

## Chapter 4

# Further Relevant Provisions for EU Gambling Law

The Court of Justice has dealt with the gambling cases as a matter for the law on fundamental freedoms, and this book focuses on these provisions. Therefore, this chapter only briefly examines whether and to which extent other provisions could apply as well.

### 4.1 Primary Law

The Union's primary law is codified in its Treaties. With the entry into effect of the Lisbon Treaty,<sup>1</sup> the Union's primary law consists of the *Treaty on the Functioning of the European Union* ('TFEU'),<sup>2</sup> the *Treaty on European Union* ('TEU')<sup>3</sup> and the *Charter of Fundamental Rights of the European Union* ('Charter').<sup>4</sup> According to the TEU, 'the Treaties'<sup>5</sup> and the Charter have the same legal value.<sup>6</sup> This section briefly inquires whether and to which extent provisions of primary law, other than those relating to the fundamental freedoms, could apply to gambling services.

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<sup>1</sup> Prior to the Lisbon Treaty, the primary law of the Union and its communities was codified in four consolidated treaties: the Treaty on European Union (EUT), the Treaty establishing the European Community (ECT), the Treaty establishing the European Coal and Steel Community (TECSC), which expired already on 23 July 2002, and the Treaty establishing the European Energy Community (Euratom).

<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 083, 30.03.2010. The TFEU is the amended version of the Treaty establishing the European Community (ECT).

<sup>3</sup> Consolidated Version of the Treaty on European Union, OJ C 83, 30.03.2010. The TEU is the amended version of the old Treaty on European Union (EUT).

<sup>4</sup> Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000. By contrast, Euratom, one of the three initial communities of European integration, was not integrated in the new treaty structure of the EU and continues to form a community through a separate treaty: the consolidated version of the Treaty establishing the European Atomic Energy Community.

<sup>5</sup> Art. 1(2) TFEU and Art. 1 *if.* TEU.

<sup>6</sup> Arts 1 *if.* and 6(1) *ii.* TEU.

### 4.1.1 *Escape Gates*

The chapter regarding the right of establishment contains two *escape gates* that exclude the application of this chapter's provisions. First, Article 51 TFEU holds that the provisions on freedom of establishment do not apply to "activities which in that State are connected, even occasionally, with the exercise of official authority." However, the exercise of official authority only includes core activities of the power monopoly of the state, such as police and justice.<sup>7</sup> Indeed, Advocate General Mazák expressly denied the application of this paragraph to the facts in his opinion in the gambling case *HIT & HIT LARIX*.<sup>8</sup>

Secondly, according to the same article, the Parliament and the Council may rule that the provisions on the right of establishment do not apply to certain activities. However, this provision has not been used and its use today would be controversial.<sup>9</sup> In any case, this procedure would first require a proposal from the Commission,<sup>10</sup> and it is difficult to identify an interest of the Commission in taking this road.<sup>11</sup> With the initiation of the Green Paper process,<sup>12</sup> the Commission is more likely to suggest some form of regulation rather than an express exemption.

### 4.1.2 *Competition and State Aid*

There are situations where national gambling regulations may be assessed through the provisions on competition law and state aid. A couple of Advocates General have alluded to this possibility.<sup>13</sup> While state aid issues have received major attention

<sup>7</sup>Ennuschat, J., "Zur gemeinschafts- und verfassungsrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele" in *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, at 58.

<sup>8</sup>Opinion of Advocate General Mazák in 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, at fn 9.

<sup>9</sup>Ennuschat, "Zur gemeinschafts- und verfassungsrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele", at 58.

<sup>10</sup>Stein, T., "Zum < Glück > haben wir den EuGH" in *Festschrift für Günter Hirsch*, Müller, G., Osterloh, E., and Stein, T. (Eds.), Munich: Verlag C.H. Beck, 2008, pp. 185–197, at 197.

<sup>11</sup>Cf. also the opinion of Advocate General Gulmann in C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, at fn 45.

<sup>12</sup>Green Paper on On-line Gambling in the Internal Market, COM(2011) 128 final, SEC(2011) 321 final, OJ L 337, 18.12.2009.

