Chapter 3
The General Law on EU Fundamental Freedoms and the Conditions of Their Restrictions

The Internal Market Courts[1] have dealt with gambling issues as a matter of fundamental freedoms. Before the gambling case law can be analysed (Part II), this chapter must first present the general law on the fundamental freedoms. The fundamental freedoms are outlined (Sect. 3.1) and the conditions under which they can be restricted according to the case law. This involves a presentation of the Treaty derogations and further derogations recognised in the case law (Sect. 3.2). The principle of proportionality is briefly outlined (Sect. 3.3). Special attention is given to the doctrine of the margin of appreciation as it has played a crucial role in the gambling case law (Sect. 3.4). Finally, the results are summarised (Sect. 3.5).

3.1 Fundamental Freedoms

Since the signing of the Rome Treaties in 1957, the implementation of the Internal Market has been the main focus of EU legislation. Jean Monnet and other architects of the Internal Market saw it as the key instrument to achieve the main goals of European integration: peace and prosperity in Europe.[2] Ensuring the functioning of the *Internal Market* still is the key area of the Union's regulatory activities and is *ranked first among the Union's policies*.[3] The TFEU provides that the fundamental freedoms relating to goods, persons, services, establishment and capital shall be ensured in an area without internal frontiers.[4]

An overriding principle of the Treaties is that the factors of production should be able to move freely within the Internal Market. The TFEU mentions this principle

[1] In this book, the term 'Internal Market Courts' refers to the CJEU and the EFTA Court.

[2] The TFEU now mentions in Art. 3(1) the aim "to promote peace, [the Union's] values and the well-being of its peoples."

[3] Arts 3(3) TEU and 26(1) TFEU.

[4] Art. 26(3) TFEU.

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_3,

for goods,[5] persons (workers),[6] establishment,[7] services[8] and capital.[9] However, this principle has limits. Under certain conditions, Member States may restrict fundamental freedoms. According to the case law of the Court of Justice, two tracks are open to justify derogations from the fundamental freedoms: the first track was introduced by the Treaties; the second was recognised in the Court's case law.

3.2 Justification Grounds

3.2.1 Derogations in the Treaties

The provisions enshrining the fundamental freedoms share an identical structure: first, the principle is established (fundamental freedom), followed by the grounds that may serve to justify derogations from the principle. While the exact wording of these grounds varies from one fundamental freedom to another, the grounds that serve as justifications are essentially the same: *public policy, public security and public health*. The provisions relating to persons, establishment and services refer (solely) to these justification grounds.[10] In this context, it can already be noted that the gambling jurisprudence has almost exclusively touched upon services and

[5] Art. 34 TFEU: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

[6] Art. 45(1)–(2) TFEU:

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

[7] Art. 49 TFEU: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

[8] Art. 56(1) TFEU: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

[9] Art. 63 TFEU:

"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

[10] Arts 45, 52 and 62 TFEU. Art. 62 TFEU renders Arts 51–54 TFEU applicable to the freedom to provide services. As an additional exemption, those freedoms do not apply to functions that require a particular degree of loyalty to the state (cf. Arts 45(3), 51 and 62 TFEU; for an application in the case law, cf. C-149/79 Commission v Belgium [1982] ECR 1845).

establishment. By contrast, the chapter on the free movement of capital does not list public health as a justification ground but outlines additional grounds that are specific to capital.[11] Finally, the chapter on goods refers to health in the form of "the protection of health and life of humans, animals or plants."[12] It is also the only fundamental freedom to expressly list public morality as justification ground. Moreover, additional grounds are mentioned that necessarily relate to goods.[13]

3.2.2 Derogations in the Case Law

In addition to this express catalogue of justification grounds, the Court of Justice has approved of further grounds in its jurisprudence that may serve to justify derogations from the fundamental freedoms. In *Cassis de Dijon*, it introduced the so-called *'rule of reason'* or as the Court named it the concept of *'mandatory requirements'*[14] that can serve to justify restrictions too.[15] The judge-made concept can be seen as a move to counterbalance the very broad definition that the Court had given to "measures having an effect equivalent to quantitative restrictions" in *Dassonville*.[16] It was also the judicial recognition that the Treaty system contained *lacunae*, namely that there were *public interests whose protection was not assured* by the limited catalogue of Treaty derogations and that, under certain conditions, the protection of these public interests did not jeopardise the aim of an Internal Market.[17]

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[11] Art. 65(1) TFEU:

"1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."

[12] Art. 36 TFEU.

[13] Art. 36 TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[14] C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') [1979] ECR 649, para. 8.

[15] For a detailed discussion of the rule of reason, cf. *The Rule of Reason and its Relation to Proportionality and Subsidiarity*, The Hogendrop Papers, Schrauwen, A. (Ed.), Groningen: Europa Law Publishing, 2005.

[16] C-8/74 Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR 837, para. 5.

[17] Emiliou, N., *The Principle of Proportionality in European Law – A Comparative Study*, The Hague/London/Boston: Kluwer Law International, 1996, at 237.

The Court of Justice has given varying labels to the category of mandatory requirements. In its jurisprudence on gambling, the Court has generally relied on wording similar to the one established in *Gebhard*. That case involved, as most of the gambling cases, the freedom to provide services and the freedom of establishment:

> It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by *imperative requirements in the general interest*; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[18]

The Court of Justice may refer to varying notions such as 'mandatory requirements', 'imperative requirements in the general interest', 'imperative reasons relating to the public interest'[19] or 'overriding reasons relating to the public interest'[20] – ultimately, they all relate to *legitimate public interest objectives* that are not of an economic, fiscal or protectionist nature. Even though the concept was introduced in relation to the free movement of goods (*Cassis de Dijon*), the Court subsequently extended it to all fundamental freedoms and accepted a long list of public interest objectives as mandatory requirements. Such interests can justify a measure if the latter is indistinctly applicable and proportionate to the interest pursued, namely suitable and necessary.

In its jurisprudence on games of chance, the Court of Justice has not been rigid in distinguishing between the two tracks.[21] It has generally relied on the overriding reasons relating to the public interest rather than on the express Treaty derogations.[22] Similarly, it has not referred to the general prohibition to discriminate on grounds of

[18] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37. Italic emphasis added.

