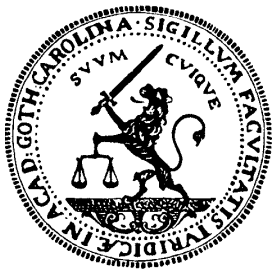

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The internal market for gambling services and the need for a clearer proportionality test

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Contents

Summary

The regulation of games of chance bears significant moral, cultural and historical features throughout the EU Member States. The particularities of gambling activities, and notably the risks they entail and the revenues they generate, have determined Member States to strictly regulate this market sector, and indeed, in some cases, to entrust the provision of such services to state-owned monopolies. The proliferation of distance communication technologies in recent years has enabled the provision of games of chance across physical borders between Member States, whereby operators established and licensed in other Member States have started to challenge national regulations in order to gain market access.

The Court of Justice has established that gambling activities are subject to the internal-market constraints, and thus capable of restricting the economic freedoms enshrined in the Treaty. In the lack of harmonisation, the Court has in its case-law acknowledged the sovereign right of Member States to regulate their gambling markets with reference to the moral and cultural aspects of gaming. However, insofar as measures enacted in accordance with the principle of subsidiarity amount to a restriction upon the fundamental economic freedoms, they must be justified by overriding reasons of public interest, and fulfil the proportionality requirements.

Overriding reasons commonly referred to by Member States are those of consumer protection against addiction and fraud, and the need to eradicate and prevent criminal activities on the gambling market. These policy aims have largely been accepted by the Court as legitimate public order concerns capable of justifying freedom of movement restrictions, and the proportionality assessment has been (save for in some cases) generally left to the referring national courts, which are consistently provided with a set of vague and insufficient guidelines by the Court of Justice. Considering the relatively large amount of preliminary references currently pending before the Court, national courts are in need of more efficient tools for assessing compatibility between national regulatory measures and EU law.

Notwithstanding the wide degree of discretion afforded to the Member States' governments and authorities in defining their policies and the aims that such measures seek to attain, it is argued that the consistency requirement developed by the Court of Justice as an instrumental measure of suitability needs to be clarified in order to fulfil its function. Moreover, a more intense proportionality inquiry by the Court itself is advocated for, whereby it is feasible to require that Member States bear the burden of proof as to the necessity and suitability of restrictive measures. This would both increase legal certainty, and enable Member States to thoroughly review the genuine aims of their restrictive legislation, and adequately address the realities of cross-border gambling.

Sammanfattning

Regleringen av hasardspel i EU:s medlemsstater präglas av moraliska, kulturella och historiska hänsyn. Spelverksamhetens särdrag, och framförallt dess skadliga följder samt intäkterna den genererar har medfört att medlemsstaterna generellt sett reglerar denna marknad på ett restriktivt sätt, och i vissa fall anförtros tillhandahållandet av speltjänster till statliga monopol. Den snabba utvecklingen av ny kommunikationsteknik under senare år har möjliggjort omfattande gränsöverskridande tillhandahållanden av hasardspel, då etablerade aktörer från andra medlemsstater har börjat utmana nationella bestämmelser för att få marknadstillträde.

EU-domstolen har genom sin praxis fastställt att spelverkamhet är föremål för den inre marknadens begränsningar, och kan således hindra de i fördraget förankrade ekonomiska friheterna. I brist på harmonisering inom området, har domstolen i sin rättspraxis erkänt medlemsstaternas suveräna rätt att reglera sina spelmarknader med hänvisning till de moraliska och kulturella aspekterna av hasardspel. I den mån åtgärder som vidtagits inom ramen för subsidiaritet utgör en restriktion av de grundläggande ekonomiska friheterna, sådana inskränkningar måste vara motiverade av tvingande skäl av allmänintresse, samt uppfylla kravet på proportionalitet.

De tvingande hänsyn som medlemsstaterna ofta hänvisar till omfattar konsumentskydd mot spelmissbruk och bedrägeri, samt behovet av att utrota och förebygga brottslighet på spelmarknaden. Dessa mål har i flertalet fall godkänts av EU-domstolen såsom legitima skäl som gäller säkerställandet av den allmänna ordningen och som kan motivera inskränkningar i den fria rörligheten, medan proportionalitetsbedömningen har (med undantag för vissa fall) överlåtits på de nationella domstolarna, som utrustats med en rad vaga och otillräckliga riktlinjer av EU-domstolen. Den relativt stora mängd begäranden om förhandsavgöranden anhängiggjorda vid domstolen påvisar ett tydligt behov från de nationella domstolarnas sida av effektivare verktyg för bedömningen av kompatibilitet mellan nationella åtgärder och EU-rätten.

Trots det omfattande utrymmet för skönsmässig bedömning som nationella regeringar och myndigheter åtnjuter i utarbetandet av regleringar ägnade att säkerställa en viss skyddsnivå, argumenteras det att kravet på konsekvens som EU-domstolen utvecklat som ett instrumentellt mått på en åtgärds lämplighet måste klargöras ytterligare för att uppfylla denna sin funktion. Det förordas också att EU-domstolen själv genomför en grundlig proportionalitetsavvägning, då det är möjligt att ålägga medlemsstaterna bevisbördan för nödvändigheten och lämpligheten av restriktiva åtgärder. Detta skulle dels öka rättssäkerheten, och dels göra det möjligt för medlemsstater att närmare undersöka de verkliga syftena bakom sina regleringar, samt vederbörligen anpassa dessa till en verklighet där gränsöverskridande spel faktiskt förekommer.

Preface

I would like to thank my patient supervisor Xavier Groussot, who provided useful suggestions throughout the most difficult part of my thesis, and allowed me sufficient flexibility in formulating and addressing the issues I found fascinating. Also, I would like to thank Mr. Jörgen Hettne for his most welcome and valuable input, and Mr. Arthur Stadler for taking the time to provide me with much-needed documentation.

Thank you, my beloved Dennis, for all your help and encouragement during times when putting all the pieces together may have seemed difficult. My wonderful family, without your unconditional and endless support and understanding, I would have never made it through these years. Lastly, I would like to express enormous gratitude to all my friends who have put up with me in stressful times, and shared my joy when I succeeded.

Lund, May 2010.

Abbreviations

AG	Advocate General
CMLRev	Common Market Law Review
EFTA	European Free Trade Association
ECT	Treaty Establishing the European Community
EU	European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

The participation in activities and events whose outcome is determined by the element of chance has been characteristic for human kind throughout the ages. Notwithstanding various religious and socio-cultural contexts, beliefs and purposes underlying the pursuit of gambling, the irrationality of chance or coincidence still renders fascination in contemporary European cultures, although primarily in the shape of recreational pastimes. In this narrower sense, chance and unpredictability are deliberately captivated within mechanisms governing the redistribution of wealth among the participants, as well as a commercial interest on the part of the organiser.[1]

Moral, ideological, psychiatric and mathematical research-based arguments against gaming have in recent decades been replaced by, but to a large extent also encompassed in rigorous policy prescriptions restricting market access to and supply of such services. Nevertheless, the allure for gaming is largely present among the population, and so is the market demand. While national governments strive to balance consumer, public order and fiscal interests in their gambling systems, a new dimension has been added to the already complex situation: that of the internal market within the EU.

1.1 Subject and purpose

The past decades have shown that the regulation of games of chance is no longer an exclusively national matter on the European market for services. Although the enactment of legislation as such remains within the sovereign competence of the EU Member States, and harmonisation is not likely to occur in the near future, exponential technological developments in recent years have transformed national jurisdictions into attractive markets for foreign gambling suppliers. The transnational elements of the industry can no longer be ignored, as they raise complex legal questions. Not the least, this shift of the discussion to the international arena has emphasised the collision between nationally regulated markets and the overall integration objectives of the EU.

The general, wide purpose of this paper is to depict the current situation and recent major developments on the market for gambling services within the European Union, from a supranational perspective. Particularly, focus lies upon the conditions developed through the case-law of the Court of Justice (hereinafter also referred to as the European Court, or merely the Court,

[1] Reith, G. – *The age of chance: gambling and western culture*, 2002, page 1.

formerly the European Court of Justice[2]) in this field, aimed at setting the outer limits for the Member States' discretion in regulating their national gambling markets. Within this frame, the narrower aim of the thesis is to critically advocate for a clearer proportionality test, in the light of the contradictory interpretations that the currently vague proportionality assessment has lead to throughout the Member States. To that end, a more nuanced consistency requirement (as a part of the suitability test) and the advantages of an evidence-based proportionality assessment conducted by the Court itself are argued for. Here, attention is aimed at non-discriminatory state monopolies and similar arrangements which generally amount to trade barriers within the internal market.

1.2 Delimitations

The thesis addresses certain elements marginally, in order to put the problematic issues emphasised in their relevant context. Given the purpose and the scope of the analysis, no national system is explored in detail – although several Member State regulatory provisions are accounted for as exemplifying in the larger context.

Further, problem gambling and gambling-related crime topics as such are not dealt with in greater detail, given the quantity of research available. However, insofar as a majority of Member States base and defend their policies on arguments related to the need to curb gambling addiction and protect consumers, whereas economic considerations estimate the social costs linked to these issues, general remarks will be made in the relevant sections.

Neither do tax issues fall within the ambit of my research. Cases concerning directly discriminatory fiscal measures deemed to restrict the freedom to provide gambling services are arguably connected to the question of fact, provided that governments attempt to justify them by reference to the derogations of public interest related to gambling legislation. However, the contribution of such cases to the development of the proportionality principle by the Court of Justice is rather insignificant, since one of the pre-conditions established through the *Gebhard*-formula is that a measure is indistinctly applicable.

The wide constitutional aspects and the general discussion on the division of power between Member States and EU institutions are largely disregarded. According to the subsidiarity principle, legislation governing games of chance is a matter for each Member State, but measures impeding the exercise of the fundamental economic freedoms (which is often the case

[2] With the entry into force of the Treaty of Lisbon on December 1, 2009, the official name of the *Court of Justice of the European Communities* has been changed to the *Court of Justice*. Together with the *General Court* (formerly the *Court of First Instance*) and the specialised tribunals, the entire judiciary instance is now referred to as the *Court of Justice of the European Union.* See, to that regard, Section 5 of the *Consolidated version of the Treaty on the Functioning of the European Union*, O.J. C 83/47 of 30.3.2010.

with restrictive gambling regulation) must nonetheless fulfil the proportionality principle. Having this in mind, the Court of Justice has long reserved itself the right to scrutinise measures capable of obstructing the achievement of the EU's economic goals, albeit more or less rigorously. Basically, this constitutes the starting point in the proportionality discussion.

1.3 Method and material

In achieving the stated aim of the thesis, I deemed it necessary to include an adequate descriptive background of the socio-historical importance of games of chance from a global perspective, as well as a short guide of the activities normally considered as *gambling* (or *gaming*, which for the purpose of the thesis has been used as a synonym to gambling). In outlining the significance of the European gambling industry, the difficulty in finding recent and reliable sources has lead to the use of the *Study of Gambling Services in the Internal Market of the European Union* from 2006. Further, various inter-disciplinary sources and studies have been employed in order to lay down general points on the risks implied by gambling activities.

A comprehensive overview of the gambling legal framework comprises both the national level (where various regulatory models are exemplified with reference to secondary sources), and the EU level, with focus on primary law and in particular the freedom of establishment and the freedom to provide services. The scope of the Treaty provisions and of the derogations thereto (based, to a certain extent on textbook material) are linked to their relevance in gambling-related cases adjudicated by the Court of Justice, three of which are subsequently presented and analysed with the help of legal journals.

The analytical section arguing for a clearer stance by the European judiciary takes its starting point in doctrine on the proportionality principle. By applying a comparative method between relevantly similar fields of law where the Court has taken a different approach, recommendations are made with certain support in academic doctrine.

1.4 Outline

Chapter 2 provides a short cultural history of games of chance, and briefly assesses the economic significance of this market sector within the internal market, as well as the risks commonly associated with activities involving gambling. Moreover, the importance of globalisation and the ongoing trend towards a *de facto* borderless digital market for gaming services are touched upon.

Chapter 3 presents the legal framework relevant to the field of gambling; the most common regulatory schemes employed by Member States are addressed on a general level, without detailed references to a particular regime. Further, given the lack of harmonisation in the field, the interference

between national measures and the internal market is framed in terms of the clash with the relevant fundamental economic freedoms enshrined in the Treaty, whereby the derogation possibilities are explored in relation to gambling regulations.

Chapter 4 aims at outlining the main issues in the gambling-related jurisprudence of the Court of Justice. With the help of several crucial rulings, critical analyses thereof, and the inclusion of a short overview of relevant pending cases and available AG Opinions, the ambit is to construe the judicial tools applied in the compatibility assessment of Member State regulations with the free movement provisions.

Within chapter 5, some of the problematic and unclear aspects of the proportionality test conducted by the Court of Justice in its case-law are emphasised. The more nuanced approach of the European judiciary in other fields of EU law is used as a cogent example in order to advocate for a clearer consistency requirement, and a more evidence-based approach.

The concluding remarks in chapter 6 summarise the essential points in the previous discussion, and touch briefly upon future development scenarios for Member State cooperation. Moreover, a short section refers to the infringement proceedings commenced by the European Commission against several Member States.

2 Games of chance

Generally, most types of games of chance involve a monetary stake wagered by the participant, and the element of chance governing the outcome. Having these basic characteristics in mind, most nations nowadays define the pursuit of gambling within this frame. However, historical research shows that the origins of gaming can be found in incipient forms in ancient societies, in somewhat different forms and having diverse purposes. Throughout the centuries, the status and variety of games of chance has shifted considerably; nowadays, many gambling forms are accepted in most of the cultures, albeit in strict, controlled forms due to the serious risks involved. Bearing significant economic implications, the gaming industry is nowadays subject to the globalisation phenomenon, which has proven to challenge the historically and culturally defined national regulations more than ever, and which threatens to change the legal landscape of gambling considerably.

2.1 A brief history

The beginning of gambling and gambling tools can be traced back to the primitive, pre-historic societies. Modern history and anthropology assert that records of games of chance are among the earliest found in all civilizations.[3] In ancient societies, the pursuit of games of chance and the randomness of the outcome were almost always inseparably linked to various forms of god divination, and the result was often interpreted as a sacred message or sign from the gods, lacking the belief in an element of chance as such.[4] Often used when making decisions in legal or religious matters, the incipient forms of gambling had practical purposes, and did not entail any monetary prizes or entertainment aspect.

