 (holding that “national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible

The ECJ invalidated the monopolies, holding that they did not achieve their stated objective of preventing problem gambling because they only applied to certain types of betting⁸⁸ and because the state aggressively advertised them.⁸⁹ Though the decisions were viewed by analysts and gambling lobbyists as watersheds and overwhelmingly positive for private gaming firms,⁹⁰ the Court later reinforced its previous holding in *Liga Portuguesa*, stating that online gambling's constant availability and lower transaction costs increased the likelihood of gambling addiction and other negative social consequences.⁹¹ In September 2011, the ECJ held that E.U. member states could ban online gambling companies based in other states from operating within their borders, suggesting it was not ready to liberalize online gambling laws.⁹²

2. Online Gambling Regulation by Member States

E.U. member states have fully taken advantage of the opportunity to regulate gambling locally. As of 2010, six of the European Union's twenty-seven members have completely outlawed online gambling.⁹³ Of the other twenty-one, only thirteen have liberalized their markets.⁹⁴ The remaining member states regulate online gambling using two broad framework models: one based on E.U. member states granting licenses to operators that provide services within a strictly regulated framework, and another based on a strictly controlled monopoly usually owned by the state.⁹⁵ Even among member states with similar regulatory approaches, significant differences exist in the nuances of their schemes.⁹⁶

with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period”).

88. See *Carmen Media Grp. Ltd.*, 2010 O.J. (C 288) 8.

89. See *Stoß*, 2010 O.J. (C 288) 7.

90. See Pfanner, *supra* note 85 (quoting a lobbyist as saying, “This is a landmark ruling which will have a decisive impact on the much needed reform in Germany”).

91. See Harry Ashton, *ECJ Special Report: A Mandate for German Gambling Reform*, GAMBLINGCOMPLIANCE (Jan. 12, 2011), <http://www.gamblingcompliance.com/node/45652> (“Without reference to evidence, the court reconfirmed that internet gambling has an increased likelihood of gambling addiction and negative social consequences.”).

92. See Case C-347/09, *Criminal Proceedings Against Jochen Dickinger & Franz Ömer*, 2011 O.J. (C 282) 26.

93. HÖRNLE & ZAMMIT, *supra* note 69, at 29. The E.U. member states that have outlawed gambling are Cyprus, Germany, Estonia, Greece, the Netherlands, and Poland. *Id.*

94. *Online Gambling in Europe*, *supra* note 83.

95. See *Commission Green Paper*, *supra* note 58, at 3 (explaining the two current regulatory models).

96. See *infra* Part II.C.2.b (discussing France and Italy).

a. The United Kingdom's *Laissez-Faire* Approach

In 2005, the United Kingdom's Parliament enacted the Gambling Act of 2005,⁹⁷ which established a Gambling Commission to oversee all gambling in the United Kingdom.⁹⁸ The Gambling Act adopted a relatively *laissez-faire* approach to gambling and allowed citizens to gamble online (or "remotely") on any website they choose.⁹⁹ Furthermore, unlike many other countries, it did not require foreign firms to apply for licenses to reach its market.¹⁰⁰ Despite the permissive approach the United Kingdom takes to regulating English citizens' gambling habits, the Gambling Commission found in a recent study that just 7% of citizens gambled online.¹⁰¹ Furthermore, a 2010 Gambling Prevalence Study found that between 0.5-0.6% of all British citizens were problem gamblers.¹⁰² Meanwhile, Germany, which has strict online gambling regulations,¹⁰³ has had a problem gambling rate estimated at between 0.29-0.64%, which is similar to Great Britain's overall rate.¹⁰⁴ Both countries have taken measures to limit problem gambling, such as requiring that online gambling services offer self-exclusion lists, though German regulators can ban problem gamblers from playing even without their consent, whereas English regulators cannot.¹⁰⁵

b. France, Italy, and Belgium's Licensing Schemes

Both France and Italy require operators that wish to reach their markets to pay for licenses that only allow gamblers to play other players within the country.¹⁰⁶ In 2006, Italy passed a law that prevented

97. Gambling Act, 2005, c. 19 (U.K.).

98. *Id.* §§ 20–32.

99. Circumstances to Need a License, GAMBLING COMMISSION, http://www.gamblingcommission.gov.uk/gambling_sectors/remote/getting_a_licence-what_you_need_to_do_i_need_a_licence.aspx (last visited June 17, 2012) (explaining the numerous situations in which operators are not required to purchase licenses). A foreign firm is any firm with all of its "remote gambling equipment" located outside of the United Kingdom. *Id.* Only foreign firms established in the European Economic Community and a few other countries may advertise in Britain. *Id.*

100. *Id.*

101. HEATHER WARDLE ET AL., NAT'L CTR. FOR SOC. RESEARCH, BRITISH GAMBLING PREVALENCE SURVEY 2010, at 10 (2011). The 7% figure does not include lottery players. *Id.*

102. *Id.*

103. For an in-depth explanation of Germany's online gambling regulations, see HÖRNLE & ZAMMIT, *supra* note 69, at 30–40.

104. *Id.* at 13.

105. See *Self-exclusion*, GAMBLE AWARE, <http://www.gambleaware.co.uk/help-and-advice/self-exclusion> (last visited June 17, 2012); HÖRNLE & ZAMMIT, *supra* note 69, at 64–65 (detailing the effectiveness of current self-exclusion provisions).

