Chapter 12
Epilogue

In the literature on European gambling law, many contributions take a strong normative stance on the question whether the national gambling markets should be harmonised. Arguably, that question is of a *political* nature. It is primarily for the EU legislator, that is, the Council and the Parliament, to decide which steps are required by the goals of an *Internal Market*.[1]

This book did not look into the issue of harmonisation of national gambling markets. Instead, it gave a *legal* analysis of the gambling jurisprudence of the Court of Justice.[2] A central research question related to the use of the *margin of appreciation* and how this was combined with a *proportionality review* of national measures. The contours of these legal concepts have been developed by the European High Courts through a rich body of jurisprudence. In its early case law on gambling, the Court of Justice granted an *unlimited margin of appreciation* to Member States in relation to restrictions of gambling services. It did not review the proportionality of national measures. This very unusual approach was based on the conception that gambling was of *peculiar nature*.[3] The Court largely followed the opinion of Advocate General Gulmann who had argued:

> What is more important, however, in my view, is that the Court in the present case is considering a market of a very special nature where the rules of all the Member States show that the general mechanisms of the market cannot and should not apply.[4]

Political considerations relating to the principle of subsidiarity and a *moral perspective* on games of chance clearly influenced the early case law. *Financial interests* (the financing of social activities) – normally the only justification ground

[1] Arts 4(2)(a), 26, 114 TFEU as well as Art. 3(3) TEU.

[2] For comprehensive summaries of the findings, the reader is referred to the results sections of this book.

[3] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

[4] Opinion of Advocate General Gulmann in ibid., para. 120; cf. also ibid. (judgment), para. 60–61.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_12,

that cannot be recognised as a mandatory requirement of public interest – were found to be relevant.

> So far as I can see, not one of the Member States considers it appropriate to have free competition in this area with the consequences that are detailed above. There would be competition that could hardly fail to have far-reaching consequences for a number of lotteries of long-standing which are a major source of finance for important benevolent and public-interest organizations.[5]

Private and public operators as well as charities can experience conflicts of interest by running games of chance and profiting from the gambling proceeds. However, contrary to some Advocates General and the EFTA Court, the Court of Justice only recently addressed the conflict of interest that public authorities and charities experience. In this author's view, sound gambling regulation must defuse the conflicts of interests, putting in place a regulator that independently can address the risks that games of chance involve. This must be done *irrespective* of the chosen regulatory model (monopolies, strict or liberal licensing system).

Since the financing of social activities was not accepted as a sufficient justification ground by the Court of Justice, restrictions were justified by concerns relating to *crime*, *public morality* and *gambling addiction*. In the Court's view, the peculiar nature of games of chance was reflected in these concerns; a wide margin of appreciation was therefore justified.[6]

This book questioned the notion that gambling was of a peculiar nature. With regard to *crime*, the case law of the EFTA Court and the post-*Gambelli* case law of the Court of Justice show that the Internal Market Courts did not grant a wide margin of appreciation in relation to these concerns – with the exception of Internet gambling. The two other aspects, public morality and gambling addiction, remained to be assessed by this author. It was argued that only *core cases of morality*, that is, where the moral concerns regard the *activity as such*, could justify a wide margin of appreciation. The rich case law of the ECtHR on the doctrine of the margin of appreciation supports this view. Only where cases touch upon moral concerns *exclusively*, is wide discretion granted. While historical sources show that Christian religious leaders condemned the game and the players as immoral, it is hard to argue in twenty-first century Europe that the activity of playing games of chance is immoral.

Legitimate concerns can be noted in relation to the *potential negative side effects* of gambling. These risks need to be addressed by appropriate regulation. They regard

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[5] Opinion of Advocate General Gulmann in ibid., paras 120–121. Later on, the CJEU specified that the financing of these purposes could only constitute an incidental beneficial consequence: C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

[6] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60–61; the public interest objectives were summarised by the two terms 'consumer protection' and 'public order': C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 45. For the legislative branch, cf. *ex multis* Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market ('Services Directive'), Preamble, recital 25 as well as Art. 2(2)(h).

in particular the *addiction* to games of chance. The leading medical manual DSM-5 recognises 'gambling disorder' as a mental disorder that is now grouped in the category 'substance-related and addictive disorders'. A comparison of the diagnostic criteria makes it evident that gambling addiction is very similar to other expressions of addiction; a view that is supported by solid empirical evidence. Therefore, the answer to one of the central research questions is that gambling addiction is not of a peculiar nature. The concerns regarding the addiction to games of chance are best addressed from a *holistic* perspective on addiction.

Another central research question inquired whether the general criteria of the doctrine of the margin of appreciation suggest a wide margin of appreciation for gambling cases. The detailed criteria established by the ECtHR in relation to this doctrine show that a wide margin of appreciation can be granted in relation to health and crime concerns if justified by the factors *urgency and severity*. Gambling addiction is not a new phenomenon that recently emerged. Also, the Court itself found that it was not shown "that gambling addiction had reached a dimension which could justify relying on public health grounds."[7] The general criteria steering the use of the doctrine of the margin of appreciation do not suggest a margin of appreciation as wide as granted in the gambling jurisprudence.