Evidence shows, that as early as 4000 years ago, Chinese played *wei-ch'i*, a game that is still played today in the East. Bones cast from cups in ancient Greece and India (*astragali*) are considered the ancestors of what we nowadays know as dice. The oldest board games using dice are about 5000 years old, traces of which have been found in the royal tombs in Mesopotamia. The Etruscans were the first to use six-sided dice, and archaeological findings confirm the presence of such objects in Rome around 900 B.C.[5]

The origins of the playing cards can, with a certain degree of certainty, be connected to divinatory practices in Korea, with subsequent modifications

[3] Arnold, P. - *The encyclopedia of gambling : the game, the odds ,the techniques, the people and places, the myths and history,* 1977, page 8.
[4] Reith, 2002, pages 13-15.
[5] Arnold, 1977, page 8.

adduced by the Chinese culture. In Europe, card games developed and spread during the fourteenth and fifteenth centuries A.D.[6]

Even the harmful effects of gambling are emphasized in ancient sources. In his writings, Aristotle mentions the ”sordid greed” and ”meanness” in the pursuit of games of chance, comparing the players to despots and thieves.[7] In the first century A.D., the writings of Tacitus mention gamblers “staking their liberty on the throw of dice”, and being enslaved upon loss.[8]

During the Middle Ages, gambling was considered unproductive, as it consumed the energy of the workers and the wealth of the aristocracy, and was therefore prohibited in many Western societies, although the Catholic Church did not regard games of chance as sinful *per se*. The prohibition sought to divert human efforts to more important activities such as warfare. With the Reformation, the Church adopted a strong moral stance against games of chance, damning gamblers as moral sinners, guilty of blasphemy and greed.[9] The religious Protestant argument against gambling mainly rests on the elements of chance and superstition, as opposed to the ethically accepted pursuit of wellbeing through honest work.[10]

The age of the Enlightenment weakened the emphasis on the sinful nature of games of chance, but gambling did not become more accepted as such. Restrictions on gambling, suppressing one form of gaming or another, have been passed through legislation for three centuries, starting in the mid seventeenth century in Britain.[11]

However, due to the inefficiencies and risks associated with complete bans, more pragmatic policy approaches arose in the 1960s – that of permitting and regulating games of chance. This gradual development has been mainly stimulated by the discovery of gambling as a source of income for the national treasury, for, *inter alia*, charitable causes and tourism.[12] Certainly, two world wars and huge national debts may have influenced the overall policy change.[13] Subsequently, other objectives have come to shape and determine the form of gambling regulations, such as the protection of customers, the prevention of fraud and the combating of crime.[14] Both the content of these major policy concerns and the restrictive national regulations reflecting them will be elaborated upon below.[15]

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[6] Ibid., pages 10-11.
[7] Reith, 2002, page 5.
[8] Arnold, 1977, page 8.
[9] Reith, 2002, page 5.
[10] Arnold, 1977, page 22.
[11] Ibid., page 15.
[12] Polders, B. – *Gaming Policies in Europe*, Gaming Law Review, 1(2), 1997, page 171.
[13] Brenner, R., and Brenner, G. – *Gambling and Speculation: A Theory, a History and a Future of some Human Decisions*, 1990, pages 17-18.
[14] Polders, 1997, p. 175.
[15] In that regard, see Chapters 2.4 The risks associated with gambling and 3.1 National legislation.

2.2 Types of games

Gambling services consist of a variety of gaming types, which in their turn form separate market sectors. Having in view the definition provided above, that gambling involves wagering a monetary stake in an event, the outcome of which (success or loss) depends completely or predominantly on chance, several market sectors show such characteristics and are therefore included in the present analysis. A generic classification of the most common games of chance would divide them into four main categories.[16]

Firstly, lotteries and bingo activities are types of games in which the outcome is entirely determined by chance – the winning numbers or symbols are extracted randomly, no skill is required in order to participate, and the games may be organized on different scales and forms, with prizes in money or in kind. Even scratch-card "instant" lotteries belong to this group.

Secondly, casino services comprise a large number of different games of chance. Generally, a casino may be defined as a location where such games are organised, and where different social and cultural activities may take place.

The third major category of games of chance comprises betting games, whereby the participant takes a bet on the outcome of an event (such as a competition or a process), on the likelihood of something occurring or not occurring, or on a certain fact being true or respectively false. Betting on horse races and sports bets are the most common examples, and the winnings depend either on the total amount of pre-paid stakes (so-called *pari mutuel* betting or *pool betting*) or on the odds agreed between the player and the bookmaker (*pari á la cote* or *fixed-odds betting*). In betting games, the player may solely rely on luck, but he or she may even possess certain knowledge about the characteristics and previous performances of the actors involved in the event.

Lastly, the fourth major category consists of slot machines, where the result of the process is determined by a random computer system. The winning combination cannot be influenced by the player, the frequency of certain displayed outcomes depends completely or predominantly on coincidence.[17]

National regulatory schemes generally distinguish between various forms of gambling, and in some Member States, certain games are excluded from the scope of the gambling laws altogether. However, since in most Member States, the gaming types enumerated above are subject to regulatory

[16] A similar classification is employed by Advocate General Bot in his Opinion on the case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericordia de Lisboa*, paragraphs 16-26.
[17] Swiss Institute of Comparative Law - *Study of Gambling Services in the Internal Market of the European Union*, Final Report, 2006, part I, paragraphs 1.21-1.2.6.

restrictions, no such distinction will be applied for the purpose of this paper. Furthermore, it is clear that even games of chance that imply a certain degree of knowledge and skill are to be regarded as gambling activities, as long as the success or loss does not depend on these abilities, but predominantly on the element of chance.[18]

2.3 An economically significant industry

Whereas the size of the gambling industry is difficult to estimate in real figures (partly due to the illegal part of the sector), gambling and games of chance have in recent years undoubtedly become a significant economic factor, both on a European level and in the Member States.

The Study of Gambling Services in the Internal Market of the European Union, conducted at the request of the European Commission in 2006, depicts the dimension of the legal gaming services industries in the Member States in 2003. Based on estimates in the (then) 25 Member States of the European Union, the study provides an estimate for the gross revenue (i.e. gross winnings after the payment of prizes) in the gaming industry of € 51.5 billion.[19] For the same year, the ratio of gross gaming revenues in the states' GDPs remained under 1%, with the exception of Malta, Cyprus and Slovenia.[20] For 2008, the gross revenues in the European gaming market were estimated at € 85 billion, and projected estimates produced by global betting and gaming consultants show that the corresponding market size for 2012 will amount to € 93 billion; in that regard, especially online gambling volumes are expected to rise significantly.[21] Considering the rapid expansion of this sector during the past two decades, partly due to new communication channels which enable cross-border gambling (more elaborated upon below), *The Study of Gambling Services in the Internal Market of the European Union* previously referred to advanced similar economic predictions for the growth of the gambling industry in subsequent years – the economic scenario of the study depicted forecasted gross revenues in the gambling sector for the year 2010 at € 63 billion. That figure seems to have already been exceeded, but it is of interest to mention that the market share of betting services alone was expected to grow considerably (from 17.2% of the aggregated gross revenues in 2003 to 20.8% in 2010), particularly due to the expansion of remote gambling.[22]

Not only is the industry growing at a tremendous rate, but it also represents an important source of employment. For instance in 2003, in Germany there were about 65 000 employees in the lottery, casino and casino-related

[18] In the case of betting, this was recognised by the European Court of Justice in Case C-67/98, *Questore di Verona v Diego Zenatti*, [1999] E.C.R. I-7289, paragraph 14.
[19] Swiss Institute of Comparative Law, 2006, part IV, page 1102.
[20] Ibid., page 1105.
[21] Levi, M. – *E-gaming and money laundering risks: a European overview*, ERA Forum (2009) 10: 533-546, page 535.
[22] Swiss Institute of Comparative Law, 2006, Executive Summary, paragraph 4.5.1.

sectors;[23] one of the three major Spanish lotteries employed 27 000 visually disabled persons in 2004, making it the main source of employment for the blind in Spain; in the same year, there were about 42 000 employees in the casino and gaming machine sectors [24] In the United Kingdom, the number of people employed in the gambling sector in 2004 was estimated at 100 000.[25]

As far as the remote gaming sector is concerned, although it has become increasingly important on the European market for gambling services, it is a relatively small employer, and is likely to remain so according to economic predictions.[26] Due to operational efficiency concerns, total employment within this sector was expected to rise from about 5000 in 2004 to merely between 10 000 and 15 000 individuals by 2010.[27]

From a national point of view, revenues from the gambling industry are of great importance in funding certain activities of a social, charitable or cultural nature, and in providing financial support to sport or equine organisations.[28] This fact can never *per se* justify a trade restriction between Member States, but it ought to be undisputed that such revenues are significant for various national policies pursued.

2.4 The risks associated with gambling

The growth of the industry in recent decades has come with subsequent problems and social costs. A detailed overview thereof does not fall within the ambit of this paper, but it is however necessary to highlight the main features of the arguments most commonly invoked against gambling expansion and/or liberalisation. To the extent that national markets remain foreclosed and under strict government supervision, the policy concerns that have shaped this approach generally include consumer protection against addiction and fraud and the fight against crime, especially money laundering.

The moralistic tone has in contemporary approaches to gambling been gradually replaced by clinical arguments: gambling has become problematic from a medical, rather than an ethical point of view, save for some parts of the world where religious objections are still present. In modern psychiatric literature, problem gambling is largely defined as "patterns of gambling behaviour which may compromise, disrupt or damage family, personal or vocational pursuits".[29] Gambling-related problems are identified as

[23] Swiss Institute of Comparative Law, 2006, pages 1203 and 1206.
[24] Ibid., pages 1339, 1347 and 1350.
[25] Ibid., page 1404.
[26] Ibid., page 1422.
[27] Ibid., Executive Summary, paragraph 4.5.1.
[28] European Council, *Gambling and betting : legal framework and policies in the Member States of the European Union*, Presidency Progress Report, 16022/08, 2008, page 5.
[29] Lesieur, H. R. and Rosenthal, R.J. - *Pathological Gambling: A Review of the Literature*, Journal of Gambling Studies (1991)7:5-40, page 7.

psychiatric disorders in both major tools used for clinical diagnosis: the American Psychiatric Association's Diagnostic and Statistical Manual, and the World Health Organization's International Classification of Diseases.[30] In order to get an idea of the prevalence of the problem in real terms, reference can be made to the British Gambling Prevalence Study 2007, which found the percentage of problem gamblers across all different types of games between 0.5% and 0.6% of the British population. The Study offers some comparison with equivalent percentages resulting from prevalence surveys carried out in other states, where the rates of problem gambling/population were 0.2% for Norway, 0.6% for Sweden, 0.8% for Switzerland and 1.1% for Iceland.[31] Remarkably, the overall effects of problem-gambling may even entail comorbidities, *i.e.* other disorders linked to, or enhanced by the gambling behaviour as such.[32]

Extensive research has shown, that increased availability of opportunities to gamble is generally linked with the incidence of problem gambling.[33] The introduction in recent years of remote gambling opportunities undoubtedly has potential to increase problematic gambling behaviour. Although there are yet no conclusive studies to show that this is *de facto* the case, researchers within the academic world have strong reasons to assume the hazards involved by such forms of gambling. Remote gaming is especially attractive, and potentially addictive, due to its unlimited accessibility, convenience, anonymity, lack of timely or physical barriers, interactivity, the large variety of games offered and loss of inhibitions.[34]

Also, a large body of studies indicates that adolescents may be more susceptible to problem gambling than adults.[35] This is clearly a major concern for policy-makers, and in view of the detrimental effects that a fully developed addiction has on the individual, there is a formulated need to restrict gambling opportunities to adults only.[36]

A second major concern in consumer protection policies is the risk of misleading or fraudulent activities from the part of the gambling operators. The enactment and enforcement of certain standards and fair commercial business practices are aimed at keeping the consumer informed about the odds at stake, the minimum and maximum payouts, and, more generally, transparent and accurate information about the gambling activity. Especially

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[30] Meyer, G., Hayer, T., and Griffiths, M. – *Problem Gambling: A European Perspective*, in Meyer, G., Hayer, T., and Griffiths, M. (eds.) – *Problem Gambling in Europe. Challenges, Prevention and Interventions*, 2009, page xvii.
[31] Wardle, H., Sproston, K., Orford, J., Erens, B., Griffiths, M., Constantine, R. and Pigott, S. - *British Gambling Prevalence Survey 2007* (National Centre for Social Research) prepared for the Gambling Commission 2007, pages 83-85.
[32] Walker, D. – *Problems in Quantifying the Social Costs and Benefits of Gambling*, American Journal of Economics and Sociology, 66(3):609-645, 2007, page 617.
[33] Griffiths, M. – *Problem Gambling and European Lotteries*, in Viren, M. (ed.) – *Gaming in the New Market Environment*, 2008, page 126.
[34] Ibid., pages 140-141.
[35] Griffiths, 2008, page 135.
[36] Ibid., page 137.

in the context of online gambling, there is a considerably high risk of fraud – dishonest operators collecting deposits and disappearing from the market, refusing to pay out winnings, or illegally using the customer details received (such as credit card or bank account number).[37]

Lastly, but of great significance, policy-makers often emphasise the potential of gambling operations being used for money laundering purposes. In a broad sense, money laundering entails the act or attempt of concealing or disguising the illicit origin of property derived from criminal activity, in order to make it appear originate from a legitimate source.[38] The volume, rapidity and cross-border nature of transactions in remote gambling operations certainly facilitate the occurrence of such activities, even though there appears to be no conclusive evidence of such practices being featured significantly on the online market gaming market, as opposed to traditional, land-based forms of gambling.[39] Notwithstanding the lack of concrete evidence, the dangers of money laundering are consistently invoked as a public policy argument against the opening up of the European online market for games of chance.

The dangers and threats associated with gambling can be said to be trans-cultural, and a European paradigm for gambling regulation can be identified. A majority of Member States have chosen to form their policies based on the public concerns outlined above[40], although the choice of different regulatory and restrictive schemes varies throughout the Member States.[41] Arguably, the inherent risks of gambling activities are amplified by the globalisation currently occurring in this market sector. The following section will briefly describe this ongoing phenomenon and its effects on games of chance.

2.5 Globalisation

During the past few decades, games of chance have transcended geographical boundaries in an unprecedented manner. Fast and overwhelming advances in telecommunications technologies have enabled the development of new gaming forms, and created new delivery channels for gambling services. Today's digital gambling market, which encompasses online, mobile, and TV-based services, is in continuous growth. Some forms of gambling, such as betting and interactive poker games, have quickly and steadily secured a large share of the market. These novel forms of gaming operations are cheaper to provide, and at the same

[37] Hörnle, J. – *Online Gambling in the European Union: a Tug of War without a Winner?*, Queen Mary School of Law Legal Studies Research Paper No. 48/2010, page 3.
[38] For a complete definition in the context of EU law, see Article 1 of the Directive 2005/60/EC on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, O.J. L 309/15 of 25.11.2005.
[39] Levi, 2009, page 535.
[40] Swiss Institute of Comparative Law, 2006, part II, pages 984-986.
[41] See below, Chapter 3.1 National legislation.

time as the customer base is continuously expanding with increasing access to the interactive communication forms, so is the demand for such services.

The switch to the digital environment has dual implications. On the one hand, there is enhanced efficiency in the possibilities to enforce control, supervision, limitations and blocking of gambling activities conducted online. Such technologically advanced counter-measures against fraud, money laundering and unauthorised gambling already form part of self-regulatory codes of conduct and sets of standard applied amongst regulated operators in the industry.[42] On the other hand, and leaving aside the enhanced consumer risk related to addiction problems already touched upon, the online environment arguably entails greater opportunities for dishonest and fraudulent providers to exploit the anonymity and the simultaneity of online transactions for a short while, and untraceably disappear from the market afterwards.

Much like other sectors of e-commerce, gambling activities are thus subject to globalisation, and this fact has put the question of jurisdictional boundaries on the European legal agenda more than ever before. As will be showed in the following chapters, the jurisdictional clash in the internal market is a pressing issue, one yet to be properly dealt with on a European level.

Following an overview of the legal framework for gambling regulations addressing both the on- and offline provisions of gambling services, the interface between such national regulatory measures and EU law is depicted in order to prepare for the understanding and critical analysis of European case-law.

[42] Levi, 2009, pages 537-542. The author refers, *inter alia*, to the principles and standards applied by the European Gaming and Betting Association.

3 The legal context

The legal landscape regulating the provision of games of chance is multi-faceted and complex. On a national level, various considerations of an ethical, philosophical, cultural and social nature have shaped the development into a multitude of regulatory models.[43] Hereinafter, the main features will be highlighted, insofar as there are similarities across the different systems in place.