106. See *infra* note 113 and accompanying text; Earl Burton, *Italian Poker Players Shuttled*

its citizens from gambling online with sites based in other countries.¹⁰⁷ Subsequently, the Italian government set up a state-run monopoly.¹⁰⁸ After being threatened with a lawsuit by the European Commission for violating the TFEU's prohibition on restrictions of services, the government set up the State Monopolies Autonomous Administration (AAMS) to issue licenses to foreign companies.¹⁰⁹ The new law had some seemingly arbitrary requirements: (1) it only permitted tournament, and not cash game, play, (2) it required that the operating site's servers be located in Italy, (3) it required that no game could be played for more than 100 euros, and (4) it required that every tournament be pre-approved in real-time by the AAMS.¹¹⁰ Legislation passed in early 2011 allowed sites to offer cash games and increased the maximum buy-in to 250 euros,¹¹¹ a figure that is still much lower than the amount for which professionals frequently play. Furthermore, only Italian citizens could play on Italian-licensed sites.¹¹²

Similarly, after being threatened with a lawsuit by the European Commission in 2007, France now requires sites to obtain licenses from the Authority of Regulation of Online Games to reach French citizens.¹¹³ The license is not only expensive, but it also administers a tax on every poker pot, a cost inevitably passed on to players via the rake.¹¹⁴ Although anyone with an E.U. bank account can play on French sites,¹¹⁵ the prohibitive rake makes it difficult to play

from *Regular PokerStars to Italian Version*, POKER NEWS DAILY (July 28, 2009), <http://www.pokernewsdaily.com/italian-poker-players-shuttled-from-regular-pokerstars-to-italian-version-3634> ("Back in 2006, the government enacted laws that ordered Italian Internet Service Providers (ISPs) to block all access by its citizens from gaming outlets located outside of the country.").

107. See Burton, *supra* note 106.

108. See *id.*

109. See B. Solomon, *Italian Poker Players Face New Restrictions*, ONLINEPOKER.NET (July 29, 2009), <http://www.onlinepoker.net/poker-news/poker-law-industry-news/italian-poker-players-face-restrictions/596> (explaining the details and chronology of the Italian regulation scheme).

110. See *id.*

111. See Stephen Carter, *Italy Legalises Cash Poker and Casino*, EGR MAG. (Apr. 2, 2011), <http://www.egrmagazine.com/news/875122/italy-legalises-cash-poker-and-casino.shtml>.

112. See *Frequently Asked Questions*, POKERSTARS (Italy), <http://www.pokerstars.it/en/poker/room/faq> (last visited June 9, 2012) (explaining that only Italians can play on the site).

113. See Earl Burton, *PokerStars Licensed by ARJEL to Operate in France*, POKER NEWS DAILY (July 1, 2010), <http://www.pokernewsdaily.com/pokerstars-licensed-by-arjel-to-operate-in-france-13016> (noting that the Authority of Regulation of Online Games requires companies to purchase licenses before offering online gambling to French citizens).

114. See lolzzz_321, *supra* note 1 (noting the high price of licenses and taxes).

115. See *Registration Procedure*, POKERSTARS (France), <http://www.pokerstars.fr/en/nouvelle-procedure-inscription> (explaining how non-French citizens can play on Pokerstars.fr).

profitably.¹¹⁶

The newest version of Belgium's Gambling Act, which went into effect on January 1, 2011, puts the country in a similar position to France and Italy.¹¹⁷ Belgium's Gambling Act brings the online market under a strict regulatory scheme that prohibits companies without a Belgian land-based license from operating within the country and only allows for cash games when all the players are Belgian.¹¹⁸ The Belgian Gaming Commission immediately enforced the Belgium Gaming Act aggressively, sending letters to regulators in Alderney and Gibraltar, where Full Tilt Poker and PartyGaming are respectively licensed, demanding that those companies withdraw from the Belgian market.¹¹⁹ The letters not only threatened the sites with administrative sanctions and criminal prosecution for crimes such as money laundering, but also accused the regulators in Alderney and Gibraltar of not preventing the sites from operating illegally.¹²⁰

PartyGaming responded to the letters by issuing a defiant statement, saying, in part:

Please note that the European Union (EU) as well as our own legal counsel has affirmed that the legislation infringes EU law. As an EU licensed company we are following the direction of the European Commission and the European Court of Justice. Please note that PartyGaming is regulated by the Government of Gibraltar and Gibraltar is part of the European Union. We can assure you that we are compliant with any European laws that apply to the industry and therefore see no reason for concern that our services would be banned from [Belgium]. This means business as usual: and in accordance with our legal advice we continue to accept wagers and gaming from Belgium.¹²¹

Another site, Pokerstars, partnered with a land-based casino and was consequently granted a license to operate Pokerstars.be in Belgium under the Belgian Gambling Act's terms, which requires players to be twenty-one years old and also prevents sites from issuing bonuses to

116. See Hood, *Re: Is Segregation the Future of Online Poker?*, TWO PLUS TWO (Dec. 17, 2011, 10:50 AM), <http://forumserver.twoplustwo.com/showpost.php?p=30437590&postcount=56> ("France is a funny one because the only reason 'we' (Europeans) aren't all playing there is the rake. If taxation there was sensible then I think we'd all be there.").