[19] C-76/90 Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221, para. 15.

[20] C-154/89 Commission v France [1991] ECR I-659, para. 15.

[21] This point was also noted by Advocate General Mengozzi in his opinion in C-153/08 Commission v Spain [2009] ECR I-9735, paras 80–81.

[22] Exceptionally, the CJEU mentioned the Treaty derogations in general terms, however, only to nevertheless assess the measures from the angle of mandatory requirements: cf. e.g. C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51; C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, para. 20. Only were the national measures were found to be discriminatory, the CJEU had to rely on the Treaty derogation: cf. e.g. C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 79; C-153/08 Commission v Spain [2009] ECR I-9735; cf. also the opinion of Advocate General Mengozzi in the latter case who assessed the gambling addiction concerns under the Treaty derogation of 'public health' (paras 84 and 94). In C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, the CJEU did not even discuss the Treaty derogations but simply noted that the justifying reasons needed to be "accompanied by an analysis of the appropriateness and proportionality of the restrictive measure" (para. 25).

nationality contained in Article 18(1) TFEU.[23] In any event, the requirement of an indistinct application of restrictive measures is integral part of the *Gebhard* formula.[24]

3.2.3 Differences Between the Two Tracks

According to the jurisprudence of the Court of Justice, a difference between the two tracks exists in that mandatory requirements *can only justify non-discriminatory ('indistinctly applicable') measures*.[25] By contrast, the Treaty exceptions can justify both discriminatory ('distinctly applicable') measures[26] and non-discriminatory ('indistinctly applicable') measures.[27] The distinction has been criticised as superfluous, most notably by Advocate General Jacobs,[28] and the *EFTA Court has*

[23] Art. 18(1) TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

[24] Discriminatory measures have rarely played a role in the case law on gambling. Cf., however, C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185.

[25] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

[26] Opinions of Advocates General Fennelly in C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 25, and Stix-Hackl in C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, para. 70, and, *ex multis*, judgment of the CJEU in C-288/89 Stichting Collectieve Antennevoorziening Gouda et alii v Commissariaat voor de Media [1991] ECR I-4007, para. 11. For a similar statement in a gambling case, cf. C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51.

[27] C-76/90 Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221, para. 12:

"Article [56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."

[28] Opinion of Advocate General Jacobs in C-136/00 Rolf Dieter Danner [2002] ECR I-8147, para. 40:

"As to which grounds of justification may be invoked, I think it is inappropriate to have different grounds depending upon whether the measure is discriminatory (directly or indirectly) or whether it involves a non-discriminatory restriction on the provision of services. Once it is accepted that justifications other than those set out in the Treaty may be invoked, there seems no reason to apply one category of justification to discriminatory measures and another category to non-discriminatory restrictions. Certainly the text of the Treaty provides no reason to do so: Article [56 TFEU] does not refer to discrimination but speaks generally of restrictions on freedom to provide services'. In any event, it is difficult to apply rigorously the distinction between (directly or indirectly) discriminatory and non-discriminatory measures. Moreover, there are general interest aims not expressly provided for in the Treaty (e.g. protection of the environment, consumer protection) which may in given circumstances be no less legitimate and no less powerful than those mentioned in the Treaty. The analysis should therefore be based on whether the ground invoked is a legitimate aim of general interest and if so whether the restriction can properly be justified under the principle of proportionality. In any event, the more discriminatory the measure, the more unlikely it is that the measure complies with the principle of proportionality. Such a solution would be consistent with

abstained from relying on this differentiation. The flexible interpretation of the principle of homogeneity by the EFTA Court (see Sect. 3.4.5 *i.f.*) has been referred to as 'creative homogeneity' by a judge of the Court of Justice.[29] The Court of Justice, however, has continued to practise the distinction. In practice, the difference does not appear to be significant. Under the Treaty derogations, a direct discrimination based on grounds of nationality is hard to justify for a Member State. Even in the case of indirect discrimination, such measures are reviewed very closely by the Court and can only be justified by objective circumstances.[30]

Another difference consists between the *strict interpretation of the Treaty derogations* and the *flexible recognition of mandatory requirements*. The Court of Justice generally practises a strict interpretation of the Treaty derogations: 'public policy' and 'public security' can only be relied on "if there is a genuine and sufficiently serious threat to a fundamental interest of society."[31] With regard to 'public morality', the Treaty lists this justification ground only in relation to goods. The Court has accommodated public morality concerns under the heading of 'public policy' in relation to the other fundamental freedoms but only to secure central values of a society. 'Public health' may be more frequently invoked. In general, the Court emphasises the role of the proportionality test, demands a thorough risk assessment and underlines the role of best international science.[32]

In sharp contrast to the strict practice in relation to the Treaty exceptions, the Court of Justice *has accepted a wide array of justification grounds as 'mandatory requirements'*. It virtually accepts any public interest objective as legitimate, from media pluralism to traffic security, except for interests of a purely economic, fiscal or protectionist nature.[33] By way of exception, 'economic' concerns may nevertheless qualify in relation to public health services where the economic

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the Court's implicit approach in most of the recent cases on freedom to provide services. I would add that the same solution may be appropriate for the free movement of goods. That solution would meet the need to give equal weight, when assessing restrictions on the free movement of goods, to interests no less vital that those set out in Article [36 TFEU], notably the protection of the environment."

[29] Timmermans, C. (2006). "Creative Homogeneity" in *A European For All Seasons: Liber Amicorum in Honour of Sven Norberg*, Johansson, M., Wahl, N., and Bernitz, U. (Eds.), Brussels: Bruylant, pp. 471–484.

[30] Confirmed by the CJEU in the gambling case C-64/08 Criminal Proceedings against Ernst Engelmann [2010] ECR I-8219, para. 51.

[31] C-54/99 Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister [2000] ECR I-1335, para. 17; cf. in relation to public policy already C-30/77 Régina v Pierre Bouchereau [1977] ECR 1999, para. 35.

[32] Chalmers, D., Davies, G., and Monti, G. (2010). *European Union Law: Text and Materials*, Cambridge University Press, at 902.