From a European perspective, it is necessary to briefly look at some of the arguments against market liberalisation, and add en economic touch to the debate; further, it will be shown that this lack of political will has lead to the exclusion of gambling services from the scope of potentially relevant secondary legislation. The last part of the chapter will assess the interference between national gambling legislation and primary law, in particular the fundamental freedoms.

3.1 National legislation – some common features

Due to the specific risks associated with gambling, the theoretical starting point for a majority of legal systems in the EU is the prohibition of games of chance. Depending on different historical, political and social factors, the scope of the prohibitions and the exceptions hereto vary considerably among Member States.

According to the legislation of half of the Member States, gambling is regarded illegal unless authorised. Such is the case in Austria, Belgium, Cyprus, Denmark, Finland, France, Ireland, Italy, Germany, Greece, Luxembourg, Portugal and Slovakia.[44] Other Member States have a more open gaming market, although strictly regulated. The most frequently restricted gaming forms are casino games, slot machines and betting on events other than sports contests and horse racing. In 2003, some of the Member States even applied a complete ban on online gambling (Cyprus, Germany, Estonia, Greece, The Netherlands and Poland), whereas others applied additional restrictions on gambling services supplied remotely, without banning them entirely.[45]

Seen to the market structure, a majority of the Member States require that providers of any form of gambling obtain a licence within their territory. Generally, the granting of licenses is restrictive, and applicants have to comply with certain requirements. Moreover, such licenses can only be

[43] European Council, *Gambling and betting: legal framework and policies in the Member States of the European Union*, Presidency Progress Report, 16022/08, 2008, page 3.
[44] Ibid.
[45] Ibid.

issued by public authorities (national or regional). Another common feature in most Member States is the limitation on the number of operators licensed on certain market sectors, whereby a *numerus clausus* in respect of casinos and gambling halls is in place in several jurisdictions.[46] Where the number of licenses is limited to one, the single operator enjoys a *de facto* legal monopolistic position on the relevant market sector.

Other European states have thoroughly regulated state monopolies for games of chance (or for particular forms thereof, a common example being lotteries), or created *de facto* monopolies through the award of exclusive rights granted to state entities or private, often non-profit, bodies. The real effects of both types of regimes is practically similar – the exclusion of all other commercial operators from the market.[47]

3.2 Why is there no harmonisation of the gambling market?

As an unavoidable consequence of the establishment of the internal market, firm steps towards market liberalisation have been taken by the European legislator in the case of several service industries during the past three decades.[48] Major sectors of the European industry characterised by state monopolies have gradually been open to competition. The liberalisation programme initiated by the European Commission in the mid-1980s has mainly targeted network industries, such as telecommunications, energy, transport and postal services. Monopolistic suppliers of such services, often owned and operated by the state, have successfully been replaced by private actors on competitive markets, where public interest objectives such as consumer protection have been guaranteed by means of strict additional regulation.

The immediate question arises, why similar structural changes have not yet occurred in the case of the gambling service industry, where state monopolies and restrictive licensing systems prevent foreign actors from entering national markets.[49]

As a starting point, it should be noted that the measures to liberalise monopolistic network industries (which often have the character of natural monopolies) have been taken mainly within the framework of Article 86 ECT[50] (now Article 106 TFEU). On the other hand, the situation as regards gambling services does not necessarily entail the existence of a legal monopoly in the Member States. As previously pointed out, some national

[46] Swiss Institute of Comparative Law, 2006, Executive Summary, paragraphs 3.1.2-3.1.3.
[47] Ibid., paragraph 3.1.4.
[48] Geradin. D. (ed.) – *The Liberalization of State Monopolies in the European Union and Beyond*, 2000, page 1.
[49] Van Damme, E. – *Liberalising Gambling Markets: Lessons From Network Industries?*, TILEC Discussion Paper, 2007, page 2.
[50] *Consolidated version of the Treaty establishing the European Community*, O.J. C 325/33 of 24.12.2002.

legislators have opted for licensing systems, which nevertheless *de facto* restrict market access for foreign service providers. Gambling regulations that affect the internal market are currently dealt with in the scope of the fundamental freedoms (of establishment and to provide services).

Generally, the advantages of liberalisation, and implicitly those of creating competitive markets for services, are stated in terms of reduced costs, consumer benefits (better quality, larger product variety, lower prices), efficiency and innovation arguments, and economic integration within the internal market.[51] Basic economic theories underpinning competition law associate monopolised, or otherwise strictly regulated market sectors with inefficiencies, high costs and insufficient supply. In the case of gambling however, regulatory schemes generally purport to reduce demand and supply for such services, due to the inherent risks, or, from a microeconomic perspective, the externalities they entail. Insofar as political measures are grounded on economic theory (as opposed to prevailing moral and ideological discourse), government policies are shaped with regard to societal wealth, and activities that are likely to decrease the overall wealth are treated accordingly. Thus, the social costs linked to the risks of gambling prominently encompass expenditures for treatment, prevention, research, law enforcement and lost productivity[52] are generally deemed to outweigh potentially quantifiable benefits such as increased employment, higher average wages, and increased tax revenues.[53]

Indeed, one may even argue that the possible benefits of competition as regards non-problem, responsible gamblers are constantly overlooked in the general debate, and that focus tends to lie on the disadvantages and costs associated with a harmonised market in gambling services.[54] This line of argumentation may even be supported by microeconomic public choice theory – on the one hand, stakeholders such as organisations whose functioning and activities are contingent upon revenues derived from gambling activities are well-organised and strong lobbyists for the maintenance of monopolies and state-owned licensees. On the other hand, non-problem consumers (obviously the majority of purchasers of gambling services) are unable to efficiently assert their preferences for, and benefits from a (more) open market.[55]

Nevertheless, the main argument against harmonisation appears to lie in the lack of political will to create common standards in this delicate policy field. All EU institutions, including the Court of Justice, have consistently acknowledged the sovereignty of Member State in regulating their gambling markets. Numerous national and regional jurisdictions have created a fragmented European legal landscape in gambling, and the achievement of

[51] Geradin (ed.), 2000, page 2.
[52] Walker, 2007, page 611.
[53] Ibid., page 620.
[54] Van Damme, 2007, page 3.
[55] Paldam, M. – *The Political Economy of Regulating Gambling*, in Viren, M. (ed.) – *Gaming in the New Market Environment*, 2008, page 185.

homogenous legal standards throughout the Member States seems unlikely in the near future.[56]

3.3 EU secondary legislation

Secondary legislation has not helped achieve a coherent internal market for gambling services. Already in 1992, the European Commission decided in the context of an EU Summit not to pursue its harmonisation plans in the field of gambling services. In the course of evaluating pending legislative proposals, the Commission then stated that it intended to abandon its initiatives concerning the regulation of gambling, given the principle of subsidiarity.[57] The standpoint that gambling issues are best dealt with at a national level has been consistently maintained from the part of the European Commission, whose representatives have on a number of occasions pointed out that infringement actions against Member States do not seek to liberalise the market; it has been clarified, that such actions rather aim at ensuring that national measures are compatible with existent EU law.[58]

The cross-border provision of gambling services by means of information society (e.g. through internet, mobile telephones or interactive TV) has been expressly excluded from the scope of application of the Electronic Commerce Directive.[59] Consequently, the "country of origin" principle established by the directive does not apply to remotely provided gambling services. Member States are thus free to restrict the supply of such services within their territories, even in cases where the provider is a company lawfully established and licensed in another Member State. Upon review of the application of the Directive, the European Commission subsequently announced that it would consider the "need and scope of a possible new EU initiative" in relation to online gambling. Although the Commission acknowledged in its report that the provision of cross-border gambling services caused significant internal market problems already in 2003, measures have yet to be taken.[60]

As concerns the Distance Selling Directive, this is *per se* applicable to gambling services, but this directive deals mainly with procedural contract

[56] Littler, A. – *The Regulation of Gambling at European Level*, 2007, ERA Forum (2007)8:357-371, page 370.
[57] European Council, *Conclusions of the Presidency* Edinburgh, December 11–12, 1992 (DOC/92/8, 13.12.1992). Annex 2 to Part A, Subsidiarity.
[58] European Commission Press Release IP/06/436 - *Free movement of services: Commission inquires into restrictions on sports betting services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden*, Brussels, 4 April 2006.
[59] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), O.J. L 178/1 of 17.7.2000, Art 1.5.
[60] First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), COM(2003) 702 final, Art. 7.4.

issues in market sectors where cross-border trade is permitted.[61] Thus, it does not help create a harmonised market for such services, and its significance is rather limited in this context.

The most realistic hope of liberalisation and harmonisation of the European gambling market was probably brought about by the controversial Services Directive.[62] In the Commission's initial proposal, the application of the "country of origin" principle was made subject to a transitional derogation; additional harmonisation was made dependent upon a report and further consultation with stakeholders.[63] Upon passing through the European Parliament, the Directive was substantially amended, and gambling activities were excluded from its scope. This standpoint was motivated by the Parliament by its concerns as to consumer protection, public order and the existing differences between national regulatory approaches.[64]

Finally, it can be concluded that enacted directives which apply to gambling services do not require any harmonisation within the internal market, whereas secondary legislation regulating the cross-border provision of services through the "country of origin" principle does not apply to gambling. The lack of legislative initiatives concerning gambling in the EU has however not left the field completely unaddressed. The Court of Justice has in a number of judgments attempted to clarify the outer jurisdictional boundaries of the Member States' discretion to regulate gambling services, assessing the compatibility of national measures and policies with primary EU law.

3.4 Primary Law

In the lack of harmonisation, national regulations concerning games of chance must however respect the obligations that Member States have under the TFEU (transposed from the ECT), and in particular in relation to the freedom of movement. Rather early in its judgments related to cross-border gambling, the Court of Justice established that games of chance are to be regarded as an economic activity within the meaning of the ECT, and thus falls within the scope of the commercial freedoms enshrined therein.[65] Both the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU) are relevant in the context of cross-border gambling, although the rapid development of cross-border gaming services

[61] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. L 144/19 of 4.6.1997.
[62] Directive 06/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. L 376/36 of 27.12.2006.
[63] European Commission, Proposal for a Directive on services in the internal market COM(2004) 2 final., Articles 18.1.b and 40.1.b.
[64] European Parliament, Committee on the Internal Market and Consumer Protection, Draft Report, Evelyne Gebhardt on the proposal for a directive on services in the internal market: Amendments 152-426 (PE 355.744v04-00).
[65] Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português*, [2003] ECR I-8621, paragraph 47.

by means of information society referred to above has made the latter freedom of particular interest in the debate.

It is clear, that national legislation concerning fields where Member States enjoy exclusive legislative competence may still fall under the scrutiny of the EU institutions, whereby a proportionality assessment in relation to the fundamental freedoms sets the outer boundaries of the Member States' freedom. In that respect, the Court pointed out already in 1981, in a case concerning the free movement of goods and persons, that criminal legislation and rules of criminal procedure must not be conceived in such a way as to restrict the freedoms guaranteed in the Treaty; furthermore, penalties imposed may not be so disproportionate to the gravity of the infringement that they become an obstacle to the exercise of those freedoms.[66] In a similar manner, even though gambling regulations are a matter for the Member States, national measures which have as their aim or effect the restriction of one of the fundamental freedoms are subject to the proportionality requirement. In that regard, the Court has through its case-law established that rules relating to a commercial state monopoly in goods cannot be upheld beyond the reach of the four freedoms.[67]

The criteria for a proportionality assessment are formulated in general terms, and their interpretation and application in the context of national measures regulating gambling will be developed in subsequent chapters. At this point, it is however necessary to analyse how national regulations in the field of games of chance interfere with the fundamental freedoms guaranteed by the Treaty. The assessment of restrictive national rules is rather similar both in the case of the freedom of establishment and in the freedom to provide services.

3.4.1 The freedom of establishment

The right of establishment entails the "actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period".[68] Articles 49-55 TFEU require the removal of restrictions on the right of natural and legal persons to maintain a permanent place of business in a Member State. The scope of the concept of "establishment" has been clarified by the Court of Justice in the seminal *Gebhard*-case, where it was stated that establishment allows an EU national to participate on a "stable and continuous basis" in the economic life of a Member State other than that of his origin. Contrary, a service provider pursues his activity in another Member State on a temporary basis; when assessing whether the activity is of a temporary character, one has to take into account not only the duration

[66] Case C-203/80, *Criminal proceedings against Guerrino Casati*, [1981] ECR 2595, paragraph 27.
[67] Littler, A. – *Regulatory perspectives on the future of interactive gambling in the internal market*, European Law Review, 33(2):211-229, 2008, page 213.
[68] Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*, [1991] ECR I-3905, paragraph 20.

of the provision of the service, but also "its regularity, periodicity or continuity".[69]

According to Article 54 TFEU, Member States are required to treat companies and firms in the same manner as natural persons for the purpose of the Treaty establishment provisions. Although this is not entirely possible due to the artificial nature of a legal person, it is clear that companies established in one Member State (*i.e.* formed in accordance with the law of that Member State and having their registered office or their principal place of business within the EU) have the right to establish themselves in another Member State.[70] This right entails both primary and secondary establishment. A company can exercise the right of primary establishment by taking part in the incorporation of new legal entity in another Member State, or by transferring its seat from a Member State to another.[71] More common however, is the creation of a secondary establishment in a host state, by the setting up of a branch, agency or a subsidiary. In this regard, the European Court has made it clear through its case-law that a company is lawfully established in a Member State even though it has never conducted any business there, but instead had traded through its secondary establishments in another Member State.[72]

In the context of gambling, a company lawfully established in a Member State may wish to enter the market of another state and offer its gambling services there. Such was the case in *Gambelli*, where a British capital company registered and lawfully licensed in the United Kingdom (Stanley International Betting) offered sports bets on national, European and global sporting events. The bookmaker provided its services to consumers in Italy through Italian operators and intermediaries acting as agencies, which collected and registered the intentions to bet, and subsequently forwarded them to the British betting company. The AG asserted that the Italian centres were to be regarded as fixed establishments, but he doubted upon the strength of the contractual link between these intermediaries and the central undertaking in the United Kingdom, and their dependence thereof, mainly due to the fact that these centres provided a wide range of various other data transfer services.[73] Although the AG adopted the view that the Italian centres could not be regarded as secondary establishments of Stanley for the above mentioned reasons, the Court of Justice ruled that national restrictions on the activities of the Italian intermediaries constituted obstacles to the freedom of establishment, without conducting an in-depth analysis of the link between the secondary establishments and the central undertaking.[74]

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[69] Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, paragraphs 25-27.
[70] Barnard, C. – *The Substantive Law of the EU*, 2nd edition, 2007, pages 330-331.
[71] Ibid., page 333.
[72] Case C-79/85, *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*, [1986] ECR 2375, paragraph 16.
[73] Opinion of Advocate General Siegbert Alber delivered on 13 March 2003 in Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and Others*, paragraphs 85-87.
[74] Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others*, [2003] ECR I-13031, paragraph 46.

The Court confirmed this line of reasoning in its subsequent judgments, although without always maintaining a strict delimitation between the two freedoms when assessing the derogation possibilities. However, in practically all the cases concerning gambling services offered remotely by means of information society, and where the provider does not have any form of fixed establishment in the host Member State, national legislation is bound to interfere with the freedom to provide services rather than the establishment provisions.