117. *PartyGaming and Full Tilt Given the Boot in Belgium*, GAMBLING UPDATE (Mar. 10, 2011), <http://gamblingupdate.blogspot.com/2011/03/partygaming-and-full-tilt-given-boot-in.html>.

118. See *id.*

119. See *id.*

120. See *id.*

121. See Gilius, *Re: Belgium Wanna Apply the Same Law as France*, TWO PLUS TWO (Mar. 3, 2011, 9:14 AM), <http://forumserver.twoplustwo.com/showpost.php?p=25523786&postcount=616>.

players who deposit money, a common way of enticing first-time players.¹²² Importantly, after initial concerns that Belgian players would only be able to play against their countrymen, players on Pokerstars.be were allowed to play anyone else playing on Pokerstars.¹²³

3. The European Commission's Conflict with the European Parliament

Recently, the European Commission has changed its enforcement approach from attempting to harmonize national laws on online gambling to bringing infringement actions against E.U. member states in hopes of forcing them to conform to the European Commission's vision of a more harmonized market.¹²⁴ In March 2011, the European Commission issued a green paper, a document published by the European Commission to stimulate discussion on a given topic,¹²⁵ acknowledging that the current disharmonized online gambling regulatory scheme "pose[s] regulatory and technical challenges. [It] also gives rise to societal and public order issues, such as the protection of consumers from fraud and the prevention of gambling addiction."¹²⁶ The green paper began a four-month public consultation period in hopes of reaching a pan-European consensus on how to regulate online gambling.¹²⁷ The green paper was met with mostly favorable reactions from liberalization advocates, though some expressed concern that the paper focused on harmonizing national laws instead of installing a pan-European scheme.¹²⁸

122. See *PartyGaming and Full Tilt Given the Boot in Belgium*, *supra* note 117.

123. Except in countries like Italy, whose players cannot play outsiders. See *PokerStars.be Migration FAQs*, POKERSTARS (Belgium), <http://www.pokerstars.be/en/poker/room/support/faq/migration> (last visited June 17, 2012) (explaining that Belgian players will have access to players from other countries).

124. See HÖRNLE & ZAMMIT, *supra* note 69, at 173.

125. *Glossary: Green Paper*, EUROPA, http://europa.eu/legislation_summaries/glossary/green_paper_en.htm (last visited June 17, 2012) ("Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.").

126. *Public Consultation on On-line Gambling in the Internal Market - Frequently Asked Questions*, EUROPA (Mar. 24, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/186&format=HTML&aged=0&language=EN&guiLanguage=en>.

127. *Gambling Compliance, EU Commission's Gambling Green Paper Uncovered*, YOUTUBE (Mar. 30, 2011), <http://www.youtube.com/watch?v=fREl8oHZtLo> (discussing the Green Paper and the difficulties of consensus-building).

128. Brendan Murray, *Online Gambling Regulation Back on EU Agenda*, CARD PLAYER EUR. (Mar. 25, 2011), <http://www.cardplayer.com/poker-news/11003-online-gambling-regulation-back-on-eu-agenda> (quoting Sigrid Ligné, secretary general of the European Gaming

Influential Members of the European Parliament, the European Union's legislative body, also supported the paper. For example, U.K. representative Malcom Harbour, the chairman of the European Parliament's internal market and consumer protection committee, said "[o]nline gambling is a cross-border issue and it needs a clear EU framework in order to fulfill its potential."¹²⁹ As a body, however, the European Parliament has taken a stance against online gambling, as published in its "Resolution of 10 March 2008."¹³⁰ The resolution describes a number of problems with liberalizing online gambling regulations, including the possibility of it leading to an increase in online fraud, money laundering, and addiction.¹³¹

D. *The Skill Versus Luck Debate*

1. Skill Versus Luck in the Law

Most countries' laws regulate games of chance differently from games of skill.¹³² Since medieval times, European governments have tolerated betting on games of skill such as chess, where the outcome of the game is determined exclusively by skill,¹³³ however, they have heavily regulated games of pure chance, such as dice, and mixed games such as poker, where the outcome is determined by both skill and luck.¹³⁴ During the Protestant Reformation in the sixteenth and seventeenth centuries, church authorities deemed playing cards "the devil's picture book" because of cards' tendency to facilitate gambling, and excommunicated or killed card players and gamblers—laying the groundwork for today's more refined regulation.¹³⁵ As has thus far been the case with today's regulations, card games continued to flourish despite the threat of penalty.¹³⁶

Today, the British Gambling Act of 2005 divides gambling into three

and Betting Association, as saying "We welcome the Commission coming forward with a Green Paper and a factual discussion on all aspects of online gambling. We are deeply concerned though that the focus of the paper seems to be on a national rather than an EU approach despite the clear cross-border nature of this sector").

129. *Id.*

130. *See* HÖRNLE & ZAMMIT, *supra* note 69, at 173.

131. *See id.*

132. *See id.* at 5 (noting that European nations have attempted to distinguish between prohibited and tolerated gambling since medieval times).

133. *Id.*

134. *See id.*

135. *See* MCMANUS, *supra* note 9, at 36 (detailing the Church's treatment of card players).