[33] Ibid., at 70–75. The Court speaks of 'settled case-law': C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633, para. 52. For a list of 'imperative requirements' recognised in the case law of the CJEU, cf. Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Report prepared for the European Commission, available at http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf. 2006, Chap. 2, at 971, *i.i.*: "Consumer protection, protection of creditors, protection from unfair competition, enforcement of

effects of unlimited patient migration *threaten the health care system as such*. In view of a balanced medical and hospital service, these concerns qualify as 'public health' derogation.[34]

3.3 Proportionality

It was shown that national measures restricting fundamental freedoms can be justified either based on express Treaty derogations or mandatory requirements. In a next step, the Court of Justice examines the proportionality of the measures, that is, whether the measures can be considered *proportionate in relation to the objective* pursued by the Member State. The express Treaty reference to the principle of proportionality was only introduced by the Maastricht Treaty and relates to EU actions exclusively.[35] The Court of Justice has nevertheless practised a proportionality review since the early days,[36] applying it very broadly as a *general principle of EU law*.[37]

In an attempt to generalise the Court's approach towards proportionality review, it is argued in the literature that the review consists of three elements: suitability, necessity and proportionality *stricto sensu*.[38] While it is true that allusions to a

tax laws, functioning of the law, protection of health, environmental protection, media pluralism, important threat to the financial stability of the social security system, traffic security."

[34] C-158/96 Raymond Kohll v Union des Caisses de Maladie [1998] ECR I-1931, paras 50–51. For this point, cf. also the EFTA Court judgment in *Rindal* in which the risk of seriously undermining the financial balance of the social security system was recognised as an 'overriding general-interest reason': E-11/07 and E-1/08 (Joined Cases) Olga Rindal and Therese Slinning, Represented by Legal Guardian Olav Slinning v Norway, Represented by the Board of Exemptions and Appeals for Treatment Abroad [2008] EFTA Court Report 320, para. 55.

[35] Art. 5(4) TEU.

[36] Emiliou notes that the principle made an early debut already in the jurisprudence relating to the European Coal and Steel Community: Cf. C-8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community [1956] ECR English special edition 245, and Emiliou, *The Principle of Proportionality in European Law – A Comparative Study*, at 134.

[37] *Ex multis*, C-562/08 Müller Fleisch GmbH v Land Baden-Württemberg [2010] ECR I-1391, para. 43; Emiliou, *The Principle of Proportionality in European Law – A Comparative Study*, at 134 *et seq.* Similarly, proportionality was expressly recognised as a principle of EEA law by the EFTA Court: E-4/04 Pedicel AS v Sosial- og helsedirektoratet [2005] EFTA Court Report 1, para. 56.

[38] Harbo, T.-I., *The Function of Proportionality Analysis in European Law,* Ph.D. Thesis submitted at the EUI, Florence: European University Institute, 2010; Lilli, M., *The Principle of Proportionality in EC Law and Its Application in Norwegian Law,* LL.M. Thesis submitted at the EUI, Florence: European University Institute, 1997; Pollak, C., *Verhältnismässigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs,* Schriftenreihe Europäisches Recht, Politik und Wirtschaft, Schwarze, J. (Ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1991.

tripartite test can be found in the Court's jurisprudence,[39] the Court nevertheless significantly adjusts its review practice from one area to another and emphasises those aspects, which it finds most appropriate to describe the case at hand.[40] Moreover, the Court of Justice interprets the principle of proportionality *autonomously* and does not feel bound to the tripartite doctrine that has traditionally been suggested by German scholarship.[41] Where the Court deals with *mandatory requirements*,[42] it regularly uses a wording that is – expressly or in substance – reminiscent of the aforementioned *Gebhard formula*. Accordingly, the Court reviews whether the national measures are *suitable* and *necessary* to attain the pursued objective.[43]

In a first step, the Court of Justice assesses whether the national measures are *suitable*, that is, whether they are capable of attaining the declared public interest objective. Therefore, there must be a (at least potentially successful) *causal relationship* between the means and the end. Unsurprisingly, national measures often pass this first subtest since a government will generally try to adopt measures that it considers capable of attaining the objective.

In a second step, the Court assesses whether the national measures are *necessary* to achieve the declared objective. In relation to this criterion, the Court generally inquires whether there are 'less restrictive measures' available, or alternatively, whether the government relied on the 'least restrictive measure'.[44] As briefly

[39] *Ex multis*, cf. the *Fedesa* case:

"The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"

(C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et alii [1990] ECR I-4023, para. 13).

[40] Hoffmann, L., "The Influence of the European Principle of Proportionality upon UK Law" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 107–115, at 107; Tridimas, T., "The Rule of Reason and its Relation to Proportionality and Subsidiarity" in *Rule of Reason – Rethinking Another Classic of European Legal Doctrine*, Schrauwen, A. (Ed.), The Hogendorp Papers, Groningen: European Law Publishing, 2005, at 112.

[41] Lord Hoffmann speaks of "the standard tripartite definition used by German writers" and concisely notes the focus on the tripartite structure: "[Academic writers] have seemed much more interested in dissecting the principle [of proportionality] itself and allocating cases to the various categories of suitability, necessity and Verhältnismässigkeit im engeren Sinn than in discussing what seems to me the all-important question of the extent of the margin of appreciation and the grounds upon which it is allowed"

(Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law", at 107 and 112).

[42] Mandatory requirements have been relevant *inter alia* in the gambling jurisprudence.

[43] C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

[44] For the former formula, cf. e.g. the *de Peijper* case: "can [be] as effectively protected by measures which do not restrict intra-Community trade so much" (C-104/75 Adriaan de Peijper,

illustrated with the following two judgments, the Court has established a *prudential practice of the necessity criterion*, carefully considering both market integration interests as well as national public interest objectives. The formula used in *Rau* is commonplace in the jurisprudence on fundamental freedoms and relevant in that this case, comparable to the gambling case law, regarded *mandatory requirements relating to consumer protection concerns, in the absence of harmonised rules:*

> If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods.[45]

The Court regularly understands the notion 'necessary' as *relating to the protection level chosen* by the respective Member State. Accordingly, "[t]he fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law."[46] The opinion of Advocate General Jacobs, adopted by the Court, in *Alpine Investments* well illustrates this approach:

> where no harmonization measures have been introduced, the rules of a Member State cannot be held contrary to the principle of proportionality merely because another Member State applies less strict rules. […] As already stated, the Directive on Investment Services does not harmonize national rules concerning the marketing of investments. […] It is clear therefore that, in the absence of harmonization rules, each Member State enjoys some discretion in determining the level of investor protection in its territory. Otherwise, it would follow that, in the absence of harmonization rules, Member States would need to align their legislation with that of the Member State which imposed the least onerous requirements. That might have the effect of undermining, rather than promoting, investor confidence.[47]

The Court's approach towards the notion of 'necessity' should not be confused with an all too lenient or even arbitrary proportionality review.[48] While it is for the Member State to define the protection level, it is for the Court of Justice and the national courts to review the necessity of the measures *in the light of the protection level chosen by the Member State.* This approach is prudential in that it respects differences in national protection levels, while still reviewing the necessity of the measures.