<sup>13</sup>In his opinion in the case *Läärä*, Advocate General La Pergola briefly discussed the provisions regarding competition, but his conclusions were nevertheless largely argued with the provisions relating to the fundamental freedoms: 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, paras 16

in media and scholarship during the recent financial crisis,<sup>14</sup> this angle has so far received little attention in the field of gambling.<sup>15</sup> The potentially applicable provisions include Articles 101 (cartels) and 102 (dominant positions) TFEU. Article 106(1) TFEU extends the Treaty's applicability to *public undertakings and undertakings to which special or exclusive rights* were granted. These provisions can apply both to private gambling operators as well as state monopolies.<sup>16</sup>

Article 106(2) TFEU deals with “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly.” It may be difficult to argue that *gambling operators as such* provide *services of general economic interest*. While the Court has not dealt with that issue, several Advocates General have answered in the negative.<sup>17</sup> This may be different in relation to a parafiscal levy.<sup>18</sup> Indeed, the Commission approved an amended French scheme for a *parafiscal levy on online horse-race betting to finance a service to improve the bloodline and promote horse-breeding*. The Commission based its decision on Article 107(3)(c) TFEU according to which state aid may be compatible if it “facilitate[s] the development of certain economic activities [...], where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”<sup>19</sup>

It is more plausible to qualify an *exclusive right holder as such* as having the character of a *revenue-producing monopoly*.<sup>20</sup> Gambling revenues from state monopolies are either integrated in the general state budget or directly allocated to certain public tasks, such as charitable causes. These undertakings may thus be subject to the Treaty rules.<sup>21</sup>

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and 24 as well as fns 27, 43 and 58. Cf. also opinion of Advocate General Fennelly in C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289.

<sup>14</sup> *Ex multis*, cf. Baudenbacher, C., and Bremer, F. (2010). “European State Aid and Merger Control in the Financial Crisis – From Negative to Positive Integration”, *Journal of European Competition Law & Practice*, 1(4), 267–285.

<sup>15</sup> Koenig, C. (2007a). “Verspielen die Mitgliedstaaten ihr gemeinschaftsrechtliches Monopolglück?”, *Europäische Zeitschrift für Wirtschaftsrecht*, 18(2), 33–34.

<sup>16</sup> The German competition authority (‘Bundeskartellamt’) for instance saw in the national lottery practice a violation of Art. 101 TFEU: cf. BKartA, B 10 – 92713 – Kc – 148/05, judgment of 23 August 2006.

<sup>17</sup> Advocate General Fennelly in his opinion in C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, at fn 31; Advocate General La Pergola in his opinion in C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjät (Jyväskylän) and Suomen valtio (Finnish State)* [1999] ECR I-6067, at para. 30.

<sup>18</sup> State Aid No C 34/10 *Taxe affectée au financement de la mission de service public d’amélioration de l’espèce équine et de promotion de l’élevage, déformation dans le secteur des courses et de l’élevage chevalin ainsi que de développement rural*, C(2010)7672 final, OJ C 10/4.

<sup>19</sup> Commission Decision of 19 June 2013 regarding French parafiscal levy on online horse-race betting to finance horse-racing companies, case no SA.30753.

<sup>20</sup> Concurring: Stein, T. (1993). “Glücksspiel im europäischen Binnenmarkt: Kein “Markt” wie jeder andere”, *Recht der internationalen Wirtschaft*, 39(10), 838–845, at 845.

<sup>21</sup> Art. 106(2) TFEU, cf. further Art. 14 TFEU.

*State aid* rules too can apply to gambling operators. A Member State may, for instance, grant to its national gambling operator(s) a more favourable tax regime than that granted to foreign operators, which would constitute a form of state aid.<sup>22</sup>

Article 37 TFEU stipulates that state *monopolies of a commercial character* must be adjusted to avoid discrimination regarding the conditions under which goods are procured and marketed. The Court of Justice held that this provision can only apply to the free movement of goods.<sup>23</sup> This provision could therefore be applicable, for example, in a situation where a state or privately controlled undertaking enjoys the exclusive right to produce or distribute slot machines.<sup>24</sup>

Competition and state aid provisions have received increased attention by the Commission in recent years. It opened infringement proceedings under the state aid rules,<sup>25</sup> including in a Danish case regarding an anti-competitive tax regime<sup>26</sup> and a French parafiscal levy to finance horse racing companies.<sup>27,28</sup> The *Zeturf* case before the Court of Justice regarded competition issues too, but the judgment was ultimately argued with the law on fundamental freedoms.<sup>29</sup> Nevertheless, the aforementioned

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<sup>22</sup>For an example of a selective tax reduction (state aid), cf. C-88/03 Portugal v Commission ('Azores islands') [2006] ECR I-7115. For an introduction to the topic, cf. Baudenbacher, C., *A Brief Guide to European State Aid Law*, European Business Law and Practice Series, vol. 13, The Hague/London/Boston: Kluwer Law International, 1997.