136. *See id.*

categories: gaming, betting, and lotteries.¹³⁷ Gaming is defined as the “playing [of] any game of chance for a prize,”¹³⁸ and “game of chance” is broadly defined as any game (other than a sport)¹³⁹ that “involves both an element of chance and an element of skill,” even if the element of chance “can be eliminated by superlative skill.”¹⁴⁰ Furthermore, the British Gambling Act of 2005 explicitly states that whether something is a game of chance is unaffected by whether computer images are used to represent player’s actions, as is the case with online poker.¹⁴¹

Similarly, in the United States, under the UIGEA, poker is treated the same as all other online gambling at the federal level.¹⁴² In 2007, the Texas state legislature formally noted that Hold ‘em requires a “high level of skill to win consistently.”¹⁴³ In March 2011, the Hawaii state legislature introduced a bill that would redefine Hold ‘em and another poker variant, Omaha, as games of skill.¹⁴⁴ As games of skill, Hold ‘em and Omaha would be removed from under the umbrella of gambling, which is illegal in all forms in Hawaii.¹⁴⁵

Many countries, such as Sweden, distinguish betting on games determined “predominantly” by skill from betting on those determined mostly by luck.¹⁴⁶ The Swedish Supreme Court recently held that tournament poker is a game of skill, but that cash games are games of chance because theoretically an individual could play just one cash game hand and then leave, letting luck play a dominant role in the

137. Gambling Act, 2005, c. 19, § 6(1) (U.K.). Betting is defined as “making or accepting a bet on (a) the outcome of a race, competition, or other event in process, (b) the likelihood of anything occurring or not occurring, or (c) whether anything is or is not true.” *Id.* § 9(1).

138. *Id.* § 6(1). The British Gambling Act further explains that a prize “means money or money’s worth” and as long as a prize is at stake, it does not matter if the participant is risking anything to play the game. *Id.* §§ 6(4)–(5).

139. According to the British Gambling Act, the secretary of state determines what is considered to be a sport. *Id.* § 6(6)(c). Not surprisingly, poker has not been named a sport.

140. *Id.* § 6(2).

141. *Id.* § 6(3)(b).

142. See *supra* notes 39–41 and accompanying text.

143. See MCMANUS, *supra* note 9, at 244–45. Curiously, the game is still illegal to play in Texas in public. See *id.* at 245.

144. See S.B. No. 755, 26th Leg. (Haw. 2011); see also Julio Rodriguez, *Hawaii Bill SB755 Seeks Legalized and Regulated Live and Online Poker*, CARD PLAYER (Mar. 30, 2011), <http://www.cardplayer.com/poker-news/11033-hawaii-bill-sb755-seeks-legalized-and-regulated-live-and-online-poker> (providing a summary of the bill and quotations from legislators).

145. See Rodriguez, *supra* note 144.

146. See Steven Stadbrooke, *Swedish Supreme Court Weighing Poker Skill v. Luck Argument*, CALVINAYRE.COM (Feb. 25, 2011), <http://calvinayre.com/2011/02/25/poker/swedish-supreme-court-poker-skill-v-luck> (providing details of a case before the Swedish Supreme Court discussed in note 147, *infra*).

outcome of his session.¹⁴⁷ As demonstrated by the various rules and restrictions discussed above, if poker is to be treated differently from other casino games, it is crucial to prove that skill plays a larger factor in a player's success than luck.

2. How Poker is Different From Other Gambling

Poker is, indisputably, a mixed game, with both luck and skill playing large roles in the outcome of a hand, session, or tournament.¹⁴⁸ Throughout history, whether luck or skill is more important in determining a player's success has been hotly debated.¹⁴⁹ Players often claim that skill prevails over luck; this argument serves both to legitimize their vocation and move it toward a more protected legal status.¹⁵⁰ On the contrary, opponents of the game—who usually oppose all types gambling—argue that luck is the more important determinant.¹⁵¹ Conventional wisdom holds that while luck plays a large role in the outcome of individual hands, its importance cedes to skill as a player plays a large number of hands.¹⁵² For instance, a professional golfer may lose to an amateur on a single hole due to a miscalculation or unexpected gust of wind, but if the two played every day for a year, there is little doubt that the professional would come out ahead. The same can be said about an amateur poker player playing a single hand against a professional compared to playing thousands of hands against the same professional.¹⁵³

147. See *Chance and Skill to Texas Hold'em: Swedish Court*, LOCAL (Apr. 6, 2011), <http://www.thelocal.se/33040/20110406> (explaining the court's opinion). Interestingly, most players consider tournaments to be higher variance, and therefore more luck dependent, than cash games. *Id.*

148. See MCMANUS, *supra* note 9, at 346 (“Skill remains paramount, but the luck factor—usually in the form of bad timing in a single key hand late in the tournament—prevents the most talented players from finishing first as often as they do in golf, chess, tennis, boxing, or Scrabble.”).

149. *Compare Commonwealth v. Dent*, 992 A.2d 190 (Pa. Super. Ct. 2010) (holding that “[w]hile the outcome of poker may be dependent on skill to some degree, it is predominantly a game of chance”), with MCMANUS, *supra* note 9, at 346 (providing arguments from professional poker players that success in poker is predominated by skill as well as providing a history of the debate).