3.4.2 The freedom to provide services

Articles 56-57 TFEU lay down the principle of the freedom to provide services for a person or a company established in one Member State to a recipient established in another. The application of the provisions governing the freedom to provide services comes into question only insofar that the rules on the free movement of goods, capital and persons are not applicable to the situation at hand. Although made residual in relation to the other freedoms, the importance of these provisions can hardly be underestimated - case-law concerning services has grown exponentially in recent years, reflecting the economic growth in the sector within the internal market.[75]

When it comes to gambling services, several Member States argued in the *Schindler* case that lotteries were not to be regarded as "economic activities" within the meaning of the Treaty provisions on services, based on the fact that such activities were normally prohibited, or operated under strict control by state authorities in the public interest. In that regard, national governments pointed out that lotteries have no economic purpose, being based on chance, and that such activities are instead means of recreation and amusement.[76] The Court rejected these arguments, establishing that lotteries were services provided for remuneration (consisting in the price for the lottery ticket), and that neither the element of chance inherent in the return, nor the recreational aspect of such activities altered the economic nature of the services as such. Regardless of the questionable moral nature of lotteries, the fact was, according to the Court, that a majority of Member States did not prohibit them entirely, and thus the activities in question were not comparable to those involving illegal products such as drugs.[77]

Using arguments similar to those advanced in *Schindler*, the Court subsequently clarified through its decision-making that even the activity of enabling consumers to participate in sports betting[78], and the operation of slot machines[79] constitute gambling activities comparable to those in

[75] Barnard, 2007, page 354.
[76] Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039, paragraph 16.
[77] Ibid., paragraphs 31-34.
[78] Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others*, [2003] ECR I-13031, paragraph 52.
[79] Case C-6/01, *Associação Nacional de Operadores de* Máquinas *Recreativas (Anomar) and Others v Estado português*, [2003] ECR I-8621, paragraph 55.

Schindler, and are thus to be considered services within the meaning of the Treaty provisions.

There are, however, cases in which certain small-scale lottery-type games do not qualify as gambling services. In a case concerning crossword and puzzle competitions published in magazines, whereby readers who sent in the correct solutions were eligible for a prize-winning draw, the Court of Justice took the stand that such small-scale games organised for insignificant stakes were not to be regarded as an economic activity. Rather, they constituted merely one aspect of the editorial content of the publication.[80]

In some particular situations related to games of chance, the Court has had the opportunity to distinguish the freedom to provide services from the free movement of goods. Notably, this is the case where national regulations prohibit any other entity than the licensed public body from operating slot machines. Insofar as such a restriction has a practical effect on the importation of the machines, it may hinder the free movement of goods. However, it was clarified that, in such situations, the operation of gaming machines must be considered a service, irrespective of the fact that this may be linked to "activities relating to the manufacture, importation and distribution of such machines".[81] Likewise, in connection to lotteries, the Court held that the importation, sending and distribution of material objects such as application forms, letters, tickets and advertisements cannot be considered independently of the activity to which they relate: the lottery; such goods are mere steps in the organisation or operation thereof, their purpose being to enable residents in the Member State where they are distributed to participate in the lottery.[82]

In a similar manner, payments between a consumer residing in one Member State, and a provider of gambling services established in another offering its services remotely to the first-named Member State, can *de facto* be restricted by legislation imposed on the provision of such services. However, this fact has been regarded as being of secondary importance to the restriction upon the freedom to provide services, and an "inevitable consequence" thereof, rendering the provisions in Article 63 TFEU on the free movement of capital inapplicable.[83]

Generally, it could be said that the Court is inclined to assess gambling regulations under the services provisions. One of the reasons may be the fact that state monopolies of a commercial character can be justified and

[80] Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR I-3689, paragraph 23.
[81] Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português*, [2003] ECR I-8621, paragraphs 55-56.
[82] Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039, paragraph 22.
[83] Case C-42/07, *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Bwin International Limited* v *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Judgment of the Court of Justice of 8 September 2009, nyr, paragraph 47.

maintained according to Article 37 TFEU when it comes to goods, whereas this provision does not apply to a monopoly in services. The Court has explicitly made this distinction in a question submitted to it by a national court, by pointing out that both the place of the provision in the Treaty chapter relating to goods, and the use of the terms "imports", "exports" and "products" in the text of the article makes it applicable to trade in goods. Thus, a monopoly in the operation of games of chance clearly falls outside the scope of this article.[84]

Another reason for this tendency by the Court of Justice to address gambling situations in terms of services when even establishment elements are present may be the fact that the overriding reasons for justifying restrictions in these two fields are to a large extent similar. The proportionality evaluation bears the same essential features in all cases, although one may very well notice that national restrictions imposed upon a service provider by the host state in the general interest are unreasonable, provided that the interest is safeguarded by rules applicable in its state of establishment.[85] In a majority of cases however, provided that both freedoms are infringed by a measure, the Court will conduct a combined proportionality analysis of the legislation with exclusionary aims/effects.

Lastly, it should be noted that the freedom to provide services comprises both situations in which the service provider moves to another Member State than that of his establishment to offer its services there on a temporary basis, as well as cases where the service recipient travels to the Member State of the provider.[86] Moreover, the right can be relied upon even in cases where neither one of the parties travels, but the service itself moves across the borders, by means of, *inter alia*, telephone, fax, internet or cable. In most cases concerning access to or the provision of games of chance, it is either the provider or the service itself that moves across the border, but it is also possible for the recipient of the service to travel to another Member State and participate in a gambling activity there; the situation will nevertheless be assessed within the scope of the Treaty provisions concerning services.[87]

3.4.3 Derogations

A general starting point regarding the fundamental freedoms is that Treaty-based exceptions allow Member States to restrict these freedoms in certain situations, in order to protect well-defined national interests. These express derogations can be invoked by the Member States in order to justify directly

[84] Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português*, [2003] ECR I-8621, paragraphs 59-60.
[85] Opinion of Advocate General Fennelly delivered on 20 May 1999 in Case C-67/98, *Questore di Verona*
v Diego Zenatti, paragraph 21.
[86] Barnard, 2007, pages 355-357.
[87] See, to that regard, the facts of the case C-42/02, *Proceedings brought by Diana Elisabeth Lindman*, [2003] ECR I-13519.

or indirectly discriminatory and non-discriminatory national measures that impede the freedom of establishment and the free movement of services. Pursuant to Article 62 TFEU, the derogations from the freedom of establishment contained in Articles 51 and 52 TFEU are extended to the field of services.

Although neither the public authority exception in Article 51 TFEU, nor the public policy, public security and public health derogations in Article 52 TFEU have been expressly invoked in cases concerning gambling regulations, a few general remarks concerning these derogations are of importance. Firstly, exceptions to the fundamental freedoms are to be interpreted strictly, and are subject to the general principles of law, in particular proportionality and the respect for fundamental human rights. Their scope cannot be determined unilaterally by the Member State relying on them, that being instead a matter for the Court of Justice. Indeed, in a significant number of cases, the Court has afforded a generous margin of discretion to the Member States and their authorities in the light of their national needs, when these would invoke, *inter alia*, public policy concerns to justify restrictive regulations.[88] Lastly, a well-established ground rule of interest is that such justifications cannot in any circumstances be invoked in order to protect national economic purposes.[89]

Apart from the express derogations found in the Treaty, a considerably large body of case-law acknowledges several different categories of exceptions under the rule of reason. In terms of establishment and services, indirectly discriminatory and non-discriminatory national measures can be maintained on account of "public", or "general interest", or "imperative requirements".[90] Much like in cases concerning the free movement of goods, where one refers to the so-called mandatory requirements, the Court has through its case-law acknowledged that certain national interests may, in some cases, take precedence over the EU fundamental freedoms concerning services and establishment.

In the seminal *Gebhard* ruling, the Court of Justice laid down the conditions that need to be satisfied in order for national measures restricting the fundamental freedoms to be justified under EU law. The so-called *Gebhard* formula provides that "national measures liable to hinder or make less attractive the exercise" of the fundamental internal market freedoms must be applied in a non-discriminatory manner, and have to be justified by imperative requirements in the general interest. Furthermore, the restrictive measures must be suitable for attaining the objective pursued, and "they must not go beyond what is necessary" to attain that legitimate objective.[91]

[88] Barnard, 2007, page 474.
[89] Ibid., page 461.
[90] Ibid., page 491.
[91] Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, paragraph 37.

In cases concerning services, a non-exhaustive list of the most common public interest grounds recognized through case-law includes the protection of intellectual property and of workers, consumer protection and cultural policy arguments.[92] In an attempt to divide the various other justifications invoked by Member States, and to a large extent accepted by the Court, doctrine has identified four different groups of public interest grounds. Firstly, those concerning market externalities include interests such as environment protection, the promotion of sustainable settlement in certain regions and road safety. A second category includes justifications related to the protection of civil liberties such as human dignity and the freedom of expression and assembly, in some cases afforded greater weight than the economic freedoms. Thirdly, Member States sometimes invoke justifications related to certain "socio-cultural practices", such as, for instance, the prevention of social dumping, social protection of worker or the combating of illegal employment. Lastly, national governments attempt to maintain restrictions on account of the aim of preserving public order within their territories; here, common objectives provided by Member States include the coherence of the fiscal system, the effectiveness of fiscal supervision, the prevention of fraud within the social security system and the preserving of the justice system. Moreover, this category entails the justifications often elaborated in cases concerning gambling, where Member States protect their policies by referring to specific "moral, religious and cultural factors", in order to be able to ensure a high degree of consumer protection, the efficient limitation of the incitement to spend and the prevention of fraud and crime associated with gambling activities.[93]

As is the case with regulations concerning areas considered ideologically sensitive, or associated with particular risks, the Court affords Member States a wide margin of discretion in forming their gambling policies. Save for cases where it is more or less obvious that the objective invoked is not the bearing motive for restrictive legislation, the proportionality assessment is often left to the national referring courts, and the guidelines provided to their aid are scarce and ambiguous. The following chapter attempts to present and critically analyse the landmark decisions concerning gambling services, and to a certain extent, the practical implications of the judge-made principles for the Member States.

[92] Barnard, 2007, page 492.
[93] Ibid., pages 493-495.

4 Development through case-law

The question of compatibility between national gambling regulations and the fundamental freedoms has been assessed in a relatively large number of judgments by the European judiciary. In outlining the main points of the Courts' case-law, the choice of landmark judgments aims at depicting the situation of restrictive gaming legislation in the internal market, with particular focus on the development of the proportionality criteria.

A general starting point is that insofar as the Member States' legislation amounts to a restriction of the free movement of services or the freedom of establishment, such effects are to be removed in favour of the internal market. However, due to the very particular nature of games of chance and the risks involved in these activities, this has proven to be a rule with generous exceptions; in other words, although the threshold for the application of the market freedoms is low, the derogation possibilities are quite large.

4.1 Case C-275/92 Schindler

In 1994, one of the first references for a preliminary ruling in the field of gambling was made by a national court in the United Kingdom. The importance of this case can hardly be underestimated – the Court lays down the underlying issues for the assessment of restrictive national gaming rules within the internal market, and the principles established in *Schindler* have been reaffirmed on several occasions in subsequent case-law.

4.1.1 Facts

The main proceedings in the national court concerned the dispatch of advertisements and tickets to United Kingdom nationals, inviting and enabling them to participate in a lottery organised in Germany. Gerhart and Jörg Schindler, who had sent the aforementioned materials, were independent agents acting on behalf of the German lottery organiser. The envelopes containing invitations to participate in the lottery and application forms thereto were intercepted and confiscated by the British Commissioners of Customs and Excise, on account of the importation being in breach of several pieces of national legislation then in force.[94]

Not only did the British legislation prohibit the importation with the purpose of publication of any such lottery advertisements or notices, but it also mainly prohibited lotteries as such within the territory of the United

[94] Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039, paragraphs 2-5.

Kingdom, with certain narrow exceptions concerning small-scale lotteries with charitable purposes.[95]

The defendants argued that national measures prohibiting the importation and distribution in a Member State of letters, tickets and application forms for a lottery lawfully organised in another Member State constituted an unjustified restriction to the free movement of goods and to the freedom to provide services within the meaning of Articles 34 and 56 TFEU. On the other hand, the official customs authority was of the opinion that neither the Treaty provisions on goods, nor those on services were applicable to the situation, since the legislation at issue was indistinctly applicable to all lotteries, regardless of their origin. In any case, such restrictions could be justified by the United Kingdom's concern to limit lotteries for social policy and fraud prevention reasons.[96]

The referring court asked in essence whether the importation and distribution of lottery tickets and advertisements fell under the Treaty provisions on goods or services respectively, and whether the applicable fundamental freedom principles precluded national prohibitions such as those enacted in the British legislation.[97]

4.1.2 Judgment

The Court rejected the arguments brought in favour of the view that the importation and distribution of material objects such as letters and leaflets promoting lotteries and enabling participation therein was connected to the free movement of goods. As accounted for above[98], the Court clarified that such activities were to be regarded as mere steps in the organisation and operation of the lottery itself, and that they did not constitute ends in themselves.[99] However, according to the Court, such activities were to be regarded as services provided for remuneration (consisting in the price of the lottery ticket); neither the strict regulation that games of chance are subject to in the Member State, nor the element of coincidence governing the outcome or the allocation of profits generated through the operation of such games deprived the activity of its economic character. The judgment also emphasised the questionable moral nature of games of chance, but it also pointed out, in the context of lotteries, that such activities are de facto permitted (under strict conditions) in a majority of Member States.[100]

Having established that the situation at hand fell within the scope of Article 56 TFEU, the Court made clear that a prohibition such as that in the United Kingdom constituted an obstacle to the freedom to provide services, in spite

[95] Ibid., paragraphs 6-9.
[96] Ibid., paragraphs 10-11.
[97] Ibid., paragraphs 13-14.
[98] See above, Chapter 3.4.2 The freedom to provide services.
[99] Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039, paragraphs 22-24.
[100] Ibid., paragraphs 25-35.

of the fact that it applied without distinction, *i.e.* it was non-discriminatory. According to established case-law, the Court reiterated, national legislation which applies without distinction to both foreign and national operators, but which is "liable to prohibit or otherwise impede" the provision of services by an operator established in another Member State may also be caught by the ambit of the Treaty provision on services.[101]

Although the lottery prohibition was general and did not envisage foreign lottery operators, it was necessary to consider whether it was justified on the basis of overriding public interest considerations. The objectives pursued by the United Kingdom legislation were to prevent crime, to ensure that gamblers be treated honestly, to avoid stimulating demand which could lead to excess gambling, and lastly, to finance charitable, sporting or cultural events. The Court acknowledged that such considerations taken together were related to consumer protection and the maintenance of order in the society – both objectives having previously been accepted by the Court as being capable, in principle, of legitimately justifying restrictions on the freedom to provide services.[102] The Court went on to consider the "peculiar nature of lotteries", resulting from moral, religious and cultural aspects of lotteries and other gambling types in the different Member States. Given the general tendency to restrict, or even prohibit such activities, and taking into account the high risk of crime or fraud where large amounts are at stake, as well as the potential destructive individual and social consequences of gambling, the Court concluded that Member States enjoyed a considerably large margin of discretion to form their policies so as to ensure the attainment of the objectives previously stated.[103] The positive effects of games of chance were also mentioned, such as the contribution to the financing of public interest activities, although the Court pointed out that this ground could not be considered as an objective justification in itself.

In the light of these considerations, the British legislation was not precluded by the Treaty provisions on the freedom to provide services, even though it went so far as to prohibit the operation of large-scale lotteries, and inherently, the importation and distribution of materials enabling United Kingdom nationals to participate in lotteries organised in other Member States.[104]

4.1.3 Analysis

The message from the European court in *Schindler* was quite straightforward and unequivocal. In clear terms, it was established that the cross-border supply of gambling services could be legitimately restricted by a Member State, with reference to the "peculiar nature" of games of chance and the various risks inherent in such activities.

[101] Ibid., paragraphs 43-45.
[102] Ibid., paragraph 58.
[103] Ibid., paragraphs 60-61.
[104] Ibid., paragraph 62.