<sup>23</sup>C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, paras 57–61; cf. also the opinion of Advocate General Tizzano in this case at paras 54–61 who had reached different conclusions on this point.

<sup>24</sup>Art. 37(1) *i.f.* TFEU.

<sup>25</sup>Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 17.

<sup>26</sup>State Aid No C 35/2010 Duties for Online Gaming in the Danish Gaming Duties Act, OJ C 22, 22.01.2011 and IP/19/1711, cited in Green Paper on On-line Gambling in the Internal Market, COM(2011) 128 final, SEC(2011) 321 final, OJ L 337, 18.12.2009, at 12. For a comment, cf. GamblingCompliance, "EU Opens State Aid Case Against Denmark", 16 December 2010.

<sup>27</sup>State Aid No C 34/10 Taxe affectée au financement de la mission de service public d'amélioration de l'espèce équine et de promotion de l'élevage, déformation dans le secteur des courses et de l'élevage chevalin ainsi que de développement rural, cited in Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 17; for a comment, cf. GamblingCompliance, "European Scrutiny Weighs On French and British Racing", 21 January 2011. Cf. for the Commission's approval: Commission Decision of 19 June 2013 regarding French parafiscal levy on online horse-race betting to finance horse-racing companies, case no SA.30753.

<sup>28</sup>The French Competition Authority for its part issued a non-binding opinion regarding the horserace and lottery monopolies of Pari Mutuel Urbain (PMU) and Française des Jeux (FdJ), calling for clearer guidelines with regard to the separation of online and land-based operations: Opinion no 11-A-02 of 20 January 2011 Regarding the Sector of Online Games of Chance, available at <http://www.autoritedelaconurrence.fr/pdf/avis/11a02.pdf>. For a comment, cf. Gambling Compliance, "Starting With France, EU Competition Watchdogs Turn To Gambling", 24 January 2011.

<sup>29</sup>C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633. For comments, cf. Gambling Compliance, "French Monopolies Facing European Scrutiny", 9 December 2010, and Gambling Compliance, "Starting With France, EU Competition Watchdogs Turn To Gambling".

considerations show that competition and state aid provisions can apply to gambling issues and that the Commission has started to pursue this road.

### 4.1.3 *Non-Discrimination*

The aforementioned Article 106(1) TFEU expressly refers to Article 18 TFEU, which *prohibits discrimination on grounds of nationality*. However, the practical relevance of the provision is rather limited in the gambling cases. National measures in the gambling sector are often not discriminatory. In the case of a state monopoly for instance, no other operator can enter the market – irrespective of whether it is a foreign or national operator.<sup>30</sup> More importantly, the Court of Justice so far relied on *mandatory requirements* rather than on the express Treaty derogations. According to the relevant *Gebhard* formula, measures must be ‘non-discriminatory’.<sup>31</sup> Even in those gambling cases that involved a discriminatory measure, the Court of Justice did not refer to Article 18 TFEU. This practice is compatible with the perception that the codified non-discrimination provision is only of *general use* in relation to the fundamental freedoms.<sup>32</sup>

### 4.1.4 *Fundamental Rights*

EU fundamental rights are prominently protected in the primary law. The Union is “founded on the [...] respect for human rights”<sup>33</sup> and recognises the rights, freedoms and principles of the Charter of Fundamental Rights.<sup>34</sup> With the adoption of the Lisbon Treaty, the *Charter became a legally binding document*.<sup>35</sup> For the first time, EU primary law enumerated legally binding fundamental rights. The Court of

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<sup>30</sup> Exceptions included C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519, and C-347/09 Criminal Proceedings against Jochen Dicking and Franz Ömer [2011] ECR I-8185.