150. MCMANUS, *supra* note 9, at 346.

151. See *Dent*, 992 A.2d at 196.

152. See MCMANUS, *supra* note 9, at 350 (quoting poker legend Doyle Brunson as saying, “I do know there is a lot of luck in the short term, hardly any luck in the long run”).

153. This is similar to a concept in statistics known as the “law of large numbers,” which says that the more trials of a certain activity attempted, the closer the cumulative results will be to their theoretical counterparts. See *Law of Large Numbers*, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/LawofLargeNumbers.html> (last visited June 17, 2012) (defining the concept of law of large numbers). For example, the odds of a coin landing half the time on

Furthermore, according to a study of 103 million Hold ‘em hands played on Pokerstars.com, 75% of pots were won without a showdown,¹⁵⁴ supporting the proposition that a player’s skill and judgment about when to bet, raise, or fold determines the outcome of the hand more than the actual cards he holds.¹⁵⁵ Howard Lederer, a famous poker professional and one of the founding members of Full Tilt Poker, argues that poker is a skill game because it requires dozens of decisions to be made each hand.¹⁵⁶ In a single hand of Hold ‘em, players must decide whether to fold, call, or raise as many as five or six times.¹⁵⁷ These decisions are made after considering factors such as one’s own hand, likely hands of other players based on their history and recent actions, physical tells that betray an opponent’s hand, how an opponent will likely react to a decision, the size of the bet in relation to the pot, and hundreds of other considerations.¹⁵⁸ It is indisputable that the decisions a player makes affect whether he wins or loses.¹⁵⁹ Lederer argues that poker is therefore a game predominated by skill and not luck because a player who makes better decisions will necessarily win substantially more often than a player who makes less advantageous decisions.¹⁶⁰

III. ANALYSIS

There is no such thing as a professional roulette or craps player because it is mathematically impossible to win at those games over the long term.¹⁶¹ Poker and blackjack are the only two common casino table games in which a player who plays optimally may have a long-term edge over his opponent (be it another player, as is the case in poker, or the house, as is the case with blackjack).¹⁶² Poker is the only

heads and half the time on tails is dramatically higher if 1,000 trials are run than if two are.

154. That is, without a final bet being made and called, which would result in the player with the best dealt hand winning.

155. See *At War with Luck*, *supra* note 31, at 6 (citing the PokerStars study carried out by Citigal, a software consultancy).

156. See Howard Lederer, *Is Poker a Game of Skill?*, GLOBAL POKER STRATEGIC THINKING SOC’Y, <http://gpsts.org/poker-a-game-of-skill> (last visited June 17, 2012).

157. For the rules of Hold ‘Em, see *supra* note 18.

158. See, e.g., adiosking, *Full Tilt Poker Jennifer Harman Commercial*, YOUTUBE (Aug. 13, 2007), <http://www.youtube.com/watch?v=myfhIxRPNmQ> (providing a dramatization of a professional poker player making a decision based on a physical “tell” of an opponent).

159. Indeed, a player who folded every hand would have no chance of winning at all.

160. See Lederer, *supra* note 156 (arguing that poker is a game predominated by skill).

161. Cf. *Beatable Gambling Games*, GAMBLING TIPS, <http://www.gamblingtipster.co.uk/beatable-gambling-games> (last visited June 17, 2012) (explaining the two games are essentially 100% random).

162. *Id.*

game in which casinos do not prohibit play that will make the player a long-term winner, allowing skilled players to adopt it as their vocation.¹⁶³

Casinos do not thwart winning players because a winning player's money comes from other players rather than from the house. In that sense, poker is unique as well. Casinos—both live and online—make money from poker by taking a rake no matter who wins the hand.¹⁶⁴ Losing players—who may be playing for any of a number of reasons, including recreation or to improve—provide the income to winning players. While these players are not happy to lose, they are consenting adults risking their money with the understanding that better players are likely to win. Indeed, many are happy to pay simply for the chance to play cards for a few hours.¹⁶⁵

Furthermore, poker is different from other types of gambling because the size of the player pool matters. To an online roulette or blackjack player, it makes no difference if he can only play on websites based in his country because he is playing against just a single entity—the house—no matter where that entity is located.¹⁶⁶ Being able to compete against players from all over Europe is essential to professional poker

163. Modern casinos take extreme measures to detect, thwart, and ban skilled blackjack players who use a technique called “card-counting.” See, e.g., Jeff Haney, *Confessions of a Card Counter*, LAS VEGAS SUN (Mar. 23, 2008), <http://www.lasvegassun.com/news/2008/mar/23/confessions-card-counter> (providing a first-hand account of casinos banning professional counters). Moreover, card-counters cannot take their skills to online blackjack games because successful card-counting depends on the dealer dealing a finite number of cards. In a live casino blackjack game, as each card is dealt, the probability of the remaining cards being dealt next increases. See MICHAEL BENSON & BERT RANDOLPH SUGAR, *BLACKJACK STRATEGY: TIPS AND TECHNIQUES FOR BEATING THE ODDS* 54 (2000). Online, the deck is limitless, and each hand has no effect on the one after it, making card-counting impossible.