Oddly, the Court did not engage in any proportionality assessment of the restrictive measure in question. One may argue that the test is self-understood within the Court's assertion that the lottery ban restricting trade in services is justified. However, earlier case-law dealing with the compatibility of non-discriminatory national rules liable to hinder trade in services looked at the public interest ground invoked, and accepted it only insofar as that interest was not already safeguarded by regulations in the state of establishment and provided that the same result could not be achieved by less restrictive means.[105] The double regulatory burden aspect is not even touched upon in the judgment, presumably due to the particular nature of games of chance. In *Schindler*, the British prohibition was subjected to a minimal control, much like it usually happens in cases where moral principles are invoked to justify restrictions, although the overriding reasons at issue here were not subsumed under the express derogations in Article 52 TFEU.[106]

Without any kind of argumentation balancing the Member State's interests against those of the internal market, the practical effect of *Schindler* was that foreclosed national markets were in principle acceptable from a European perspective. On a more general level, empowering national governments, authorities and courts with unlimited discretion runs contrary to the principle that exceptions to the fundamental freedoms must be interpreted restrictively. Furthermore, one may very well criticise the fact that the United Kingdom was not in any way required to show a link or adduce supporting evidence that its restrictive measures actually served the objectives it invoked; especially, it would have been of interest in this context to point out the specific socio-cultural particularities that were taken into account upon the creation of the national lottery in the United Kingdom in 1993. Having this in mind, not merely the suitability, but also the necessity of a prohibition could have been called into question.

4.2 Case C-243/01 Gambelli

Case-law following *Schindler* reaffirmed the principles established therein, but maintained the ambiguity of the apparently unlimited discretion afforded to Member States in forming and defending their policies. In the aftermath of *Schindler*, there was a clear need for a stricter approach, one that would seem more consistent with the Court's earlier judgments on services. In *Gambelli*, it can be said that the Court had the chance to deal with the

[105] Case C-279/80, *Criminal proceedings against Alfred John Webb*, [1981] ECR 3305, paragraph 17.
[106] Hatzopoulos, V. - *Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, [1994] ECR I-1039*, CMLRev 32:841-855, 1995, page 850.

Member State discretional competence carried to the extreme, and to set the outer limits thereto.[107]

4.2.1 Facts

The main proceedings concerned the collection of bets on sporting events in Italy, and the transmission thereof through the internet to the United Kingdom. The defendant in the national case, Gambelli, belonged to a network of Italian agencies collecting bets from Italian gamblers, and forwarding them to the British bookmaker Stanley International Betting. The latter was a company established in the United Kingdom, operating there under a lawfully granted licence. By means of commercial agreements between Stanley and the Italian intermediaries, so-called data transmission centres were established, whereby intentions to bet, details on the sporting event and amount envisaged were collected, registered and forwarded to Stanley. Upon receipt of confirmation of acceptance in real-time from Stanley, the Italian agent received payment from the bettor, and transferred the sum into the British bookmaker's account.[108]

The Italian legislation in force at that time required that operators accepting bets have a licence, whereas in fact the national market was monopolised by two state-controlled bodies holding a licence and authorised to take bets, on sporting events and horse races respectively. Moreover, both companies operating on the market without a licence and consumers participating in gaming activities organised by such actors were liable to criminal penalties.[109]

In order to justify the adopted restrictions, the Italian government evoked the objective of crime prevention, the protection of players and the re-allocation of profits; the aim of both the authorisation requirement and of the penalties imposed was namely to prohibit such activities and to reduce gaming opportunities in situations other than those provided for by the law. This position was largely supported by a majority of the intervening Member States.

In its order for reference, the national court inquired upon the compatibility of the Italian measures with the EU provisions on establishment and services, questioning the proportionality of the prohibition and of the penalties. The court even pointed out the contrast between the public order interests supposedly protected by these restrictions and the expansive betting and gaming policy pursued by the Italian state.[110]

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[107] Straetmans,G.- *Case C-6/01, Anomar v. Estado português, Judgment of the Court of 11 September 2003 (Third Chamber), nyr; Case C-243/01, Piergiorgio Gambelli e.a., Judgment of the Court of 6 November 2003(Full Court), nyr; and C-42/02, Diana Elisabeth Lindman, Judgment of the Court of 13 November 2003 (Fifth Chamber), nyr*, CMLRev 41: 1409-1428, 2004, page 1421.

[108] Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others*, [2003] ECR I-13031, paragraphs 10-14.

[109] Ibid., paragraphs 7-9.

[110] Ibid., paragraphs 20-24.

4.2.2 Judgment

The Court began by asserting that the legislative restrictions imposed by the Italian legislation upon Stanley's agents amounted to obstacles to the freedom of establishment. Applying its reasoning from *Schindler ex analogia*, the Court held that the measures at issue even restricted the exercise of the freedom to provide services enjoyed by the British bookmaker and the Italian residents wishing to receive the services of the former.[111]

The Court of Justice went on to assess the possible justifications for the aforementioned restrictions, after first reiterating a few well-established principles. Firstly, it emphasised that the diminution of tax revenue was neither a derogation ground accepted under Article 52 TFEU, not a matter of overriding general interest under the rule of reason. Secondly, it pointed out that national restrictions must reflect a concern to accomplish a genuine reduction of gambling opportunities, whereby the financing of social activities may only be a beneficial incidental coincidence, but not the main objective for the measures adopted. Lastly, Member State discretion in gambling policies was reaffirmed, but expressly made subject to the *Gebhard*-criteria: suitability, necessity and non-discrimination.[112]

Although ultimately a matter for the national court, elements to be taken into account were provided by the Court. Consumer protection against fraud, the prevention of criminal activities and the need to preserve public order can justify restrictions, but these have to be suitable in that they aim at limiting "betting activities in a consistent and systematic manner".[113] Insofar as Italian authorities pursued a policy of expanding betting at a national level, in order to gain revenues and protect the monopolistic state controlled licensees, the state could not invoke public order issues to justify its measures.[114] Further, it was left for the referring court to assess whether the Italian rules concerning the invitations to tender for betting licenses applied without distinction to national and foreign operators alike.[115] Lastly, the Court expressed its doubts as to the proportionality of the criminal penalties imposed on gamblers wishing to purchase betting services from a bookmaker lawfully established in another Member State, and on the latter's intermediaries. Notably, it was pointed out that market exclusion of capital companies quoted on the regulated markets of other Member States, where these are already subject to controls and penalties, may amount to a disproportionate measure aimed at preventing fraud, especially since there were other, less restrictive means of checking their accounts and activities.[116]

[111] Ibid., paragraphs 46 and 52-58.
[112] Ibid., paragraphs 61-64.
[113] Ibid., paragraph 67.
[114] Ibid., paragraph 69.
[115] Ibid., paragraphs 70-71.
[116] Ibid., paragraphs 72-74.

4.2.3 Analysis

The guidelines laid down in *Gambelli* undoubtedly left Member States with a considerably narrower margin of appreciation in regulating their gambling markets. On a general level, the judgment showed that the Court was firmly determined to assess the suitability of national measures in a sensitive policy area, thereby placing gambling activities within the constraints of the internal market, much like it had previously done within the social security field.[117]

If state monopolies in gambling and similar restrictive policies seemed legitimate in the light of *Schindler*, this subsequent ruling pointed out, in accordance with existing jurisprudence, that pure economic objectives can never justify a derogation from the Treaty rules. However, the particular situation in *Gambelli* hardly left room for any other outcome; by actively contributing to the increase in gaming opportunities through, *inter alia*, aggressive advertising campaigns, the Italian state clearly had economic, protectionist aims and could hardly claim to diminish the availability of gaming services. The policy pursued was flagrantly incoherent, and this can to a large extent explain the Court's "boldness".[118]

The importance and impact of *Gambelli* has to a certain extent been modified by subsequent case-law. Practically the same issue was addressed in the *Placanica* case, but here the Italian government chose a different strategy for defending its restrictive licensing legislation. The public policy aims in focus in that case were the eradication of crime and fraud from the Italian gambling market, whereby supporting evidence of criminality was presented in the main proceedings. The argument offered by the Italian state – that the challenged measures aimed at combating gambling-related criminality by channelling the existing demand for such activities into controlled venues – was accepted by the Court. Moreover, it was deemed consistent with the above-stated objective to allow the state-controlled licence-holders to expand, advertise, use new distribution techniques and introduce new gaming forms.[119] The licensing system as such could, according to the Court, be an efficient and suitable instrument to prevent the exploitation of gambling for criminal and fraudulent activities, but expressed doubt as to whether the limitation to a certain number of licensed operators was proportionate to that aim.[120]

Nonetheless, from the perspective of the freedom of establishment, the principles in *Gambelli* were subsequently reaffirmed. As regards the exclusion of companies quoted on the regulated markets of other Member States from the licence tender procedures, as well as the criminal sanctions applied to those operators who therefore could not acquire licenses, these

[117] Straetmans, 2004, page 1422.
[118] Ibid.
[119] Joined Cases C-338/04, C-359/04 and C-360/04, *Criminal Proceedings against Massimiliano Placanica and Others*, [2007] ECR I-1891, paragraph 55.
[120] Ibid., paragraphs 57-58.

measures were once again found to be disproportionate and incompatible with EU law.[121] The Court expressly suggested that there were other means to monitor the accounts, activities and ownership structures of such actors, that were less hindering to the fundamental freedoms than their blanket exclusion from the tender procedures.[122]

4.3 Case C-42/07 Bwin Liga

The much-awaited *Bwin Liga* judgment definitely confirmed and strengthened the subsidiarity approach displayed in previous judgments. It added a new dimension to the already complex body of case-law – that of a gambling operator marketing its services in a Member State exclusively through the internet, without any physical presence in that State.

4.3.1 Facts

In Portugal, the operation of lotto games and betting was reserved exclusively to the publicly controlled entity Santa Casa, a solidarity institution formed in the 15th century.[123] In 2003, legislative amendments extended Santa Casa's exclusive right of operation to include lotto games and betting offered by electronic medium, in particular the internet.[124] Consequently, the provision of gambling services via the internet by any other operators within the Portuguese territory was prohibited. Bwin, an online gaming undertaking registered and licensed in Gibraltar, offered lottery and betting games on its Portuguese-language website. Pursuant to a sponsorship agreement concluded between Bwin and the Liga, a non-profit organisation responsible for the commercial operation of professional sports competitions throughout Portugal, the latter promoted Bwin's betting opportunities.[125] Both the Liga and Bwin were fined for the administrative offences of advertising and respectively offering such games of chance on the Portuguese market, contrary to Santa Casa's monopoly.[126]

The national court essentially asked the Court whether the restrictive Portuguese legislation establishing the monopoly, and subsequently extending it to the provision of online gambling services was contrary to the fundamental freedoms of the Union.[127]

[121] Ibid., paragraphs 64 and 71.
[122] Ibid., paragraph 62.
[123] Case C-42/07, *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Bwin International Limited* v *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Judgment of the Court of Justice of 8 September 2009, nyr, paragraphs 3-4.
[124] Ibid., paragraph 9.
[125] Ibid., paragraph 25.
[126] Ibid., paragraph 26.
[127] Ibid., paragraph 28.

4.3.2 Judgment

The Court started by acknowledging that the Portuguese rules amounted to a restriction on the freedom to provide services enshrined in the Treaty.[128] In consistence with its earlier case-law, it accepted further that these restrictions could be justified by overriding reasons related to the public interest. Once again, in the light of the significant moral, religious and cultural differences between Member States, it was confirmed that different regulatory approaches and protection systems in the field of games of chance fell within the large margin of discretion enjoyed by the Member States. The Court recalled that the aim of fighting against crime, and more specifically consumer protection against fraud on the part of operators, invoked by Portugal, could indeed constitute such an overriding reason, which was, however, subject to the proportionality requirement.[129]

As regards the suitability of the Portuguese legislation for achieving that objective, the Court was of the view that the granting of exclusive rights to the publicly run Santa Casa was appropriate for confining the operation of gambling within controlled channels and thereby protecting consumers in accordance with the stated objective.[130]

Concerning the necessity of the regulatory arrangement in question, the Court found that Portugal was entitled to doubt whether its national consumers were sufficiently protected against the risks of crime and fraud through the statutory conditions and controls that the service provider (Bwin) was already subject to in its state of establishment (Gibraltar).[131] In that regard, the Court also pointed out that, in contrast to traditional markets, the provision of games of chance via the internet entailed different and more substantial risks of fraud from the part of the operators, due to the lack of direct contact between consumers and operators.[132] Moreover, the Court considered that the risk could not be ruled out, that gambling operators which sponsor sporting competitions on which they accept bets could influence the outcome of such events directly or indirectly, thereby increasing their own profits.[133]

Consequently, in the light of the "specific features associated with the provision of games of chance via the internet", the Court considered that the Portuguese prohibition against the provider of gambling services lawfully established in another Member State was not precluded by the freedom to provide services.[134]

[128] Ibid., paragraph 54.
[129] Ibid., paragraphs 56-60.
[130] Ibid., paragraph 67.
[131] Ibid., paragraph 69.
[132] Ibid., paragraph 70.
[133] Ibid., paragraph 71.
[134] Ibid., paragraphs 72-73.

4.3.3 Analysis

The *Bwin Liga* judgment is undoubtedly in line with the Court's earlier approach in gambling cases, as amended by its *Gambelli* and *Placanica* rulings. To a large extent, Portugal's choice and enforcement of a restrictive, monopolistic gambling policy is assessed with tools from previous cases. Measures taken within the Member State's discretion latitude are justifiable, so long as they are proportionate, and the generally formulated and vague elements of the test are not new in themselves: suitability, necessity, non-discrimination. Their application, however, calls for criticism on some points, which will be elaborated upon below.

The novelty of this ruling consists in the fact that the Court expressly addressed the so-called "channelling" argument in the context of online gambling. Moreover, it takes a clear stance against the principle of mutual recognition, in a manner not at all characteristic to its generally pro-European approach.

Firstly, it should be noted that the order for reference did not contain a clear description of the public interest objective pursued through the legislation. The Court rather assumed that the legitimate objective of combating crime was a bearing argument for the restrictions in place, based on the submissions by the Portuguese Government and Santa Casa, and did not address this lack of factual information, otherwise questioned by Bwin, Liga and three intervening governments.[135]

Secondly, upon assessing the appropriateness of the Portuguese gambling regime, the Court awkwardly points out historical and structural facts about the monopoly holder Santa Casa. This could indeed either suggest the particularity of the context, and thus open up for other possible outcomes in future cases, or it could have had the aim of emphasising the Member State's genuine commitment in pursuing the objective of combating crime and fraud against consumers. However, as doctrine notes, arguments for national monopolies resting on the long existence thereof (and implicitly the reliability and quality of the institutions concerned) is rather unconvincing.[136] Possibly, this is the major drawback of a wide consistency criterion, extensively discussed below.[137]

The necessity examination entails a surprising element. It is uncharacteristic of the Court to accept a restriction on a fundamental freedom motivated, *inter alia*, by a Member State's assertion that its consumer protection measures are somehow more efficient than those in force in another Member State. While the dismissal of the mutual recognition principle is not unexpected as such, the value judgment engaged in by the Court confirms, without further elaboration, the difficulties encountered by the Member

[135] Planzer, S. - *Liga Portuguesa – the ECJ and its Mysterious Ways of Reasoning*, European Law Reporter (2009)11:368-374, page 372.
[136] Ibid., page 371.
[137] See below, Chapter 5.2.2 Consistency v liberalisation.