The Court of Justice appears to be very cautious about reviewing the proportionality *stricto sensu* in fundamental freedom cases,[49] or alternatively, implicitly includes

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Managing Director of Centrafarm BV [1976] ECR 613, para. 17). For a discussion whether one formula represents a stricter standard than the other, cf. Harbo, *The Function of Proportionality Analysis in European Law*, at 36–38.

[45] C-261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 3961, para. 12.

[46] C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141, para. 51.

[47] Opinion of Advocate General Jacobs in ibid., paras 88–90.

[48] Concurring: Harbo, *The Function of Proportionality Analysis in European Law*, at 41.

[49] Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at. 19; Jans, J. (2000). "Proportionality Revisited", *Legal Issues of Economic Integration, 27*(3), 239–265, at 248. According to the latter author, the CJEU proceeds only in exceptional circumstances to a review of the proportionality *stricto sensu* such as in the case relating to the British Sunday trading legislation: C-169/91 Council of the City of Stoke-on-Trent and Norwich City Council v B & Q Plc [1992] ECR I-6635.

this aspect within the necessity review.[50] References in the literature to fundamental freedom cases, where the Court of Justice supposedly reviewed this third subtest, are often unfounded.[51] In any event, the aforementioned *Gebhard* formula does not mention the third subtest. The essence of the third subtest is indeed different to the first two subtests. While suitability and necessity are *means-end tests*,[52] proportionality *stricto sensu* is a delicate *balancing test* involving competing values. It identifies the relevant interests at stake and tries to establish a *fair balance* between them.[53] In this context, the procedural dimension must not be neglected. In preliminary ruling cases, the Court of Justice does not dispose of all *facts* and often leaves the (at times) complex balancing exercise to the referring court.[54] The *importance of this subtest* of the proportionality review should not be underestimated. It serves as a guarantee that an independent court considers, first, the negative consequences for the individual/undertaking, and second, in case they are found excessive, strikes the measure down as disproportionate.[55]

3.4 Margin of Appreciation

A brief presentation of the general law on the fundamental freedoms could usually be limited to the aforementioned aspects of fundamental freedoms, justification grounds and proportionality. While related to the principle of proportionality, the

[50] Harbo, *The Function of Proportionality Analysis in European Law*, at 48.

[51] Cf. e.g. Pollak, *Verhältnismässigkeitsprinzip und Grundrechtsschutz in der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs*, at 139. This author mentions the *Groener* case as an example of a proportionality *strito sensu* review. Yet, the CJEU hardly reviewed the measure at all. It limited itself to referring to the general formula that "the requirements […] must not […] in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States." The formula (and the CJEU's review) only refers to the principle of proportionality in general, not to the specific proportionality *stricto sensu* test, which would only follow subsequent to an assessment of suitability and necessity (C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR 3967, para. 19).

[52] Harbo, *The Function of Proportionality Analysis in European Law*, at. 29.

[53] With similar wording, von Danwitz, T. (2003). "Der Grundsatz der Verhältnismässigkeit im Gemeinschaftsrecht", *Europäisches Wirtschafts- und Steuerrecht, 14*(9), 393–402.

[54] However, where the CJEU considers that it disposes of all necessary facts and a balancing between fundamental freedoms and fundamental rights must be performed, it may engage in a lengthy balancing exercise. Cf. e.g. C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659.

[55] With similar wording, Craig, P. (1993). *EU Administrative Law*, Oxford: Oxford University Press, 2006, at 657; de Burca, G., "The Principle of Proportionality and Its Application in EC Law", *Yearbook of European Law, 13*(1), 105–150, at 113. It can already be noted that the standard of scrutiny of national courts may considerably vary from one Member State to another due to different judicial cultures, resulting in different protection levels for market actors. See for this point Sect. 9.3.3.3 *i.f.*

doctrine of the margin of appreciation deserves a separate and detailed presentation for the purpose of this book. Part II will examine the *significant role* that this doctrine has played in the case law on gambling. As a consequence, this section describes the doctrine in detail, namely its *notion and origin* (Sect. 3.4.1), its relationship to the principles of *subsidiarity* (Sect. 3.4.2), *judicial review* and *proportionality* (Sect. 3.4.3) and the *reasons* for which it is practised (Sect. 3.4.4). Since the *ECtHR* has strongly shaped this doctrine, the following considerations regularly refer to that court. This angle further underlines that the use of the doctrine is not limited to the Internal Market Courts. However, there are *commonalities and differences* between the Internal Market Courts and the ECtHR, which must be considered when examining whether the former should apply a wider, similar or narrower margin of appreciation when confronted with similar justification grounds (Sect. 3.4.5).

3.4.1 Notion and Origin

The term 'margin of appreciation' is derived from the French *'marge d'appréciation'*. Besides this term, other notions can also be found to describe the same judicial tool; margin or range of discretion, discretion, latitude, space of manoeuvre, deference and variations thereof. According to this doctrine, an inter-/supranational court may leave a range of discretion to domestic authorities when reviewing whether the relevant national measures comply with the inter-/supranational[56] rules in question. In other words, the respective court *applies self-restraint in the review process*. The doctrine of the margin of appreciation therefore regards the process of judicial decision-making; it is a tool that serves to reach solutions in specific court cases.[57]

The doctrine finds its origins in national law. It is known to the practice of administrative law in all civil law jurisdictions,[58] and the most complex and sophisticated canon has been developed in Germany.[59] In a national setting, a (higher) court may regularly leave a certain amount of discretion to administrative authorities when reviewing the objective and proportionality of their decisions. This is particularly true for courts of last resort. Ultimately, these are ways to address the tensions between the *local and centralised* authority, or alternatively, *governmental/administrative and judicial* authority. The world of common law

[56] In the case of the EU (EEA) and the CJEU (EFTA Court), one would arguably have to speak of *(quasi-)supranational* rules and *(quasi-)supranational* court.