164. The rake taken from each pot varies according to casino policy and the stakes of the game, but it is usually between one euro and ten euros in live games and is lower in online games. See, e.g., *PokerStars Poker Table Rake*, POKERSTARS.COM, <http://www.pokerstars.com/poker/room/rake> (last visited June 9, 2012).

165. Opponents of liberalization say that playing poker for a living is an illegitimate way of earning income because it necessarily requires lying (in the form of bluffs) and taking other people's money. Cf. Kaburakis, *supra* note 7, at 29 (discussing moral opposition to gambling). However, the same thing occurs routinely in business deals, where each side expects the other to withhold a certain amount of information during negotiations and present their case in a skewed way. Furthermore, poker professional Phil Gordon wrote that while he “feel[s] bad” for degenerate gamblers at the poker table, “[they] are going to lose their money, at this table, another table, or the craps table. Someone will end up with the chips. That someone should be me.” GORDON, *supra* note 37, at 230.

166. The cases that have reached the ECJ have been lawsuits filed by private companies running online casinos and hoping to reach as broad of a market as possible. See HÖRNLE & ZAMMIT, *supra* note 69, at 175 (“Developments in the EU have been influenced by the drive of the online gambling providers to break into the lucrative markets of jurisdictions where gambling has traditionally been prohibited or limited to a monopoly provider.”).

players' livelihoods, especially when they live in less-populous countries.

Poker must also jostle with other diversions and activities for consumer dollars. Weak players looking to spend some money and have fun are more likely to play poker than spend money elsewhere if they know a site offers "thousands of games" and access to millions of players instead of just a few tables. Poker is no different from most consumer goods in that it is self-propelling—that is, it increases in popularity at exponential rates as word of mouth spreads. By preventing players from one country from playing those in another, laws artificially limit the potential for growth of a legitimate industry and profession.

In addition, limiting the number of players that can play makes games more difficult, which deters weaker players from playing and makes games less profitable for professionals. With smaller player pools, it becomes more likely that a particular player will play another player frequently, enabling each player to determine who is more skilled. Once the less skilled player realizes he is at a disadvantage, he is likely to stop playing. Other weak players—seeing that the only players they could beat are no longer playing—then become more likely to quit, and the percentage of skilled players will increase to the point that recreational players will have to play either in a difficult game with professionals or quit altogether. With fewer weak players to exploit, professionals will not be able to sustain themselves.

If the player pool were expanded and the ratio of skilled players and recreational players remained the same initially, recreational players would be less likely to see the *same* skilled player on multiple occasions and thus recognize their opponent's abilities. They also have a better chance of being at a table with other recreational players,¹⁶⁷ which would dramatically increase their chances of winning over the short term. With money flowing in a less linear pattern, recreational players may be more likely to hold onto their money for a longer period of time—even if they end up losing it eventually—which could entice other recreational players to compete as well. For a potential recreational player on the margin trying to decide where to spend his free time and spending money, the knowledge that his money will last longer may tip the scales in favor of him playing poker instead of spending it elsewhere.

167. Of course, they are theoretically equally likely to play at a table of mostly skilled players. In reality, however, skilled players are adept at recognizing other good players and tend to stay spread as far apart as possible to allow each other access to recreational players.

Critics of this argument may point to the fact that professionals who play offline manage to make a healthy living while having access to a relatively small player pool at any one time. This argument falls short on several counts. First, anyone who is of age and near a casino can play in a live poker game, so the actual player pool may be rather large. Secondly, most live poker professionals play in well-known gambling centers such as Las Vegas instead of local card rooms in their hometowns because tourists who choose to spend their money playing poker supply the professionals' income. Recreational players are the tourists of online poker.

A. *The Problems with the Current Schemes*

The current regulatory scheme for online poker in the European Union does not pass the proportionality test as required by the ECJ.¹⁶⁸ Additionally, the current scheme unfairly prevents professional poker players from maximizing their earning potential. However, E.U. member states argue that they want a role in regulating their citizens' access to gambling websites in order to prevent the spread of problem gambling.¹⁶⁹ Research shows that the current regulatory schemes are ineffective in doing so.¹⁷⁰ It seems far more likely that E.U. member states so adamantly want to regulate gambling because state-run online gambling sites—whether in the form of licensing fees or state-run monopolies—generate an enormous amount of revenue for the state.¹⁷¹ Furthermore, regulations such as Italy's that arbitrarily limit the type of poker being played have no reasonable connection to preventing problem gambling, as there is no relevant distinction between the games allowed and disallowed.¹⁷² There is little evidence to support the claim that rigorous regulation limits the amount of problem online gambling among citizens. Great Britain has the most liberalized online gambling regulations in Europe, yet still has a low percentage of problem gamblers that is similar to countries with stricter regulatory schemes.¹⁷³ While the ECJ has said that each member state's citizens have a different collective attitude toward gambling that make them more or less susceptible to degenerate gambling,¹⁷⁴ the discrepancy between problem gambling rates is not large enough to prove that strict

168. See *supra* note 74 and accompanying text.

169. See *supra* note 85 and accompanying text.

170. See *supra* notes 101–102 and accompanying text.

171. See *supra* note 114 and accompanying text.

172. See Solomon, *supra* note 109.

173. See *supra* notes 101–103 and accompanying text.

174. See Case C-67/98, *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289.

regulation is effective.