<sup>31</sup> C-55/94 Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 37.

<sup>32</sup> Hailbronner, K., and Jochum, G., *Europarecht II: Binnenmarkt und Grundfreiheiten*, W. Kohlhammer Verlag, 2006, cited in Ennuschat, “Zur gemeinschafts – und verfassungsrechtlichen Zulässigkeit eines staatlichen Monopolangebotes für Online-Glücksspiele”, at 59. For an example of a broad use of Art. 18 TFEU, cf. C-524/06 Heinz Huber v Bundesrepublik Deutschland [2008] ECR I-9705.

<sup>33</sup> Art. 2 TEU.

<sup>34</sup> The codified law and the case law sometimes refer to ‘human rights’ while on other occasions referring to ‘fundamental rights’. For reasons of consistency, those rights protected under EU law are exclusively referred to as fundamental rights in this book, which at the same time allows to clearly distinguish these rights from human rights as guaranteed under the ECHR and other international human rights instruments.

<sup>35</sup> Art. 6(1) *i.i.* TEU.

Justice had already recognised – long prior to the Lisbon Treaty – fundamental rights as forming ‘*general principles of EU law*’ and developed a rich jurisprudence on fundamental rights. In a separate *excursus*, this book explores to which extent EU fundamental rights could play a role in the gambling case law (see Chap. 11).

## 4.2 Secondary Law

The question remains whether there are also provisions from secondary law that can apply to gambling issues. The EU has a number of binding and non-binding legislative instruments at its disposal,<sup>36</sup> and the EU’s classic approach in *reducing barriers to trade* consists in the *harmonisation* of national laws through directives.<sup>37</sup> To date, the national gambling markets have not been harmonised. For the sake of comprehensiveness, this section inquires *whether and to which extent other directives can be applied* to gambling issues as well as the *potential relevance* of these directives, namely the Services Directive. Furthermore, it inquires to which extent directives *expressly exclude* (fully or partly) gambling from their scope of application. The order of presentation starts with the applicable directives, followed by those (increasingly) excluding gambling services from their scope of application.

### 4.2.1 Information Society Directive

Among the more important legal acts affecting national gambling regulation is the Information Society Directive.<sup>38</sup> The overall aim of the Directive is to avoid new barriers to trade caused by *national technical standards and regulations*. To this end, Member States must notify the Commission of any relevant draft legislation that may create such barriers.<sup>39</sup> Through means of consultation and administrative cooperation, draft gambling regulations may need to be adjusted along the principles established in the case law.<sup>40</sup> The Directive refers to ‘electronic means’,<sup>41</sup> which

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<sup>36</sup> Art. 288 TFEU.

<sup>37</sup> Arts 114 and 288 TFEU.

<sup>38</sup> Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying Down A Procedure for the Provision of Information in the Field of Technical Standards and Regulations (‘Information Society Directive’), OJ L 217, 05.08.1998.

<sup>39</sup> Recitals 1, 16 and 26 of the Directive.

<sup>40</sup> Littler, A., *Member States versus the European Union – The Regulation of Gambling*, Leiden: Martinus Nijhoff Publishers, 2011, at 286.

<sup>41</sup> Art. 1(2)(a) of the Directive. This term covers also other means of communication, not just the Internet. Cf. also Sect. 4.1 of the UK Gambling Act, which refers to ‘remote gambling’, a term covering the use of any remote form of communication, UK Gambling Act, 2005, available at <http://www.legislation.gov.uk/ukpga/2005/19/contents/enacted>. Cf. further Littler, *Member States versus the European Union – The Regulation of Gambling*, at 285.

results in a wide scope of application. Gambling services and devices can fall within the scope of the Directive.<sup>42</sup> In relation to services, Advocate General Bot confirmed the Directive's applicability in *Liga Portuguesa* where the exclusive rights of the state monopolist were extended to "all means of communication."<sup>43</sup> Regulation relating to the use of gambling devices too has been found to fall under the Directive.<sup>44</sup>

### 4.2.2 Distance Selling Directive

The Distance Selling Directive<sup>45</sup> aims to approximate the laws, regulations and administrative provisions concerning *distance contracts between consumers and suppliers* and confers certain rights on consumers.<sup>46</sup> According to its definitions of distance contract and distance communication,<sup>47</sup> online gambling services can fall within the scope of the Directive. Although the Directive provides that *consumers cannot exercise their right of withdrawal* in relation to 'gaming and lottery services' except otherwise agreed by the parties,<sup>48</sup> the remainder of the conferred rights applies to gambling services.<sup>49</sup>

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<sup>42</sup> Art. 1(2)(a) of the Directive: "'service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." Cf. also the CJEU's interpretation of 'gambling services' since its first ruling in *Schindler*: C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, paras 26–29. Cf. also Art. 57 TFEU.