[57] Brems, E., *Human Rights: Universality and Diversity,* International Studies in Human Rights, vol. 66, The Hague: Martinus Nijhoff Publishers, 2001, at 422.

[58] Matscher, F., "Methods of Interpretation of the Convention" in *The European System for the Protection of Human Rights*, Macdonald, R.S.J., Matscher, F., and Petzold, H. (Eds.), Dordrecht: Martinus Nijhoff Publishers, 1993, pp. 63–79, at 76.

[59] Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen/Oxford/New York: Intersentia Uitgevers NV 2002, fns 4 and 5.

was traditionally neither familiar with the doctrine of the margin of appreciation nor with a classic proportionality test. The *Wednesbury* test is limited to assessing the *reasonableness* of the measure.[60] Similarly, courts in Scandinavia traditionally limited their review of administrative measures to a *reasonableness* test rather than a (full) proportionality test.[61]

On the *international level*, the first recourse to the margin of appreciation occurred under the Convention system,[62] and the ECtHR has shaped this doctrine like no other court.[63] Even though the origin lies in national law, the ECtHR's practice has developed *autonomously* from specific national doctrines. The doctrine became a *major export product* of the ECtHR and has been reflected around the world.[64]

While it is usually the government agents who claim a margin of appreciation, the doctrine can also be raised *ex proprio motu*.[65] In *preliminary ruling* proceedings, the Internal Market Courts grant the margin of discretion in the first place to the referring national court; that court then decides how much discretion it grants to the domestic authorities that are party to the case. This perspective is in line with the aforementioned fact that the Court of Justice regularly leaves the balancing exercise of the proportionality *stricto sensu* test to the referring court (see Sect. 3.3).

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[60] The concept was established in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948] 1KB 223, United Kingdom: Court of Appeal (England and Wales), 10 November 1947. The UK courts have nevertheless evidenced their willingness to apply a proportionality review in cases touching upon EU fundamental freedoms (Harbo, *The Function of Proportionality Analysis in European Law*, at 165 *et seq.* and cited cases).

[61] Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 4, who discusses in particular the case of Norway. The differences in judicial cultures can result in considerable differences regarding the overall standard of scrutiny when reviewing national measures that restrict EU/EEA fundamental freedoms. See for this point Sect. 9.3.3.3 *i.f.*

[62] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 3.

[63] Rupp-Swienty, A., *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, Munich: VVF, 1999.

[64] The Inter-American Court of Human Rights expressly recognised the doctrine while the United Nations Human Rights Committee implicitly referred to it (Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 4 fns 9–10). The WTO AB has not expressly referred to the doctrine. This still young court-like institution applies a more contractual rather than constitutional reading of WTO law and has found other ways of showing deference to national authorities. Cf. e.g. AB-1997–4, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 117; cf. also Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 4 fn 10.

[65] Sweeney, J.A. (2005). "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era", *International & Comparative Law Quarterly, 54*(2), 459–474.

3.4.2 Relationship Between Margin of Appreciation and Principle of Subsidiarity

The margin of appreciation is closely related to the larger principle of subsidiarity. The relationship is one of *lex specialis – lex generalis*.[66] The margin is an expression of the general principle of subsidiarity, with the latter showing a far more comprehensive character. The principle of subsidiarity addresses the *universality-diversity dichotomy in a more global manner*. This dichotomy can be observed in various legal frameworks of trade or human rights, including the Internal Market. While one principle is seen as universal, namely fundamental freedoms or human rights, the principle of subsidiarity aims at ensuring the *protection of local diversity*. It will be shown that the principle of subsidiarity is particularly important in relation to *'local values'* informed by morality, culture and religion.

According to the principle of subsidiarity, matters should be dealt with by the lowest possible authority, except if the higher or centralised authority can deal with matters more effectively.[67] This principle can apply to all three branches of state power (legislator, executive and judiciary). The relationship of the principle of subsidiarity to the margin of appreciation was aptly described in *Handyside*:

> The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights […]. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted […]. Consequently, Article 10 para. 2 (art. 10–2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force […].[68]

3.4.3 Relationship Between Margin of Appreciation, Judicial Scrutiny and Principle of Proportionality

The essence of the margin of appreciation can only be understood within the *broader process of judicial scrutiny* of national measures. It is only *within* the judicial scrutiny performed by the Internal Market Courts or the ECtHR that a margin of appreciation is granted. Accordingly, while discretion is being granted, the European High Courts review both the legitimacy of the *objective* pursued by the domestic authorities as well as the *proportionality* of the measures in question:

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[66] Christoffersen, J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights,* International Studies in Human Rights, vol. 99, Martinus Nijhoff Publishers, 2009, at 237–238.

[67] Cf. e.g. Art. 5 TEU.

[68] Handyside v the UK, Application no 5493/72 [1976], para. 48.

> Article 10 para. 2 (art. 10–2) does not give the Contracting States an unlimited power of appreciation. […] The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[69]

While the distinction between the concepts of proportionality review and margin of appreciation is often neglected and not clear in the literature,[70] it is essential for the understanding of the role of the margin of appreciation. The two aforementioned quotes of the ECtHR clearly make the distinction and render the chronological relationship clearer between proportionality and margin of appreciation. Under certain circumstances, a court may, a priori, grant discretion to the domestic authorities regarding the means of pursuing certain objectives (see Sects. 8.2, 8.3 and 8.4). Confronted for instance with a situation that regards – as in the aforementioned *Handyside* case – an issue of morality, a court will a priori take a cautious approach that is respectful of domestic diversity. However, there is no margin of appreciation without scrutiny as noted in the aforementioned quote as well. The a priori cautious approach of the court necessarily goes hand in hand with a subsequent *scrutiny* of the objective and proportionality of the measures.