The current regulation scheme is ineffective because there is almost no workable way to determine whether someone is gambling problematically or whether they have just been unusually unlucky, especially in games such as poker where skill and luck both play a role. For instance, twenty-year-old Swede Viktor Blom, who plays online poker under the name *Isildur1*, is known for being one of the best heads-up—or one-on-one—Hold ‘em players in the world.¹⁷⁵ He frequently plays thousands of hands in a single sitting, playing multiple tables with \$100,000 or more at risk on each.¹⁷⁶ When he first rose to fame in late 2009, he defeated some of the game’s best players, including most notably Tom “durrrr” Dwan, winning around \$6 million over the course of a few weeks.¹⁷⁷ Despite this early success, in December 2009, Blom lost between \$3.2 and \$4.2 million to then-19-year-old American Brian Hastings in a single five-hour session.¹⁷⁸ From there, he continued to lose most of, if not all, his previous profits, forcing him to take a break from the game.¹⁷⁹ He returned in the second half of 2010, playing for lower stakes (usually between \$10,000 and \$25,000 on each table), but continuing his “swingy” style.¹⁸⁰ As of 2012, he has reestablished himself as one of the game’s best players, at least for the time being.¹⁸¹

Blom’s story exposes the difficulty in determining who is a pathological gambler. The Diagnostic and Statistical Manual of Mental Disorders defines a pathological gambler as someone who has “persistent and recurrent maladaptive gambling behavior that disrupts personal, family, or vocational pursuits.”¹⁸² By most accounts, Blom is

175. See *Who Is Isildur1?*, POKERSTARS.COM, <http://www.pokerstars.com/team-pokerstars/viktor-blom> (last visited June 17, 2012).

176. See, e.g., Stephen A. Murphy, *Hastings Torches Isildur1 for Up to \$4.2 Million in Epic Poker Match*, CARD PLAYER (Dec. 9, 2009), <http://www.cardplayer.com/poker-news/8127-hastings-torches-isildur1-for-up-to-4-2-million-in-epic-poker-match> (providing an example of Blom’s high-stakes games).

177. See Julio Rodriguez, *Online Poker – Isildur1 Defeats Durrrr, Others in Big Games*, CARD PLAYER (Nov. 16, 2009), <http://www.cardplayer.com/poker-news/7969-online-poker-isildur1-defeats-durrrr-others-in-big-games> (detailing Blom’s series of wins against the world’s best).

178. See Murphy, *supra* note 176.

179. See Sean Lind, *Isildur1’s Triumphant Return to High Stakes*, POKERLISTINGS (Feb. 16, 2010), <http://www.pokerlistings.com/isildur1s-triumphant-return-to-high-stakes-98299>.

180. See *id.*

181. See *Who Is Isildur1?*, *supra* note 175.

182. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 671 (4th ed. 2000). The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders provides a list of ten symptoms of problem gambling, requiring five

one of the best players in the world, yet he is capable of losing enormous amounts of money in extremely short periods of time.¹⁸³ Attempting to regulate problem gambling in the realm of poker leaves more difficult questions than answers: Should Blom be prevented from playing, even though he is likely to win against nearly any opponent? Should he only be allowed to lose a certain amount in one twenty-four-hour period? If so, how would that amount be determined? And would it be fair to prevent him from continuing to play a much weaker player who gets lucky against him in a single hand for a large amount of money early in a match? Hard rules for preventing problem gambling are simply impossible because even the best players can lose on any given day and players play for vastly different reasons with vastly different financial circumstances. Similarly, it is equally impossible to determine individual stop-loss amounts for each of the millions of players who play poker online. Limiting the stakes and games available to players—the systems in place in France and Italy—may prevent problem gambling, but it also unduly prevents players like Blom from making their living playing a skill-based game and prevents recreational players from pursuing a legitimate pastime.¹⁸⁴

The unspoken but more likely reason for E.U. member states' insistence on self-regulation of gambling is that isolating their citizens makes it easier for countries to reap the revenue benefits.¹⁸⁵ If online gambling were opened up to private and public companies, states would experience considerable drop offs in revenue from gambling. Companies would likely set up in the state whose laws are most favorable to them, almost entirely depriving the other states—which currently have either a monopoly or can sell expensive licenses—of their current online gambling revenue. Even the state that serves as the home for gambling sites would only collect indirect revenues in the form of taxes from that company. Assuming that the companies will locate where taxes are lowest, that sum will likely pale in comparison to of the revenue from the current system. Protecting a revenue stream is not a legitimate reason for intervening in the market,¹⁸⁶ especially given

or more to be present to diagnose the disorder. *Id.* at 671–72. The symptoms are: preoccupation, tolerance, withdrawal, escape, chasing losses, lying, loss of control, illegal acts (such as theft, embezzlement, fraud, or forgery), risk of significant relationship, and asking for a bailout. *Id.*

183. See *Who Is Isildur?*, *supra* note 175.

184. See *supra* note 106.

185. See *supra* note 83 and accompanying text.

186. See HÖRNLE & ZAMMIT, *supra* note 69, at 11 (stating that, to date, “[t]he only justification for restricting and regulating gambling is the effective prevention of the social policy risks”).

the Directive, so E.U. member states justified their interests in deterring problem gambling as a means of avoiding conflict with the general harmonization movement of the EU. Though the ECJ showed skepticism of regulations that do not even attempt to stem problem gambling,¹⁸⁷ its other precedents hint that it is unlikely to hold that the current regulatory schemes do not pass the proportionality test.¹⁸⁸ As a result, any change to the current poker regulation scheme would likely have to come from member states, which are unlikely to voluntarily give up their current regulatory revenue stream. Thus, a solution must both open up the market and allow the member states to continue to make money.