State of establishment (!) in assessing the professional qualities and integrity of operators. This seems to suggest that countries which have opted for a more liberal (licensing) regime in the gaming sector, such as in this case Gibraltar, are bound to have to deal with such difficulties. Needless to say, such an approach hardly strives for a single market in gaming services.[138]

Moreover, the Court chooses to strengthen this standpoint by emphasising the substantial risks of crime and fraud in the context of online betting, based on the fact that a gaming service provider may have the possibility to influence the outcome of a competition on which it accepts bets. This "underlying presumption of delinquent acts" from the part of the operators is not supported by any kind of evidence or risk assessment, and reflects the rather negative view that the Court holds upon private operators in this sector.[139]

Although clearly a setback for cross-border gambling providers and those hoping for liberalisation, it remains to be seen, whether the scope of the ruling in *Bwin Liga* is limited to situations where solely the risk of fraud is invoked as a justification ground. The need to reduce gambling opportunities was neither invoked, nor addressed by the Court, but it was suggested by the defendants that the monopoly-holder conducted an expansive policy.[140] The "consistent and systematic" manner requirement may as well not be fulfilled in situations where a Member State purports to diminish gaming opportunities on account of health issues.

4.4 A few notes on the pending cases and AG Opinions

The three cases presented and analysed in this chapter highlight the gradually developed framework of assessment in relation to cross-border gambling. Other relevant judgments have mainly reaffirmed these principles upon the assessment of compatibility between different national regulatory schemes and EU law.

The criteria established in *Gambelli* gave rise to a large body of national rulings on a national level and, consequently, diverging outcomes throughout the Member States. In some instances, the question of compatibility of challenged national rules with EU law has been referred to the Court, which has lead to a significant number of references for a preliminary ruling currently pending. In the following sections, it will be argued that the guidelines thus far provided through the European case-law are insufficient in order to enable national courts to deal with the complex issues they are facing. In the meanwhile, it is of interest to focus somewhat

[138] Planzer, 2009, page 372.
[139] Ibid.
[140] Opinion of Advocate General Bot delivered on 14 October 2008 in Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericordia de Lisboa*, paragraphs 289-290.

on the available AG opinions, which seem to confirm the trend of high regulatory standards within the EU Member States.

In the pending *Betfair/Ladbrokes* cases[141], the Court was asked to rule upon the compatibility of the Dutch gambling regulations with EU law. Seen to the facts, the cases do not seem to entail new or groundbreaking elements that would validate an assessment any different than the one conducted in *Bwin Liga*. In the Netherlands, the provision of betting services is subject to an exclusive single-licence policy, the holder of which enjoys a *de facto* monopoly position on the relevant market. The disputes in the main proceedings concern, on the one side, the rejection of Betfair's application for a licence in the Netherlands, and on the other, the actions brought by the single licence holder against Ladbrokes, seeking to prohibit the latter from offering its online gambling services to Dutch residents. Most importantly, the national court seeks to ascertain whether the stated aims of the national legislation (to curb gambling addiction and to prevent fraud) could be deemed to be pursued consistently and systematically, given that the licence holder advertised and introduced new games in order to make its services attractive. In his Opinion on the joined cases, AG Bot provides a balanced approach: in the light of *Gambelli* and *Placanica*, the balance to be found when marketing and advertising for an attractive range of legally provided gambling services, in order to channel the consumer demand towards authorised games, and the risk of thereby inducing to excessive gaming is to be struck by the Member State itself.[142] Not a surprising reasoning pattern, given the practically unlimited margin of discretion that Member States consistently enjoy in this field. Moreover, the AG confirms that the principle of mutual recognition is not applicable in the context of gambling licenses; by reiterating the Court's arguments in *Bwin Liga*, he upholds the right of the Dutch authorities to prohibit operators established and licensed in other Member States from operating on the Dutch market by offering their services on the internet.[143]

The arguments against mutual recognition of licenses from one Member State to another have become stronger due to the fact that some governments award so-called "offshore" gambling licenses, which mainly preclude service providers established within their territory to offer their services there. Such examples are Gibraltar and Malta, where established operators choose this type of licenses for various tax reasons. This issue was extensively addressed by AG Mengozzi in two of his recently delivered Opinions. Basically, he provides a structured, almost pedagogical overview of the main reasons for the lack of mutual recognition in the field of games of chance. Firstly, the AG refers to the Court's jurisprudence, showing that

[141] Case C-203/08, *The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie*, and Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator.*

[142] Opinion of Advocate General Bot delivered on 17 December 2009 in Case C-203/08, *The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie*, and Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator*, paragraph 94.

[143] Ibid., paragraphs 120-124.

state monopolies and similar restrictive arrangements in the field of gambling services have been consistently declared legitimate by the Court insofar as they fulfil the proportionality requirements. This standpoint logically excludes the possibility to demand that Member States apply this homogenous principle, as case-law would thus become meaningless.[144] Secondly, lack of harmonisation, and the unwillingness thereto (reflected, *inter alia*, by the exclusion of games of chance from the provisions of the Services Directive[145]) practically render impossible the use of this instrument in the realisation of an internal market in gambling. Moreover, the AG points out that there is currently no functioning administrative cooperation mechanism between Member States in this sector.[146] Lastly, mutual trust between Member States is seriously undermined by the current practices employed by some Member States, of awarding the aforementioned "offshore" licenses.[147] Naturally, in such situations, a host Member State cannot be required to take into account the protection measures already in place in the state of establishment, since the latter state does not even allow to operator to market its services on the home market, and thus no consumer protection or crime prevention considerations are present.[148]

Surely, this line of reasoning depicts the current *status quo* in the internal market for gambling. Taken together, national and European tendencies seem to confirm the fact that mutual recognition of gambling licenses remains a chimera in the present state of EU law.

Another aspect worth mentioning is that the outer boundaries of the Member States' discretion are still in place in situations where regulatory schemes have discriminatory effects. In a pending case concerning the Swedish prohibition on promoting internet gaming possibilities offered by companies established in other Member States, AG Bot confirmed that the measure itself could be justified by the objective pursued, was proportional as such, and thus not precluded by the freedom to provide services provisions.[149] However, where legislation indistinctly prohibits both the promotion of gambling organised (without a licence) in Sweden and that of gambling organised in another Member State, the penalties imposed as such must in their turn be equivalent. Whereas the promotion of games arranged by non-authorised Swedish operators could only lead to administrative penalties,

[144] Opinion of Advocate General Mengozzi delivered on 4 March 2010 in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß v Wetteraukreis*, paragraphs 93-96.
[145] See above, Chapter 3.4 Secondary legislation.
[146] Opinion of Advocate General Mengozzi delivered on 4 March 2010 in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß v Wetteraukreis*, paragraphs 97-103.
[147] Ibid., paragraph 104.
[148] Opinion of Advocate General Mengozzi delivered on 4 March 2010 in Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein and Minister for the Interior for the Land Schleswig-Holstein*, paragraphs 43-45.
[149] Opinion of Advocate General Bot delivered on 23 February 2010 in Joined Cases C-447/08 and C-448/08, *Otto Sjöberg and Anders Gerdin v Åklagaren*, paragraph 73.

the promotion of gaming organised abroad incurred far more serious criminal liability. Such discriminatory treatment cannot, according to AG Bot, be justified by significant differences in the disruptive effects that the two categories of offences could have on the strictly regulated national market.[150]

The most recent AG Opinions seem to uphold the Court's casuistic approach in assessing every restriction on its own merits, *i.e.* in the light of the objectives invoked to justify it. Interestingly, as things stand now, the appraisal of national systems that various courts throughout Europe are completely entrusted with appears to need even further guidance.

[150] Ibid., paragraphs 86-89.

5 Justifications and proportionality

Clearly, there is certain consistency in the gambling case-law of the Court, in that it preserves the freedom afforded to Member States in designing their own gambling policies, defining their own (to a very large extent accepted) policy objectives and pursuing these aims through various, generally deemed suitable, means. Regardless of the regulatory constraints imposed upon service providers in other Member States, both the *Bwin Liga* case and subsequent AG Opinions, likely to be followed by the Court in that regard, have showed that in the current stage of EU law, mutual recognition in the field of gambling is hardly a feasible option. Market liberalisation is thus also excluded at this point, in any case in those Member States which are reluctant of "export licences". Moreover, lack of consensus among Member States precludes the matter from being a part of the harmonisation agenda.

Given the fact that the sector is unlikely to be harmonised in the near future, it is necessary to assess whether the proportionality test advocated by the Court can be made clearer, and thus constitute a more efficient tool to be applied by the national courts. Hereinafter, general remarks on the application of the proportionality test by the Court of Justice will be followed by an assessment of the coherency requirement, and arguments for its clarification, or deletion altogether. Lastly, the need for a pragmatic, evidence-based analysis by the Court will be outlined as a potential solution to the currently vague proportionality requirements.

5.1 The vague proportionality test

Throughout the decades of case-law before the Court, the proportionality principle has been used in testing whether a certain legislative or administrative measure is appropriate and necessary in order to achieve a given objective.[151] On a general, theoretical level, the application of the principle has the effect of rationalising judicial decision-making, in that it affords a ruling a certain degree of neutrality, objectivity and predictability.[152] From a constitutional viewpoint, proportionality lends legitimacy to a judge-made decision that overrules a democratically enacted piece of legislation.[153] It has been maintained, that the Court takes a modest approach as to the proportionality of EU legislation and acts, and will only remove such measures if found *manifestly inappropriate* to their aim. In contrast, the Court has on numerous occasions applied a much stricter test in the case of national legislation, often fuelled by the overall goal of European

[151] Harbo, T. – *The Function of the Proportionality Principle in EU Law,* European Law Journal (2010) 16(2):158-185, page 165.
[152] Ibid., page 160.
[153] Ibid., pages 163-164.

integration.[154] However, when dealing with Member State measures in the field of gaming, it is safe to say that the Court of Justice has consistently refrained from such judicial activism to the benefit of the internal market, and largely applied the subsidiarity approach. Clearly, other fields of EU law have demonstrated, that where the proportionality scrutiny of national measures is more intense, the shift in powers between Member State legislatures and the European judiciary is greater.[155]

Traditionally, a proportionality assessment contains three distinguishable elements. Firstly, a national measure must be *suitable* in relation to the interest that requires protection. Another way of expressing this criterion is that there must be some kind of causal relationship between the measure and its object. Through this control tool, the Court has the possibility to act against protectionist national measures disguised as pursuing legitimate interests.[156]

Secondly, the *necessity* requirement, or the "less restrictive alternative" test implies, that there are no other, equally effective, means to protect the stated interest, but which distort market integration to a lesser extent. Under this part of the test, national restrictions can come to be removed in cases where scientific research shows that there is, in fact, nothing to protect.[157]

Lastly, the third element is referred to as the proportionality *sensu stricto*, whereby a suitable and necessary measure can be found to restrict internal market trade disproportionately in relation to the intended objective; in this part of the test, the Court could arguably decide either way, after balancing the various conflicting interests at stake.[158]

In the gambling-related case-law, this threefold pattern has not been followed *ad literam*. Starting with the seminal *Gambelli* ruling, the *Gebhard* line of case-law was introduced in preliminary rulings concerning gambling. Accordingly, in order for non-discriminatory restrictions to the fundamental freedoms to be acceptable interferences with the internal market, these had to be justified by imperative requirements in the general interest, be suitable and necessary. The *sensu stricto* part of the proportionality test is instead often left to the Member State courts and authorities.[159] Essentially, the balancing of interests takes place at a national level, pursuant to the more or less detailed guidelines provided by the Court.

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[154] Ibid., page 172.
[155] Jans, J.H. – *Proportionality Revisited*, Legal Issues of Economic Integration 27(3): 239–265, 2000, page 242.
[156] Ibid., page 240.
[157] Ibid.
[158] Ibid., page 241.
[159] Here, a distincion must be made between the *strictu senso* balancing of interests conducted at a national level, and the necessity assessment performed by the Court itself in, *inter alia*, *Placanica*, where the non-discriminatory exclusion from licence tenders of companies quoted on the regulated markets was deemed to go beyond what was necessary in order to achieve the stated objectives of preventing criminal and fraudulent activities.

In that regard, the Court has pointed out that in preliminary ruling procedures, it lacks jurisdictional powers to interpret provisions of national law, or, for that matter, to rule on the compatibility of such provisions with EU law. However, the Court is not prevented from offering the national court all necessary guidance as to the interpretation of EU law, so as to enable that court to rule on the compatibility of the national rules with EU law.[160] Logically, the question arises, what the practical difference is, in cases where the Court provides detailed guidelines for the proportionality assessment, and conducts a full review of the national legislation. Normally, the Court ought to embark in such a detailed examination only when it considers that it has all the relevant facts at its disposal; thus, in cases requiring a thorough examination of the aims of a certain measure, and the efficiency of the measure, it is quite appropriate that the facts and consequences are considered by the better equipped national courts.[161] In that regard, it will be argued below that certain cases call for a full proportionality review by the Court of Justice, and that this is a feasible option, provided that relevant facts are empirically supported by the parties.[162]

Shifting focus back to the proportionality assessment in the narrow sense mentioned above (*sensu stricto*), it is quite clear that this final examination of a gambling-related measure should be left to the Member States, since these enjoy an exclusive power to determine what is necessary in order to ensure protection of a given interest.[163] Thus, it would be self-contradicting if the Court recognised the need and discretion of Member States in safeguarding legitimate interests, and then conducted a balancing of these interests against the functioning of the internal market. At an early stage in its case-law on gaming, the Court observed that "the power to determine the extent of the protection to be afforded by a Member State...forms part of the national authorities' power of assessment, recognised by the Court" in *Schindler*.[164] Moreover, it was acknowledged in the same proceedings, that "the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State" could affect neither the assessment of the need for, nor the proportionality of the measures enacted in that regard.[165] Consequently, potentially justifiable measures include, in principle, total or partial prohibitions, the granting of exclusive rights to one entity or a limited number of operators, and otherwise restrictive licensing schemes. This self-restraint by the Court in applying the narrow proportionality test can of course be understood in conjunction with the absence of EU harmonisation, and with the special nature of games of chance, stressed out by the "moral, religious and cultural aspects" of such activities, consistently invoked in practically every case from *Schindler* onwards.

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[160] Joined Cases C-338/04, C-359/04 and C-360/04, *Criminal Proceedings against Massimiliano Placanica and Others*, [2007] ECR I-1891, paragraph 36.
[161] Jans, 2000, pages 255-256.
[162] See below, Chapter 5.3 Evidence-based proportionality review.
[163] Jans, 2000, page 249.
[164] Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-6067, paragraph 35.
[165] Ibid., paragraph 36.

The measurement of appropriateness/suitability has been made in terms of a consistency criterion: the restrictive measures employed by the Member States must serve to attain the stated objective in a consistent and systematic manner. If the aims invoked entail consumer protection, and the prevention of fraud and incitement to squander on gaming (i.e. public order concerns), then the disputed measures must serve to limit betting activities, pursuant to the paramount *Gambelli*-test. This recurrent paradigm construed by the Court in gaming cases will be analysed in detail in a subsequent section.