While the judicial review also concerns the aim, the proportionality test regularly forms the crucial part of the review. In the majority of cases where the margin plays an important role before the European High Courts, it is not the legitimacy of the objective that is disputed but the proportionality of the national measures. The proportionality test is described as *corrective and restrictive* of the margin of appreciation.[71] This further underlines that *discretion never comes without scrutiny*. A wide margin of appreciation is likely to correlate with a lenient proportionality test.[72] Standard of review and margin of appreciation are *opposite sides of the same coin*.[73] It would hardly make sense to first grant an a priori wide margin only to subsequently apply a very strict proportionality review. However, the European High Courts may no longer feel bound to the a priori granted margin of appreciation if the Member State's position is hardly or not convincingly argued.[74]

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[69] Ibid., para. 49.

[70] Cf. e.g. Harbo who criticises a lack of distinction of the two concepts in the ECtHR jurisprudence. Yet, he does not clearly distinguish the two concepts in his discussion of the case law either: Harbo, *The Function of Proportionality Analysis in European Law*, at 133.

[71] Matscher, "Methods of Interpretation of the Convention", at 79.

[72] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 2.

[73] Mahoney, P. (1998). "Marvellous Richness of Diversity or Invidious Cultural Relativism?", *Human Rights Law Journal, 19*, 1–5.

[74] Villiger, M., "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts" in *Dispute Resolution*, Baudenbacher, C., and Planzer, S. (Eds.), Stuttgart: German Law Publishers, 2009, pp. 207–213, at 212.

3.4.4 Raison d'être

All three European High Courts practise the margin of appreciation in their jurisprudence. Judges at those three courts show a high degree of independence. The question thus remains *why* independent and powerful courts voluntarily apply self-restraint. The idea of a judge as mere 'bouge de la loi'[75] is not realistic. Furthermore, a shift from diplomatic conflict settlement towards judicial dispute resolution has significantly increased the powers of judges.[76] They have become important decision-makers in recent decades. Political negotiations often knowingly leave questions open, so that courts will have to provide the answers.[77] Moreover, the doctrine of the margin of appreciation is neither mentioned in the EU Treaties nor in the ECHR, and there is no legal obligation *stricto sensu* to resort to this judicial tool. The question remains *why* powerful judges would voluntarily restrict their own powers. The 'raison d'être' of the margin of appreciation is composed of two central aspects.

First, there appears to be a commonly recognised reason. The margin is presented as an expression of the broader principle of *subsidiarity*. It was already mentioned that their relationship can be described as *lex specialis – lex generalis*. In the case of the ECHR, the primary responsibility for the protection of the Convention rights lies with the domestic authorities.[78] This is slightly different regarding the Court of Justice and the EFTA Court in that the Internal Market Courts carry the primary responsibility for the homogeneous interpretation of EU/EEA law.

There is an additional reason. Any international court tries to achieve a high degree of acceptance of its jurisprudence, not least among the governments of the Signatory States because they also decide on the court's existence and powers. While courts certainly decide independently, they can nevertheless try to avoid potentially detrimental confrontations with governments. In *Handyside*, the ECtHR described it as follows:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these [moral] requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. […] Consequently, Article 10 para. 2 (art. 10–2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[79]

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[75] Montesquieu, *De L' Esprit Des Lois*, Geneva: Barrillot et Fils, 1748.

[76] Baudenbacher, C. (2004). "Judicialization: Can the European Model Be Exported to Other Parts of the World", *Texas International Law Journal, 39*(3), 381–400.

[77] Planzer, S., "*The Arrogant Judges In Luxembourg and What It Is Actually About*", euobserver, 20 September 2007.

[78] Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?".

[79] Handyside v the UK, Application no 5493/72 [1976], para. 48.

Applying deference in relation to delicate questions allows an international court to *avoid detrimental conflicts with national governments*. It should not be neglected that international courts may take decisions in cases that involve delicate policy choices. In addition, the European High Courts apply a dynamic interpretation of the law; in this constellation, acceptance by those who are affected by the case law is all the more crucial.[80] In the case of the ECHR, the early recognition of the doctrine of the margin of appreciation certainly played an important role in consolidating the Convention system.[81] Related to acceptance is also the aspect of *enforcement*. All European High Courts must ultimately rely on *national* authorities to enforce their decisions. The Internal Market Courts enjoy a relatively stronger position in that regard since the enforcement of decisions is facilitated by the powers of the European Commission and the EFTA Surveillance Authority.

3.4.5 Commonalities and Differences Between the Court of Justice of the EU and the European Court of Human Rights

Part II will inquire whether the use of the margin of appreciation in the gambling cases has followed the principles and criteria developed regarding this doctrine. While a comparative look at the ECtHR can without doubt give helpful guidance for the use of the margin of appreciation in Internal Market issues,[82] it is important to bear in mind the commonalities and differences between the courts. The differences can indicate – *in a situation of similar justification grounds* – whether the Internal Market Courts should apply *a wider, similar or narrower* margin of appreciation than the ECtHR.

With regard to the *commonalities*, the underlying tensions are similar in the frameworks of the ECHR and the Internal Market. The tensions regard the aforementioned *universality-diversity dichotomy* (see Sect. 3.4.2). While universality advocates a full and effective implementation of human rights or fundamental freedoms, diversity advocates certain discretion for domestic authorities in the implementation of human rights or fundamental freedoms. The fact that one court applies human rights, while the other two apply fundamental freedoms, only

[80] Baudenbacher, C. (2003). "The EFTA Court – An Example of the Judicialisation of International Economic Law", *European Law Review, 28*(6), 880–899, at 897.

[81] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 232. However, it would appear that the accession of countries from Central and Eastern Europe did not lead to a widening of the margin of appreciation: Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era". Cf. also Seymour, D. (1992). "The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks", *Connecticut Journal of International Law, 8*(2), 243–261.

[82] Sweeney, J.A. (2007). "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration, 34*(1), 27–52.

seemingly is a significant difference. Essential is the fact that both the Internal Market and the Convention follow the paradigm that, *in principle, certain rights or freedoms* are ensured. They can, *by exception*, *be limited* under certain conditions. Similar to the fundamental importance that the Convention rights take, the Union's fundamental freedoms are superior rights enjoyed by the subjects of the Internal Market. The Court of Justice went as far as to interpret them as superior even in relation to fundamental rights enshrined in national constitutional law.[83]

Certainly, there are also important *differences* between the ECtHR and the Internal Market courts that can affect the use of the margin of appreciation. These differences relate to the *level of integration* and the *role of the judiciary* and must be duly considered.