B. *A Proposal for a Pan-European Online Poker Site*

The European Union should establish a pan-European state-run poker network which not only would allow professional players to make a legitimate living from a larger player pool, but also would permit E.U. member states to maintain their tax revenue streams and monitor their citizens' habits. The system would require all E.U. states to allow their citizens of a certain age to play online poker because it is a skill-based game. Private firms would be forced to purchase expensive pan-European licenses to have access to players, while players would have to register with a designated E.U. agency at the time of sign-up. To justify the regulation, governments would be required to use a certain percentage of related government revenue to inform citizens of the dangers of gambling, though the licensed sites would be permitted to advertise to ensure that citizens do not turn to unregulated illegal games.¹⁸⁹ By forcing players to register and allowing players to play only on heavily regulated networks, states would be able to ensure that their citizens play on reputable, safe sites, while also guaranteeing that minors are not allowed to play.

Additionally, the European Union should establish a single exclusion database to prevent problem gamblers who cannot stop themselves from playing. This database would be similar to the current German system, which mandates that gambling providers (both private and state-run) maintain a national database of excluded gamblers, who are added to the list either by their own request or when a gambler exhibits signs of

187. See *supra* notes 87–89 and accompanying text.

188. See *supra* notes 69–74 and accompanying text.

189. Cf. Case E-3/06, *Ladbrokes Ltd. v. Norway* [2007] 3 C.M.L.R. 12, ¶¶ 53–54; see also HÖRNLE & ZAMMIT, *supra* note 69, at 165–66 (explaining the necessity of advertising even in restrictive regimes).

detrimental gambling addiction.¹⁹⁰ Furthermore, governments would be able to maintain their revenue stream by requiring sites to keep track of players' home states and tax accordingly. For instance, if French players played 10% of the total number of hands dealt on a site during a certain year, the site would pay 10% of its taxes to France.

The proposed site should offer stakes and poker game selection comparable to that which an unregulated site would offer because: (1) it is impossible to determine on a case-by-case basis which players should be playing what stakes, and (2) there is a group of skilled, responsible players who want to play extremely high stakes. Moreover, limitations such as those in place in Italy and France that dictate the types of poker games that can be offered (for example tournaments or cash games) are without rationale, as the variants are indistinguishable when it comes to assessing their dangers to the public. Accordingly, all types of skill-based poker games should be offered.

This system would also please professional poker players because they would be able to play anyone in Europe. As explained above, this system would lead to more consumers choosing to spend their money playing online poker instead of on other things and consequently would ensure that professional players have enough weak opposition to earn a living.¹⁹¹ Critics may argue that those people are better off spending their money in other, more responsible ways, but that argument fails. First, assuming that players are responsible enough to keep their gambling under control—and, as shown above, the vast majority of players are¹⁹²—gambling is the only form of entertainment that gives players any chance of *winning* money. If a person decides to spend fifty euros on a video game, that person is guaranteed to have fifty fewer euros after purchasing the video game, even if the game is not worth that amount. On the other hand, if a player decides to take that same money and play poker, depending on his skill, he has a significantly greater than zero chance of ending the night with some additional amount of money, while still receiving the entertainment of trying to outwit opponents and the rush of gambling. While the chance of winning money and the rush that results from it is what leads to addiction, data shows that such a small percentage of gamblers play beyond their means that the responsible majority should not be punished on their behalf.¹⁹³

190. See *supra* note 105 and accompanying text.

191. See *supra* Part III.

192. See *supra* Part III.A.

193. See *supra* notes 102–104 and accompanying text.

Professional players may argue that the player registration process will deter casual recreational players from playing, but recreational players will likely be glad to spend a few extra minutes during the registration process in exchange for the peace of mind of knowing they are putting their hard-earned money on a secure and reputable site backed by the government. Opponents may also say that expensive licenses would force sites to charge an exorbitant rake, thereby cutting into the profits of professionals and making the game less attractive to recreational players. However, opening networks to all of Europe should attract more players, which in turn should create substantially larger revenue streams from which sites can pay licensing fees without substantially having to raise rakes.

IV. CONCLUSION

Online gambling, in one form or another, is here to stay. The demand for it is undeniable, as is the revenue stream that comes with it. Because E.U. member states have shown that their online gambling regulations are aimed at bringing in revenue and not at limiting problem gambling, the regulations fail the proportionality test set forth by the ECJ. Therefore, the online gambling market should be opened up across E.U. borders.

While this issue is mainly relevant to online gambling companies that would be able to earn more revenue from open borders, it also has particular relevance to professional poker players, who rely on large player pools to make a legitimate living. Even if the ECJ does not hold their regulations to be invalid, member states should still create the pan-European poker site proposed by this Note because it would allow members to maintain the revenues brought in under the current system while also ensuring that poker remains a viable profession.