<sup>43</sup> However, the application of the Information Society Directive was only of relevance for the question whether the fines imposed on the defendants Bwin and Liga Portuguesa were admissible under EU law. Opinion of Advocate General Bot in C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, paras 160–192.

<sup>44</sup> C-213/11, C-214/11 and C-217/11 (Joined Cases) *Fortuna sp. z o.o. (C-213/11), Grand sp. z o.o. (C-214/11), Forta sp. z o.o. (C-217/11) v Dyrektor Izby Celnej w Gdyni* [2012] nyr. More precisely, the CJEU dealt in this case with the notion 'technical regulation' according to Art. 1(11) of the Directive. Cf. further C-65/05 *Commission v Greece* [2006] ECR I-10341, para. 61.

<sup>45</sup> 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 ('Distance Selling Directive'), OJ L 144, 04.06.1997.

<sup>46</sup> Art. 1 of the Directive.

<sup>47</sup> Arts 2(1) and 2(4).

<sup>48</sup> Art. 6(3) of the Directive, indent 6.

<sup>49</sup> The Directive is currently under review due to a proposal for a Consumer Rights Directive: cf. "Green Paper on the Review of the Consumer Acquis", available at [http://ec.europa.eu/consumers/rights/cons\\_acquis\\_en.htm#dir](http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#dir).

### 4.2.3 *Anti-Money Laundering Directive*

The Third Anti-Money Laundering Directive<sup>50</sup> replaced the two former anti-money laundering directives.<sup>51</sup> At the time of writing, a Commission proposal for a Forth Directive has been published.<sup>52</sup> To prevent money laundering and terrorist financing, the Third Anti-Money Laundering Directive imposes requirements of customer due diligence and supervisory obligations on certain institutions and businesses. The Directive is likely to be the sole directive that *expressly applies inter alia* to gambling, namely casinos.<sup>53</sup> It requires that “all casino customers be identified, and their identity verified if they purchase or exchange gambling chips with a value of EUR 2,000 or more.”<sup>54</sup> Notably, Article 36 somehow limits the regulatory choices of Member States in that it demands “casinos [shall] be licensed in order to operate their business legally.” Accordingly, Member States are obliged to devise *some authorisation scheme* that amounts to a licensing system for land-based and online<sup>55</sup> casinos.

In order to pursue a *consistent and systematic policy*, Member States relying on money laundering to justify restrictions of EU fundamental freedoms in *sectors other than casinos* should be expected, in this author’s view, to extend the national implementing act to these sectors. The Directive obliges Member States to extend its scope to activities “particularly likely to be used for money laundering or terrorist financing purposes.”<sup>56</sup>

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<sup>50</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing (‘Third Anti-Money Laundering Directive’), OJ L 309, 25.11.2005, 15–36.

<sup>51</sup> Art. 44 of the Directive referring to Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 344, 28.12.2001, and Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, OJ L 166, 28.06.1991.

<sup>52</sup> Proposal for a Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, COM/2013/045 final, 2013/0025 (COD). Regarding the gambling sector, the proposal suggests to widen the scope of application to include “providers of gambling services.” Under the Third Directive, only casinos fall within the scope of application.

<sup>53</sup> Art. 2(1)(3)(f) of the Directive.

<sup>54</sup> Art. 10(1) of the Directive.

<sup>55</sup> Arts 10 and 36, combined with recital 14 of the Directive.

<sup>56</sup> Art. 4(1) of the Directive.