In terms of necessity, the Court has in some cases actively applied the test itself. Oddly, in *Schindler*, it did not respond to the Commission's arguments that there were less restrictive means, which could have been employed by the United Kingdom in order to achieve the stated aims of public interest. The right to prohibit lotteries was subsumed under the wide degree of latitude afforded to the Member State.[166] However, in both *Gambelli* and *Placanica*, the Court took a clear stand against the unnecessarily restrictive Italian rules governing license tender procedures, pointing out that there were other means to check the accounts and activities of public companies established in other Member States. It was even suggested that the gathering of information on the representatives and stockholders of such undertakings would impinge less on the market freedoms.[167] The exclusion of EU undertakings from tender procedures in awarding gambling licences is thus clearly a disproportionate measure, likely to be removed after a necessity scrutiny. Likewise, certain requirements that a company establishes itself in a Member State in order to provide its services there pursuant to a granted licence is likely to be deemed directly discriminatory, and deter foreign operators from participating in the licence tendering procedures. The necessity of such a measure is questionable, since the activities of an undertaking established anywhere within the EU can be effectively monitored by the authorities of the host Member State, and penalties can be imposed notwithstanding the directors' place of residence; moreover, the payment of penalties can be secured by the (less restrictive) means of a guarantee provided in advance.[168] However, it is uncertain whether non-discriminatory legislation requiring that tender participants are companies limited by shares constitutes a necessary restriction on the freedom of establishment. Most likely, a proportionality analysis of indistinctly applicable measures will still remain within the duties of the national courts.[169]

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[166] Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039, paragraph 61.
[167] Joined Cases C-338/04, C-359/04 and C-360/04, *Criminal Proceedings against Massimiliano Placanica and Others*, [2007] ECR I-1891, paragraph 62, and Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others*, [2003] ECR I-13031, paragraph 74.
[168] See, to that regard, the reasoning of Advocate General Ján Mazák in his Opinion delivered on 23 February 2010 in Case C-64/08, *Staatsanwaltschaft Linz v Ernst Engelmann*, paragraphs 60-62.
[169] Ibid., paragraphs 63-68.

This certain tendency to curtail the discretion of Member States in enacting and enforcing discriminatory regulations is certainly in line with the Court's case-law on the freedom of establishment. However, the lenient application of the proportionality test remains the main rule as far as non-discriminatory measures are concerned. Furthermore, unnecessary rules restricting, or making less attractive the participation of foreign service suppliers in licence tenders can only be of importance insofar as a Member State has a particular, more or less open, licensing model in place. On the other hand, monopolies and single licence structures exclude both domestic and other EU based operators alike, and it is in such cases that the importance of clearer principles is enormous. Although the introduction of the consistency criterion bore huge potential in clarifying some matters, it is the ambit of the following section to emphasise the large number of issues that it still leaves unsolved and unaddressed.

5.2 "D'une manière cohérente et systématique"

With *Gambelli*, the Court appeared to demonstrate that it was ready to perform a more than marginal control, through the introduction of what doctrine has referred to as the "hypocrisy test".[170] The proportionality test became stricter, warning Member States that mere and unfounded reference to the overriding ground of consumer protection could not ensure the conformity of national measures with EU law.[171] The "consistent and systematic" approach clarified that Member State justifications about health concerns and the need to reduce gambling availability actually need to be lived up to. Again, the facts of the case appear to confine the application of this stricter test to situations where clear economic objectives transpire in the policy, such as the existence of a financially fuelled, ever expanding state monopoly.[172] Certainly, an outright prohibition on all or certain gaming forms would qualify for this consistency criterion, but the (hitherto partially) unanswered question arose, on the compatibility with EU law of exclusive national systems which allow and strictly regulate gambling, but which however tolerate a moderate (seemingly high) expansion of the monopoly/single licence holder. The guidelines in *Gambelli* were incomplete, and generated various strikingly diverging decisions in Italian courts – this, in its turn, lead to the background of *Placanica*.

With *Placanica*, the Court ceased to assess the justification grounds together, and it distinguished the health/gambling addiction argument from that of preventing and combating gambling-related crime. Once the objectives were treated separately, the Court of Justice asserted that insofar as the main aim of the restrictive measure was to eradicate crime from the gaming sector, a certain increase in gambling opportunities and delivery

[170] Straetmans, 2004, page 1424.
[171] Ibid.
[172] See above, Chapter 4.2.3 Analysis.

means was consistent with the need to channel the existing gambling demand towards controlled and reliable venues (*the channelling argument*).

However, even this judgment left several loophole: what happens in cases where Member States have both policy aims in mind? What is a reasonable, and thus consistent amount of advertising and marketing expenditures on the part of the monopolist, in the light of the channelling argument? Is there need for empirical evidence as to the clandestine part of the market, where crime frowns? How far does the channelling argument hold, and should there be a clearer way of telling whether lawfully expansive alternatives *de facto* attract consumers away from the "ill" alternative, or does this strategy merely increase supply, thereby inducing larger aggregated demand? And when Member States invoke the risk of fraudulent activities in order to justify a state-controlled structure, does this policy need to be accompanied by reasonable criminal measures and an efficient enforcement thereof in order to qualify for consistency?

These are indeed merely some of the issues faced by national courts throughout the EU. The Court's case-law seems to have generated a rigid set of unclear, non-exhaustive principles, the application of which can evidently lead to different outcomes in identical situations. One may maintain, that that is the whole point with a balancing test, as long as Member State authorities and courts are entrusted with discretionary powers. However, in the author's view, the rather large amount of gambling-related requests for a preliminary ruling currently awaiting more straight signals from the European judiciary witness as to the doubts raised by national courts, and to the need for better tools in tackling the new challenges. Arguably, a clarification of the consistency requirement depending upon the overriding reasons invoked, or an evidence-based assessment entirely conducted by the Court would help provide national courts with well-needed guidance.

5.2.1 Clarifying consistency

The consistency test forms an integral part of the suitability assessment, as accounted for above.[173] As such, it differentiates restrictive measures which are in principle suitable for attaining a certain objective, from measures which form part of a consistent policy pursuing that aim. Ever since the introduction of this requirement in *Gambelli*, the Court has addressed the element of consistency in its decision-making, which makes it imperative that it is additionally crystallised. If the test is to fulfil its purpose as a generally applicable, clarifying formula that would increase the uniform application of the proportionality test, the Court of Justice needs to take a more nuanced approach and address the doubts expressed by the referring courts as to the coherency of various national systems.

In one of its rulings concerning a restrictive gambling policy in Norway, the EFTA-Court developed its reasoning on suitability by stating that the

[173] See above, Chapter 5.1 The vague proportionality test.

national court "must consider whether the State takes, facilitates or tolerates other measures which run counter to the objectives pursued by the legislation at issue", and that "such inconsistencies may lead to the legislation at issue being unsuitable for achieving the intended objectives".[174] Transposed into concrete terms, this could mean that a state controlled monopolistic system resting on consumer protection aims may as well be precluded due to lack of consistency in certain cases; for instance, if the monopolist provides its services through independent distributors, the activities of which are not subject to any controls or sanctions whatsoever, the disregard by such actors as to the enforcement of age-limits, prohibitions against credit-gambling etc. are measures tolerated by the state, and thus imputable to it. This standpoint by the EFTA-Court is definitely a step in the right direction, but unfortunately the Court of Justice has yet been utterly cautious in extending, delimiting, or in some manner elucidating the closer meaning of its "consistent and systematic" lexical cliché.

Having the EU jurisprudence in mind, an important question arises, namely whether national policies as a whole need to be consistent in order to satisfy this requirement. In other words, can a state pursue an exclusive, monopolistic policy in one market sector, and open up other, potentially even more addictive, gambling forms to private operators? *Prima facie*, this should not be the case.

In order to address this issue properly, it is useful to divide the consistency requirement into two constituent elements. The functional dichotomy *internal/external* consistency refers to how widely one chooses to interpret the concept – as only related to the type of games of chance that are strictly controlled, or with regard to the entire gambling policy of a Member State.[175]

Firstly, *internal* coherency is related to the activities of the monopolist, or the single licence holder.[176] Insofar as an entity (wholly or partially publicly controlled) is entrusted with the exclusive right of providing certain gambling services within the territory of a Member State, it should act in consistency with the aims governing the regulation which afforded it this privileged market position. Consequently, if a monopoly is created and maintained in order to curb the propensity to gamble, the market actor ought to act in accordance with precise rules governing the range of games it is allowed to provide, under what circumstances it can offer and market these services, and through what type of channels. In this regard, it is clear that the stricter the regulation and enforcement of the monopolist's market behaviour, the more plausible the consistency with the stated aim.

[174] Case E-3/06, *Ladbrokes Ltd. v The Government of Norway*, [2007] EFTA Reports, page 85, paragraph 51.
[175] Talos, T. and Stadler, A. – *ECJ: requirement of 'consistent and systematic' gambling policy*, World Online Gambling Law Report, 8(4):12-13, 2009, page 12.
[176] Ibid.

From an *external* point of view, the consistency assessment entails a comparison with the national regime as a whole. Thus, a system purporting to address consumer protection, gambling addiction and fraud concerns, ought to do so uniformly, and regulate gaming forms with comparable addiction potential or equivalent risk for criminal activities in a similar manner. According to this pattern, a regulatory model which keeps certain gaming forms monopolised, while enforcing a more liberal regime on others, with equal or higher risk of addiction, would not meet the consistency requirement. Again, the more pro-active EFTA-Court seems to endorse this view:

> *44. However, when assessing the consistency of the contested legislation, it is, in the light of the overriding legislative motivation of fighting gambling addiction, essential to put the focus on games with comparable effects with respect to creating such addiction. Whether and to which extent a given game can lead to gambling addiction must be evaluated by taking into account the specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader socio-cultural environment.*[177]

Although there is no mention of this in the AG Opinion, this view was endorsed by the European Commission in its submissions to one of the pending cases.[178] It is most likely that the Court will not adopt this line of reasoning in its future judgments. Although two German courts have pointed out the lack of coherency in the German state's approach of keeping lotteries and casino games reserved to a state monopoly, while the presumably more addictive horse-race betting and gaming machines may be provided by private operators, the AG seems to maintain the Court's so far casuistic approach to each measure restrictive of the fundamental freedoms. In his Opinion on the case, he does however emphasise that although the monopoly on some gaming forms, and the more permissive tone towards other sectors, do not render the former *a priori* incoherent in relation to its aim, Member State authorities are to guarantee that private operators are subject to adequate controls. Moreover, the monopolist's gambling supply is in any event to be less extensive than that of a private entity.[179] Thus, the AG rejects the idea of a comparative analysis of different market sectors in assessing coherency, upholding the differential examination of each measure in relation to its objective. This is certainly in line with the Court's approach so far, and the most striking example is that in *Schindler*: the lottery prohibition was deemed justifiable in the light of the social policy concerns, without any reference being made in that regard to the British

[177] Case E-1/06, *EFTA Surveillance Authority v The Kingdom of Norway*, [2007] EFTA Reports, page 7, paragraph 44.
[178] Submissions by the Commission in Case C-46/08 *Carmen Media Group Ltd.*, document no. JURM (2008) 64/PD/hb, Brussels 19 May 2008, paragraphs 32-36.
[179] Opinion of Advocate General Mengozzi delivered on 4 March 2010 in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß v Wetteraukreis*, paragraph 89.

regime on sports betting, which indeed exhibits very liberal rules. In addition, it is consistent with the generic, ubiquitous principle that the socio-cultural particularities of a Member State may validate a heterogeneous risk appraisal in relation to different gambling forms.

Whether or not this course of events undermines the very concept of coherency is difficult to predict. The coherency prerequisite is not only characteristic of the gambling-related proportionality test. In its *Bwin Liga* judgment, the Court explicitly refers to the *Hartlauer* ruling, where the appropriateness of a national measure was evaluated in the light of the "consistent and systematic" formula.[180] There are certain common features between the provision of gambling and healthcare services, which makes the above-mentioned judgment of interest. Member States are in principle sovereign in organising their social security systems in accordance with the subsidiarity principle; lacking harmonisation, Member States are thus allowed a margin of appreciation in determining both the sought level of public health protection, and the means of ensuring it.[181] The healthcare sector is nevertheless subject to the Treaty freedoms, and measures regulating healthcare delivery which are liable to impede the exercise of the economic freedoms must comply with the *Gebhard*-criteria.

As a constituent part of the suitability scrutiny, the Court of Justice developed the consistency criterion in *Hartlauer*. The case concerned the refusal from the part of the Austrian authorities to grant permission to an undertaking wishing to set up and operate independent outpatient dental clinics.[182] The granting of such an authorisation was made pursuant to an assessment of the need for dental care within a certain area. The Court clarified that this legislation amounted to a restriction of the freedom of establishment, depriving the applicant from market access altogether. Upon examining whether the provisions could be justified, the Court found that the legislation did not pursue the stated objective (achieving a high level of protection of health) in a consistent and systematic manner, due to the fact that other types of establishments providing similar services (such as group practices) were not subject to the same authorisation requirement. Further, it was pointed out that the two categories of service providers may have comparable features and are thus liable to affect in an equivalent manner the attainment of the planning objectives pursued by the national authorities.[183]

If a general consistency principle were to be extracted from the *Hartlauer* ruling, it would entail that services with equivalent, or at least comparable

[180] Case C-42/07, *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Bwin International Limited* v *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Judgment of the Court of Justice of 8 September 2009, nyr, paragraph 61.
[181] Hancher, L. and Sauter, W. – *One step beyond? From Sodermare to DocMorris: the EU's freedom of establishment case law concerning healthcare*, CMLRev (2010) 47:117-146, page 121.
[182] Case C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung*, Judgment of the Court of Justice of 10 March 2009, nyr, paragraph 18.
[183] Ibid., paragraph 60.

effects be treated equally.[184] In other words, when comparable situations are treated differently, the lack of consistency limits the Member States' freedom in determining the level of protection.[185] However, one can hardly expect that the Court will extrapolate this line of reasoning to gambling cases. Firstly, in spite of the common features between the two regulatory fields, the public policy concerns relevant to gambling restrictions can be differentiated and examined separately in accordance with *Placanica*.[186] A practical example might illustrate this. While it is widely accepted that slot machines and casino games bear a considerably higher risk of causing problem gambling than lotteries and sports betting[187], there might be interest from the part of the legislator to strictly regulate, or even monopolise, the latter category on account of the high risk of fraudulent activities – even though gaming machines and casino activities are supplied by private operators. In such a case, addiction potential is not the only relevant and comparable feature determining the effect of such activities on the market, since the existence and legitimacy of the monopoly needs to be proportionate in relation to its bearing objective – that of combating and preventing crime. A *prima facie* contradiction in the legislation as a whole can thus be objectively and pertinently explained. Naturally, the policy aims pursued should not be mutually exclusive, and it is likely that Member States will choose to defend restricting schemes in different market sectors according to the overriding reason which is "most likely to succeed".

As long as there is no homogeneous European-wide research infirming general assertions on the addiction potential or inherent risk for crime as regards the various gaming types, Member States can in principle keep referring to the particularities of their national markets. This does, however, not exclude the possibility to require that empirical support is provided thereto.

5.2.2 Consistency v liberalisation

Although the need for a clearer, or at least more detailed consistency requirement has been advocated thus far, it is appropriate to present some arguments against a too strict concept thereof.

Requiring total coherence of the entire national system in order to comply with EU derogation possibilities certainly does not promote internal market integration in the medium and long terms. It can namely be held, that according to this formula, completely foreclosed markets can be justified, as long as defined objectives are attained consistently. This is obviously undesirable, and capable of obstructing future harmonisation plans.

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[184] Talos and Stadler, 2009, page 13.
[185] Koenig, C. - *Die staatliche Regulierung des Glücksspielmarktes mit Blick auf die gemeinschaftsrechtlichen Kohärenzanforderungen an Staatsmonopole*, ERA Forum (2009) 10: 513–524, page 520.
[186] Joined Cases C-338/04, C-359/04 and C-360/04, *Criminal Proceedings against Massimiliano Placanica and Others*, [2007] ECR I-1891, paragraph 49.
[187] Koenig, 2009, page 522.