In 1950, the Convention was endorsed as a *minimum standard* and thus installed as the lowest common denominator.[84] It was a 'harmonisation' of the human rights approaches of the Signatory States around a minimum standard of protection that all parties could agree on.[85] The Convention itself contains an allusion to this perspective: it indirectly states that there was no unity between the signatory states' levels of protection and that human rights had to be further realised.[86] The Strasbourg jurisprudence seems to suggest that this lack of unity not only impacts the formal means of protection of Convention rights but also the very scope of those rights.[87] The Convention thus gives quite a generous leeway to national authorities in defining domestic standards.[88] This contrasts significantly with the *far bolder and more ambitious project* of the establishment of an Internal Market.[89] The Rome Treaties already gave the Union its *supranational structure* and a legal order *sui generis*. Moreover, the 'ever closer union'[90] has constantly deepened its level of

[83] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 3. Instead of reversing this approach, the CJEU subsequently recognised human rights as part of EU law. Nevertheless, the central role of the fundamental freedoms has been upheld.

[84] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at 3.

[85] Evrigenis, D. (1982). "Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights", *Human Rights Law Journal, 3*, 121–139, cited in Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at fn 68.

[86] ECHR, Preamble, 3rd para.: "[T]he aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms."

[87] McBride, J., "Proportionality and the European Convention on Human Rights" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publishing, 1999, pp. 23–35, at 28.

[88] Hall, S. (1991). "The European Convention on Human Rights and Public Policy Exceptions to the Free Movement of Workers under the EEC Treaty", *European Law Review, 16*(6), 466–488, at 475.

[89] Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, at fn 17.

[90] TFEU, Preamble, *i.i.*

integration and produced its own *secondary law*. The significantly deeper level of integration is also reflected in the *institutions*. In three of the four main decision-making institutions (Commission, Parliament and Court), the members are not simply representatives of the government, which in international relations is unique. Institutional pressure on new Member States is big. Not only is any new Member State obliged to integrate the full *acquis communautaire*; there is also an effective monitoring process by the Commission. The latter's possibilities, in cooperation with the Council, go far beyond mere declarations of discontent. The Commission has far-reaching rights, including the right to open infringement proceedings and to bring cases before the Court of Justice. The Council of Europe does not dispose of similarly powerful instruments.

With regard to the role of the *judiciary*, there are also significant differences. The ECtHR can only hear a case if all domestic remedies have been exhausted.[91] The Strasbourg Court often decides after three national independent courts have already looked at the relevant decision: court of first instance, court of appeal and national court of last instance. The ECtHR's role is only that of a *supervisory judiciary* and it is well advised to apply a degree of self-restraint, not least out of respect for the independence of the courts in the Signatory States. This setting impacts the ECtHR's own perception of its role in the Convention system: "The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate."[92] The overall intention is to encourage states to bring their domestic law in line with the Convention.[93] As Judge Power expressed it in one of her opinions:

> The principle of subsidiarity recognises that the Strasbourg Court is a supervisory body of last resort and that the primary responsibility for remedying violations of the Convention lies with the Contracting Parties.[94]

The Strasbourg Court is at times willing to offer such wide margin of appreciation that its practice could be perceived as arbitrary by some authors. Yet, it counterbalances the margin of appreciation with an effective proportionality test.[95] The Strasbourg Court also considers that among its 47 members,[96] there are countries from Eastern Europe which may have deficits regarding democracy and the rule of law that are not found to the same extent in Western Europe. Realistically, this may lead judges to consider that the 'minimum level' of human rights cannot be imposed at too ambitious a level.

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[91] Art. 35(1) ECHR.

[92] Kokkinakis v Greece, Application no 14307/88 [1993], para. 47.

[93] Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era".

[94] Judge Power in her dissenting opinion in Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2; Merits and Just Satisfaction), Application no 32772/02 [2009], para. 47. The dissent in her opinion did not regard the principle of subsidiarity.

[95] McBride, "Proportionality and the European Convention on Human Rights", at 35.

[96] "Council of Europe", available at http://www.coe.int.

By contrast, the *Court of Justice* has jurisprudence over (only) 28 Member States, mostly from Western and Central Europe. That court has *very broad and far-reaching powers*. In the preliminary ruling procedure, under which the EU gambling cases have been mostly decided, the Court of Justice rules on the interpretation of EU law *prior* to the national court (often, of first instance). The national court decides on the merits of the case only after the interpretation by the Court of Justice, and the latter's ruling is generally decisive for the merits of the case. That procedure "requires the Court to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible."[97]

In sum, these considerations show that there are good reasons for both the Court of Justice and the ECtHR to practise the doctrine of the margin of appreciation. While the aforementioned tensions relating to the universality-diversity dichotomy are similar, the *differences* between the two judicial settings must be considered too. The EU has a bolder mission and a more advanced integration level.[98] Its institutions and law are supranational and *sui generis*, with the constitutional triad merely being the tip of the iceberg. While the tensions justifying the use of the doctrine are thus similar, one can on valid grounds argue a general tendency of a *narrower margin of appreciation before the Court of Justice* when dealing with similar justification grounds as the Strasbourg Court. This general finding will need to be considered in Part II when examining the use of the margin of appreciation in the gambling cases.

The EEA Agreement extends the Internal Market to the EEA EFTA countries, "with a view to creating a homogeneous European Economic Area."[99] EEA law is essentially identical in substance to EU Internal Market law.[100] The EFTA Court fulfils largely the same tasks towards the EEA EFTA countries as the CJEU towards the EU Member States.[101] In relation to Internal Market issues, it shares most characteristics of the Court of Justice in terms of procedure, power base and integration level.[102] The two courts apply further the same Internal Market law, apply similar

[97] Opinion of Advocate General La Pergola in 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, para. 23; cf. also Art. 267 TFEU.

[98] Cf. also Greer, S., and Williams, A. (2009). "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?", *European Law Journal, 15*(4), 462–481, at 462.

[99] Agreement on the European Economic Area, OJ L 001, 03.01.1994, p. 3, Art. 1.