#### **4.2.4 Data Protection Directive and Directive on Privacy and Electronic Communication**

The Data Protection Directive<sup>57</sup> and the amended Directive on Privacy and Electronic Communication<sup>58</sup> provide for data protection in the EU. The obligations contained in these directives may be of particular relevance in the *online gambling sector*, considering electronic storage of user data, such as contact and financial information, or behavioural data, such as gambling frequency, wagered stakes and time of play.<sup>59</sup>

#### **4.2.5 Unfair Commercial Practices Directive**

The Unfair Commercial Practices Directive,<sup>60</sup> which aims to protect consumers from unfair commercial practices that may harm consumers' economic interests,<sup>61</sup> explicitly operates without prejudice to "those rules which [...] relate to gambling activities."<sup>62</sup> Still, the Directive is important in relation to the *advertising and marketing* of gambling.<sup>63</sup> It prohibits practices contrary to the requirements of professional diligence or those that (are likely to) materially distort the economic

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<sup>57</sup>Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ('Data Protection Directive'), OJ L 281, 23.11.1995.

<sup>58</sup>Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services; Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector; and Regulation (EC) No 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws, OJ L 337, 18.12.2009.

<sup>59</sup>Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 14.

<sup>60</sup>Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.06.2005.

<sup>61</sup>Art. 1 of the Directive.

<sup>62</sup>Preamble, recital 9 of the Directive.

<sup>63</sup>Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 13. Furthermore, the Directive may be relevant regarding prize competitions, lotteries or bonuses where the participation is made conditional upon the purchase of goods or services: C-540/08 Media print Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v 'Österreich'-Zeitungverlag GmbH [2010] ECR I-10909; C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH [2010] ECR I-217.

behaviour of consumers. An interesting question is to which extent national gambling regulations respect the social responsibility principles contained in the Directive: the latter prohibits *misleading practices* likely to deceive the average consumer, *misleading omissions* regarding information necessary to make an informed transactional decision as well as *aggressive commercial practices*.<sup>64</sup> Notably, it protects those “particularly vulnerable [...] because of their mental or physical infirmity, age or credulity.”<sup>65</sup> This is directly relevant in that research has evidenced that *adolescents show a heightened vulnerability* to gambling disorders (see [Sect. 9.1.3.5](#)).

#### 4.2.6 VAT Directive

The VAT Directive<sup>66</sup> *exempts transactions* from “betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State.”<sup>67</sup> In accordance with this degree of discretion, some Member States apply the exemption only to lotteries and limited forms of betting.<sup>68</sup> Disputes between operators and tax authorities regarding the (non-)exemption of gambling services have led to a rich case law.<sup>69</sup>

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<sup>64</sup> Arts 5–9 of the Directive.

<sup>65</sup> Art. 5(3) of the Directive.

<sup>66</sup> Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax (‘VAT-Directive’), OJ L 347, 11.12.2006.

<sup>67</sup> Art. 135(1)(i) of the Directive; cf. however for operators providing online gambling from outside the Internal Market: Vlaemminck, P., and Hubert, A., *Is There Room for a Comprehensive EU Gambling Services Policy?* (paper presented at Gambling Conference, Prague, June 2009), at 8.

<sup>68</sup> Commission Staff Working Paper: Accompanying Document to the Green Paper on On-line Gambling in the Internal Market, COM(2011) 128, SEC(2011) 321, at 15. Regarding VAT exemptions, cf. de la Feria, R. (Ed.), *VAT Exemptions: Consequences and Design Alternatives*, Eucotax Series on European Taxation, Alphen aan den Rijn: Kluwer Law International, 2013, at ‘Part III: Exemptions for gambling’.

<sup>69</sup> Cf. e.g. C-377/11 *International Bingo Technology SA v Tribunal Económico-Administrativo Regional de Cataluña (TEARC)* [2012] nyr; C-38/93 *H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] ECR I-1679; C-498/99 *Town & County Factors Ltd v Commissioners of Customs & Excise* [2002] ECR I-7173; C-259/10 and C-260/10 (Joined cases) *Commissioners for Her Majesty’s Revenue and Customs v The Rank Group plc.* [2011] nyr; C-58/09 *Leo-Libera GmbH v Finanzamt Buchholz in der Nordheide* [2010] ECR I-5189; C-464/10 *État belge v Pierre Henfling, Raphaël Davin and Koenraad Tanghe* [2011] ECR I-6219; C-283/95 *Karlheinz Fischer v Finanzamt Donaueschingen* [1998] ECR I-3369; C-453/02 and C-462/02 (Joined cases) *Finanzamt Gladbeck v Edith Linneweber (C-453/02) and Finanzamt Herne-West v Savvas Akritidis (C-462/02)* [2005] ECR I-1131; C-231/07 and C-232/07 (Joined cases) *Tiercé Ladbroke SA (C-231/07) and Derby SA (C-232/07) v Belgian State* [2008] ECR I-73 (Order of the Court).