With its judgment in *Gambelli*, the Court of Justice started to combine the margin of appreciation with a *review of the suitability and necessity* of national measures. Different standards were applied to different aspects. The Court reviewed closely tender procedures and penalties imposed on potential licencees. Other aspects were reviewed very leniently, namely situations involving *Internet gambling*. The lenient review was based on assumptions that the Court of Justice expressed in its judgments regarding certain aspects of games of chance.

One research question inquired to which extent these assumptions find empirical support in the state of research on gambling addiction. The answer is mixed and must differentiate between different statements of the Court of Justice. Indeed, there is empirical evidence supporting the view that a *controlled expansion* of gambling services does not necessarily lead to increased prevalence of gambling disorder. Scholarship explains this with mechanisms of social adaptation. Studies further show that a critical stance is justified towards *expensionist advertising policies* that do not restrict content and messaging. Advertising can negatively impact pathological gamblers and adolescents. Yet, there are no indications in the research that would suggest that these findings apply to the situation of exclusive right holders only.

Other aspects found less empirical support. There is no evidence available that would support the perception that *competition* among licensed operators necessarily leads to higher prevalence of gambling disorder. With regard to the *Internet*, series of epidemiological studies do not support the view that Internet gambling has led to a sharp increase of gambling disorder. Studies on actual online gambling behaviour show that the large majority of gamblers play moderately. The Internet brings new and different risks but also new opportunities for addressing them.

[7] C-153/08 Commission v Spain [2009] ECR I-9735, para. 40. As a consequence, the CJEU dealt with this case, as it usually did, as a matter for consumer protection.

Certainly, the general principles of the doctrine of the margin of appreciation justify that a court grants discretion to *experts and local authorities* in relation to certain aspects. They are in a better position to assess studies on gambling addiction or weigh complex factors when deciding about concrete steps ('medical discretion'). National judges and the European High Courts cannot be expected to review these aspects. But a close proportionality review can ensure that governments effectively address the interests of those whose protection serves as the central justification for restrictions to gambling services: the consumers.

The Court of Justice would not invade medical discretion by asking the national courts to closely inquire whether the national gambling policies are based on a sound scientific approach. The scrutiny of decisions of the executive power by the judicial power forms an important element in a state based on the rule of law. Judicial review can verify whether the responsible authorities pursue professional standards. The case law of the ECtHR correctly notes that judicial review is of particular importance where little scrutiny is exercised by the legislative branch. An effective judicial review does not only assess whether certain standards of due process are met (for instance, requirements in licensing procedures) but also whether the gambling policies fulfil minimum standards. Relevant questions in this context include: Have the authorities elaborated a comprehensive gambling policy with concrete steps of how to address the gambling-related risks? Are the measures based on empirical evidence? Have the authorities relied on the most recent scientific information internationally available? Have the authorities inquired into international best practice? Are the measures against gambling addiction consistent with similar measures taken in relation to other expressions of addiction (holistic and coherent policy)? What preventive measures have the authorities put in place?

In the field of the precautionary principle, that is, in situations where there is *scientific uncertainty regarding the existence or extent of a risk*, the Court of Justice has imposed those requirements. There is no lack of empirical evidence regarding the existence and extent of gambling addiction globally. *E maiore minus*, there is no reason why the Court of Justice and national courts should not review whether minimum requirements are properly addressed in gambling policies.

Until recently, the Court of Justice kept underlining the role of national courts in reviewing the proportionality of national measures. The reluctant guidance, however, was joined by a reluctance of many national courts to engage in a meaningful proportionality review. This *judicial vacuum* arguably did not serve the interests of consumer protection. In the absence of judicial scrutiny, severe shortcomings of gambling policies remained uncovered. In half of the EU/EEA Member States, no studies are available on the prevalence of gambling disorder. Such studies are the very basics of a responsible gambling policy as they allow the spread of the disorder and its development to be monitored. Understandably, researchers inquire issues for which funding is available. Providing the necessary funds is part of a responsible gambling policy.

The comparison with the gambling jurisprudence of the EFTA Court demonstrated that this court applied a stricter proportionality review. It reviewed the suitability and necessity of the measures in quite some detail and gave substantial guidance to

national courts. Its approach also seemed to be less influenced by moral perceptions of games of chance. Importantly, it underlined the relevance of reviewing the gambling policy as it is actually practised. While the differences in the gambling case law of the two Internal Market Courts used to be significant, recent judgments of the Court of Justice show an *alignment towards a practice of a stricter proportionality review*. It also started to give *more substantial guidance* to national courts.

Society as a whole has an interest in a high level of protection from gambling-related harm. The Internal Market Courts and the national courts have an important role to play in ensuring that national restrictions to gambling services truly serve consumer interests. Yet, their case law cannot substitute for responsible gambling regulation. This is the task of the legislator, be it at regional, national or European level. Irrespective of the question of harmonisation of gambling markets, there are meaningful ways of cooperating at European level to protect the health of gambling consumers. In the aftermath of the Green Paper, it seems that the European Commission is indeed determined to address gambling-related risks.[8]

[8] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee on the Regions: Towards a Comprehensive European Framework for Online Gambling, COM (2012) 596 final, SWD (2012) 345 final. In its Communication, the European Commission prioritised five action areas: compliance of national regulatory frameworks with EU law; enhancing administrative cooperation and efficient enforcement; protecting consumers and citizens, minors and vulnerable groups; preventing fraud and money laundering; safeguarding the integrity of sports and preventing match-fixing.