[100] Baudenbacher, C. (2008). "The Goal of Homogeneous Interpretation of the Law in the European Economic Area: Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance", *The European Legal Forum, 8*(1), 22–31.

[101] Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice, OJ L 344, 31.01.1994, p. 3.

[102] Baudenbacher, C., *The EFTA Court in Action – Five Lectures*, Stuttgart: German Law Publishers, 2010. For instance, the EFTA Court does not have Advocate Generals. In this context, it can be noted that Advocate Generals of the CJEU have played an important role in the judicial dialogue between the CJEU and the EFTA Court: Baudenbacher, C., "The EFTA Court, the ECJ, and the Latter's Advocates General – A Tale of Judicial Dialogue" in *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, Arnull, A., Eeckhout, P., and Tridimas, T. (Eds.), Oxford: Oxford University Press, 2008a, pp. 90–122.

methods of interpretation[103] and have succeeded in guaranteeing a homogeneous development of the rights and obligations in the Internal Market.[104] In particular, the EFTA Court pursues a largely identical practice of the principle of proporionality and the margin of appreciation. Government agents occasionally argued that the EEA Agreement had a different rationale than the EU Treaties, and EEA EFTA States should therefore enjoy greater discretion; the EFTA Court nevertheless pursues the homogeneity principle also in this regard.[105] The aforementioned considerations regarding the margin of appreciation at the Court of Justice apply *in similar terms to the EFTA Court.* The EEA Agreement has remained the most far-reaching trade agreement of the EU; attempts to create other non-EU Member State courts have been struck down by the Court of Justice.[106]

3.5 Results

The creation of an Internal Market has been central to the European integration process. Accordingly, the fundamental freedoms of *goods, persons, establishment, services and capital* take a prominent place in the EU legal framework and can only be restricted under certain conditions. It was shown that Member States can justify restrictions on two tracks. One the one hand, the *TFEU* mentions certain justification grounds. While their exact wording varies, those grounds essentially include *public policy, public security and public health.* In addition, the Court of Justice has recognised further justification grounds in its case law, so-called *'mandatory requirements'*: national restrictions must apply in a non-discriminatory manner, be justified by

[103] Baudenbacher, C., "Zur Auslegung des EWR-Rechts durch den EFTA-Gerichtshof" in *Festschrift für Günter Hirsch zum 65. Geburtstag*, Müller, G., Osterloh, E., and Stein, T. (Eds.), Munich: Verlag C. H. Beck, 2008b, pp. 27–50.

[104] Baudenbacher, "The Goal of Homogeneous Interpretation of the Law in the European Economic Area: Two Courts and Two Separate Legal Orders, but Law that Is Essentially Identical in Substance"; Baudenbacher, C. (1997a). "The Contribution of the EFTA Court to the Homogeneous Development of the Law in the European Economic Area, Part I", *European Business Law Review, 8*(10), 239–248; Baudenbacher, C. (1997b). "The Contribution of the EFTA Court to the Homogeneous Development of the Law in the European Economic Area, Part II", *European Business Law Review, 8*(11/12), 254–258; Baudenbacher, C., "Anmerkungen zur Rolle des EFTA-Gerichtshofs bei der Gewährleistung von Homogenität und Rechtssicherheit im Europäischen Wirtschaftsraum" in *Festschrift für Wienand Meilicke*, Heidel, T., Herlinghaus, A., Hirte, H., et al. (Eds.), Baden-Baden: Nomos Verlagsgesellschaft, 2010, 33–48; Baudenbacher, C., "Der EFTA-Gerichtshof und sein Verhältnis zu den Gemeinschaftsgerichten" in *Höchste Gerichte an ihren Grenzen*, Hilf, M., Kämmerer, J.A., and König, D. (Eds.), Berlin: Duncker & Humblot, 2007b.

[105] Harbo, *The Function of Proportionality Analysis in European Law*, at 105 and 68–70.

[106] For an example, cf. the CJEU's opinion on a European and Community Patents Court: Opinion 1/09 on a European and Community Patents Court [2011] ECR I-1137. For a comment, cf. Baudenbacher, C. (2011). "The EFTA Court Remains the Only Non-EU-Member State Court: Observations on Opinion 1/09", *European Law Reporter, 7/8*, 236–242.

imperative requirements in the general interest and be suitable as well as necessary to attain the objective which they pursue (*Gebhard* formula).

It was explained that certain differences between the two tracks remain. According to the Court of Justice, mandatory requirements can only justify *indistinctly* applicable measures, whereas Treaty derogations can justify distinctly applicable measures too. However, the distinction seems to have little practical significance, and the *EFTA Court does not practise it*. Another difference consists in the strict interpretation of the Treaty derogations and the *flexible recognition of mandatory requirements*.

In the next step, the Court of Justice's practice of *proportionality* review was examined. The Court significantly varies its review practice from one area to another. In relation to restrictions of fundamental freedoms, the Court reviews whether the measures are *suitable* and *necessary* to attain the objectives persued. First, it is inquired whether the measures are effectively capable of achieving the objectives and second, whether the Member State could also use less restrictive measures. While the Court regularly leaves it to the Member States to define the (consumer) *protection level* that they wish to pursue in areas, which have not been harmonised, the judiciary nevertheless reviews the proportionality of the measures. In preliminary ruling proceedings, the Court often leaves it (partly) to the *referring court* to make final conclusions regarding the proportionality of the measures. Yet, the Court offers *guiding criteria* that the referring court will have to consider in its assessment.

This chapter also described the *doctrine of the margin of appreciation*. In the presence of *certain circumstances* (for instance, issues relating to morality), the European High Courts apply self-restraint when reviewing national measures. However, the a priori *granted discretion* always goes hand in hand with a *judicial review* of the objective and the proportionality of the measures. There are good reasons for the Internal Market Courts and the ECtHR to apply this doctrine: it is an expression of the broader principle of subsidiarity, and it can strengthen the acceptance of the supra-/international jurisprudence. Since the doctrine was strongly shaped by the ECtHR, commonalities and differences between the Internal Market Courts and the ECtHR were examined. Considering the *higher level of integration* and the *more significant role* of the Internal Market Courts within the EU/EEA legal order, it was concluded that a rather smaller margin of discretion was justified when they are confronted with similar public interest objectives as the ECtHR.