In *Bwin Liga*, the historical presence, cultural significance and charitable implications of the monopolist Santa Casa were somehow assessed as a token of consistency. Whether or not this was the intention of the Court, the ruling certainly leaves room for Member States to "prove" the overall consistent and systematic pursuance of public policy aims by mere emphasis of the monopolist's long existence and socially admirable goals. This in its turn hollows out the most logical function of consistency – to counter-balance the wide Member State discretion. The autonomy in defining policy goals must be accompanied by a genuine commitment in attaining them, but this type of arguments do not really fit into this rationale.

From the point of view of the Member States, a gradual opening of the market would be rendered impossible, or at least unattractive, if consistency is understood as referring to the system as a whole. It is plausible to predict, that increased gambling acceptance on a social level (and, for that matter, occurrence, which is already a cross-border fact), more extensive research on the effects of increased supply, and efficient policy enforcement mechanisms will eventually lead Member States towards limited and controlled liberalisation steps. While such Member States may well be ready to cautiously introduce transparent and non-discriminatory licensing systems in some areas of the gaming sector, and legitimately keep other activities monopolised, they may feel pressure to simultaneously liberalise the entire market in accordance with a widely interpreted consistency criterion. Certainly, this is neither the aim nor the mandate of the European Court, and it would run contrary to the tolerant view it has displayed throughout its gambling case-law. Therefore, it is of paramount importance that Member States implement possible liberalisation attempts at their own pace, while adjusting their current systems in accordance with the societal views that underlie democratic decisions.

5.3 Evidence-based proportionality review

The shortcomings of an unclear proportionality requirement undoubtedly lead to legal uncertainty concerning the possible outcome on a national court level. Notwithstanding the need for a more nuanced approach by the Court, a practical alternative solution were that it actually performed a complete proportionality review of a non-discriminatory restrictive measure, in the light of its own general guidelines. In other words, the Court would conduct a *de facto* assessment of national legislation, and leave a considerably small degree of latitude to the national court.

Arguing for such a solution rests upon two contentions. Firstly, that the Court has sufficient legitimacy to perform a detailed analysis of a specific national measure. To that end, the presently pending requests for a preliminary ruling, and the Court's bold scrutiny of a (similarly culturally sensitive) alcohol monopoly would validate such a review. Secondly, there is need for relevant factual information in order to enable the Court to

actively intervene in that manner.[188] In that regard, there is certainly room for pertinent requirements that Member States seeking derogations from the Treaty freedoms have the burden of proof and duly discharge of it.

A clear reason for active intervention by the Court of Justice is where national courts seem unable to apply the proportionality criteria previously provided by the Court, and where this leads to different outcomes within the same jurisdiction. Indeed these are exceptional cases, but the Court may feel itself determined to settle the matter by applying the proportionality test itself.[189] The questions referred for a preliminary ruling by various courts throughout the EU point to the need for a concrete stand. Although framed in general terms, these questions inquire upon the proportionality of various national measures in the light of specific circumstances established by the national courts. *Inter alia*, the Court is requested to examine whether the Austrian monopoly on casino gaming is incoherent with regard to the massive advertising of other games of chance[190], whether the German monopoly on sports betting is consistent with a more liberal approach towards more addictive gaming types[191], or whether the Swedish prohibition on the marketing of foreign gambling services is proportionate to the aim of controlling and supervising gaming activities.[192]

The inherent conflict between preserving the Member States' (and their authorities' and courts') discretion and applying a clear-cut proportionality test is less obvious when legal certainty is at stake. Delicate as the balancing of interests may be, the Court is in fact well familiar with the task of identifying the policy aims of certain measures, and weighing these against the interests of the internal market, thereby substituting itself for the referring national court. To that regard, the Court has decisively "cut the knot itself" on several occasions, an illustrative example being the chaotic situation arising from divergent national assessments of the British Sunday-trading measures.[193] Apparently, this is compatible even with the Court's assertion that it may only provide the necessary elements needed by the national court in order for the latter to decide upon the compatibility of a certain measure with EU law.

Keeping in mind the socio-culturally sensitive issue of gambling, an appropriate parallel can be drawn to the suitability test performed by the Court in the *Rosengren* ruling, where the criticised restrictive measures were related to the Swedish retail monopoly on alcoholic beverages. The Court

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[188] Jans, 2000, page 255.
[189] Ibid., page 258.
[190] Opinion of Advocate General Ján Mazák delivered on 23 February 2010 in Case C-64/08, *Staatsanwaltschaft Linz v Ernst Engelmann*, paragraph 69.
[191] Opinion of Advocate General Mengozzi delivered on 4 March 2010 in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoß*, paragraph 26.
[192] Opinion of Advocate General Bot delivered on 23 February 2010 in Joined Cases C-447/08 and C-448/08, *Otto Sjöberg v Åklagaren and Anders Gerdin v Åklagaren*, paragraph 36.
[193] Jans, 2000, page 258.

considered that the Swedish prohibition on private imports amounted to a quantitative restriction on imports within the meaning of Article 34 TFEU.[194] The Court went on to examine whether this was a justified restriction on the free movement of goods, with regard to the ground of protecting the health and life of humans invoked by the Swedish government, and especially in the light of the need to limit alcohol consumption.[195] Interestingly, the Court contemplated the effectiveness of the (non-discriminatory) measure in attaining the public health aims, and concluded that the import ban was unsuitable in relation to its objective, since consumers could in any case import alcoholic beverages through the monopoly holder.[196] While the Swedish government further argued that the contested measure in any event contributed in channelling the demand towards the monopolist, and thus served to protect young persons against the harmful effects of alcohol consumption (due to age checks enforced in the monopolist's places of sale), the Court accepted the suitability thereof.[197] However, it pointed out that the necessity of the measure was in any case questionable, and referred to the lack of an "irreproachable level of effectiveness" in the monopolist's age control system; lastly, it emphasised that there were less restrictive means capable of replacing the prohibition.[198] The referring court was thus hardly left with any discretion in deciding the matter in the proceedings, but on the other hand, legal certainty increased.

Much like gambling, alcohol policies bear strong cultural, social and historical arguments, the general debate on which is often "politically sensitive";[199] moreover, the public interest objectives invoked are to a certain extent convergent in both types of cases. From that viewpoint, it is feasible to transpose the idea of a Court-lead proportionality review to a preliminary ruling on gambling regulations.

Inasmuch as the Swedish total prohibition on the marketing of gaming organised in another Member State is enacted and maintained with the view of limiting gambling possibilities, there is ground to look at the suitability, or indeed lack thereof, such a measure. If the effect of the prohibition is marginal to the attainment of the aim, since consumers are in any event targeted by massive advertising one way or another (for instance online, or lawful, but intrusive marketing by the monopolist), then the prohibition is evidently unsuitable in the light of the reasoning in *Rosengren*. Taking the analogy one step further, it is even possible to assess the exclusion of foreign gambling service providers from the national online market, and whether legal and technological measures against them are feasible to enforce or, in other words, efficient.

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[194] Case C-170/04, *Rosengren and Others v Riksåklagaren*, [2007] ECR I-4071, paragraph 36.
[195] Ibid., paragraph 40.
[196] Ibid., paargraph 47.
[197] Ibid., paragraphs 48-49.
[198] Ibid., paragraphs 54-56.
[199] Hettne, J. – *Transforming Monopolies: EU-Adjustment or Social Changes?*, in Gustavsson, S., Oxelheim, L. and Pehrson, L. (eds.) – *How Unified Is the European Union?*, 2009, page 110.

The second major issue, and this can be connected to each part of the proportionality test, is that of adequate factual information that would enable the Court to analyse the context of the national measure. In concrete terms, it would certainly be in the Member States' interest to lay forward research that shows a causal link between, referring to the previous example, gambling advertising in general and its effects on public health. Conversely, service providers wishing to remove trade barriers by proving that the measure is disproportionate have reasons to present empirical counter-arguments showing that the consumers within a certain territory are unavoidably exposed to heavy marketing. Within a proper suitability evaluation, adequate market research may even come to prove that controlled and moderate expansion of the services range offered within the monopoly simply does not help channel the existing demand towards these alternatives.

The general principle that a Member State seeking a derogation from a Treaty freedom has the burden of proof as regards the suitability and necessity of such a measure was implied by the Court in *Lindman*. There, the Finnish government attempted to justify a discriminatory tax rule (subjecting winnings of games of chance organised in other Member State to income tax, whereas winnings from games conducted in Finland were tax-free) by referring to the reasons of preventing wrongdoing and fraud, and the need to reduce social damage caused by gambling.[200] The Court referred to *Gebhard*, implying that such overriding reasons must in any event "be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure".[201] Further, it provided:

> *26. ...the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, a fortiori, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.*[202]

The Court seems to suggest here that the lack of causal relation rendered the measure unsuitable for reducing crime and social problems. The importance of the ruling is certainly undermined by the fact that it dealt with a discriminatory measure, and one should be careful before drawing too generally applicable conclusions. However, the following case that appeared before the Court chronologically was *Placanica*, where the Italian government presented substantial evidence as to the magnitude of the crime-related activities in the illegal part of the sector, which suggested a certain acceptance from the part of the Member States that there is an evidentiary

[200] C-42/02, *Proceedings brought by Diana Elisabeth Lindman*, [2003] ECR I-13519, paragraph 23.
[201] Ibid., paragraph 25.
[202] Ibid., paragraph 26.

burden that must be fulfilled, if a restrictive measure is to be defended credibly.[203]

The EFTA-Court has addressed the issue in a more straightforward manner, by implementing it as a general principle in its gambling case-law.[204] Moreover, the European Commission is also of the view that reasons invoked by Member States in order to set aside the fundamental freedoms must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure, and evidence substantiating the arguments, and refers in that regard to *Lindman* and *Placanica*.[205] Reasonably, the suitability of a monopoly on certain games with low-addiction potential, which is founded on crime prevention concerns, will depend on whether the Member State manages to ascertain that clandestine gambling is a serious problem within its territory. According to well-established case-law, Member States have the right to enforce restrictive legislation as precautionary measures against a potential risk for public health, and before it actually materialises.[206] However, as long as this principle is fully and unconditionally applicable to gambling cases, the overriding reasons routinely invoked by Member States, and the proportionality test of the measures appear to remain semantic formulas on a theoretical level of debate, void of substance and without any empirical support whatsoever. Moreover, unproven public health and public order concerns carry the risk of disguising protectionist, economic purposes. Currently, there appears to be a manifested presumption that restrictive legislation pursues valid aims – to that regard, see the judgment in *Bwin Liga*, where the Court seemed to assume that crime prevention was the bearing motive for the Portuguese legislation. But statements in the *travaux préparatoires*, national inquiries preceding the enactment of a measure, market and social research, or nation-wide reports of a cost-benefit type may reveal that the overall goal is, let say, the financing of sports, charity etc. Since such priorities cannot, *per se*, justify trade barriers, there is persuasive interest to consider such information.

As to necessity, it would be for the Member State to prove that an outright monopoly serves its purpose (of diverting demand into controlled channels) better than a strictly regulated licence system, combined with well-defined requirements for the award of concessions, enhanced supervision and control, which would undoubtedly restrict trade to a lesser extent. The fact that the Court does not read across jurisdictions and grants a wide scope of discretion to Member States would nevertheless be preserved to the extent that such an analysis would be confined to the particularities of the territory of the state in question.

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[203] Littler, 2008, page 219.
[204] Case E-1/06, *EFTA Surveillance Authority v The Kingdom of Norway*, paragraph 31 and Case E-3/06, *Ladbrokes Ltd. v The Government of Norway*, paragraph 42.
[205] Opinion of Advocate General Bot delivered on 17 December 2009 in Case C-203/08, *The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie*, and Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator*, paragraphs 83-84.
[206] Jans, 2000, page 259.

One must at all times bear in mind that the freedoms enshrined in the Treaty represent the main rule and lie at the "economic heart of the EU"[207], and that exceptions thereto must adequately serve acceptable objectives. The enunciated mission of the rules on free movement is the creation of an internal market, and, although the Court's approach towards the Member States has been lenient and cautious so far, a more pragmatic, evidence-based proportionality review does not have to be akin to negative harmonisation. Rather, it would determine national governments to revise measures related to the gambling market, and rethink their efficiency, genuine purpose and reconsider the costs in real terms of a fragmented market where cross-border service provision is an unavoidable occurrence.

As doctrine suggests the introduction of a more rigorous, economic analysis of a cost/benefit type in relation to measures restrictive of the cross-border provision of healthcare services, the premise forwarded to that end - that it is in the market entrants' interest to provide supporting data, and that this will certainly increase the burden of proof at the other end (the state) – is equally valid for gambling cases.[208]

[207] Craig, P. And De Búrca, G – *EU Law Text, Cases and Materials*, 4th edition, 2008, page 550.
[208] Hancher and Sauter, 2010, page 144.

6 Concluding remarks

The battle between Member States, the European Commission, remote service providers established within the EU and various other stakeholders does not seem close to its *denouement*. Even in the lack of harmonisation initiatives, there is clearly need for more straightforward guidelines from the EU institutions - in this case, the Court of Justice. As long as the "internal" market for gambling services is fragmented throughout the various national and regional jurisdictions, and these restrictions are justified with reference to pronounced socio-cultural differences, a conceptualisation of the proportionality principle is imperative.

Although the Court is not likely to follow and adopt an extended consistency principle as it seems to have done in its case-law on healthcare, it is both feasible and desirable that policy aims and the choice of certain measures are substantiated and submitted to a more objective scrutiny. Whether this may *de facto* liberalise certain market sectors which are currently foreclosed through inappropriate and unnecessary measures, or on the contrary perhaps validate the very existence of such measures, it will certainly give Member States well-needed guidance in adjusting their policies, and, most importantly, provide national courts with clarity as to the explicit requirements of EU law.

The Court has made it abundantly clear that when Member States treat gambling activities as revenue-yielding commercial operations, restrictions on cross-border trade cannot be upheld on grounds of public health or policy. Uncontrolled and competitive expansion by a monopoly holder runs contrary to the aims of reducing gambling opportunities, whereas strictly supervised and planned increase in advertising, supply etc. is generally acceptable in accordance with the channelling argument. However, the line between these two courses of market conduct is currently blurry, and the point at which the balance is tipped and the presumption reversed needs to be specified. Admittedly, in cases where the legislator has not been able to attain a sufficient degree of unanimity and harmonise, the Court has intervened and shed light, even in complex national regulatory contexts of a sensitive nature. As stated above, it may be in the potential market entrants' interest to cite facts and materials which may deconstruct the empty rhetoric of Member State governments and authorities.

It is also thinkable that, although Member States cannot agree to common legal standards in the current state of EU law, they may nevertheless start to cooperate on non-contentious aspects such as age verification mechanisms for online gamblers, further research on the addictiveness of certain games, or the prosecution of fraudulent online operations.[209] Whether this in its turn

[209] Hörnle, 2010, page 33.

could lead to an approximation of laws in the long terms remains to be seen.[210]

Also, the follow-up on the infringement proceedings initiated by the European Commission against several Member States is interesting to have in mind. Most recently, the Commission announced in a press release that Italy had amended its legislation concerning online gambling, which according to the Commission represented disproportionate restrictions on the freedom to provide services.[211] Arguably, open and constructive dialogue between the Commission and the Member State whose legislation it investigates will lead to more governments seriously considering the coherency of their national regulations. Furthermore, should the Commission bring the matter before the Court of Justice following a reasoned opinion not complied with (pursuant to Article 258 TFEU), the Court will likely bring some clarity in the application of its own guidelines. Notwithstanding this possible course of events, it is needless to say that the rulings to come shortly are much-awaited.

[210] Ibid.
[211] European Commission Press Release IP/10/504 – *Online gambling: barriers removed in Italy*, Brussels, 5 May 2010.

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