### 4.2.7 *Audio Visual Media Services Directive and Television Without Frontiers Directive*

The Audio Visual Media Services Directive<sup>70</sup> succeeded the Television without Frontiers Directive,<sup>71</sup> updating it to technological developments. The latter ensured the free movement of European television programmes and introduced a broadcasting quota that reserved half of transmission time for European works. While the preamble generally *excludes gambling services*,<sup>72</sup> the Directive nevertheless applies where a *broadcasted programme* is devoted to games of chance. Moreover, it is unclear whether a preamble recital can be relied upon to derogate from the main provisions of the Directive.<sup>73</sup> In any event, certain games of chance may qualify as ‘teleshopping’ within the meaning of the Television without Frontiers Directive.<sup>74</sup>

### 4.2.8 *E-Commerce Directive*

The Directive on Electronic Commerce (the ‘e-Commerce Directive’)<sup>75</sup> aims to ensure the free movement of services of information society, involving a limited approximation of national provisions.<sup>76</sup> Gambling services are *excluded from the scope of the Directive* but their definition is narrower than in other directives.<sup>77</sup> The Directive applies to “promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise,

<sup>70</sup>Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (‘Audiovisual Media Services Directive’), OJ L 95, 15.04.2010.

<sup>71</sup>Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, OJ L 298, 17.10.1989.

<sup>72</sup>Preamble, recital 22 of the Directive.

<sup>73</sup>C-162/97 Criminal Proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn [1998] ECR I-7477, para. 54. For a discussion of that point, cf. Littler, *Member States versus the European Union - The Regulation of Gambling*, at 297–298.

<sup>74</sup>C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF) [2007] ECR I-8817, paras 30–38.

<sup>75</sup>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 in Electronic Commerce, in the Internal Market (‘Directive on Electronic Commerce’ or ‘e-commerce Directive’), OJ L 178, 17.07.2000.

<sup>76</sup>Art. 1(1)-(2) of the Directive.

<sup>77</sup>Cf. the wording of Art. 1(5)(d) 3<sup>rd</sup> indent of the Directive as well as recital 16 of the Preamble.

serve only to acquire the promoted goods or services.”<sup>78</sup> The criterion of a mere secondary, promotional role reminds of the distinction made by the Court of Justice in *Familiapress*.<sup>79</sup>

### 4.2.9 Services Directive

The Services Directive<sup>80</sup> excludes gambling services from its scope “in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.”<sup>81</sup> The original proposal included gambling services subject to a transitional derogation, and additional harmonisation efforts were made dependent upon the publication of a report and further consultations.<sup>82</sup> However, the European Parliament removed gambling services from the Directive’s scope; further consultations as foreseen in the initial proposal did not take place for many years. Even though the proposal contained a reference to future harmonisation,<sup>83</sup> it should be noted that Council and Parliament were not obliged to proceed to harmonisation. They could have limited their discussions for instance to further consultations regarding *consumer protection* issues. Considering the 2-decades-and-counting adversarial ‘dialogue’ between Member States and private operators in countless court cases, the question arises whether this controversy has allowed for a more coherent, structured and productive output. The debate could have taken place within a transitional legislative framework and it would have been a mere commitment of a continued discussion in the

<sup>78</sup> Preamble, recital 16 of the Directive. Competitions as well as games relate to promotions. Cf. the French text: « Elle ne couvre pas les concours ou jeux promotionnels qui ont pour but d’encourager la vente de biens ou de services » (Preamble, Recital 16 of the Directive). Whether or not the exclusion requires a skill component (cf. for this point Littler, *Member States versus the European Union – The Regulation of Gambling*, at 287) does not seem to be decisive.

<sup>79</sup> C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689, para. 23: “The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.”

<sup>80</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (‘Services Directive’), OJ L 376, 27.12.2006. For a contribution regarding the legal situation prior to the Services Directive, cf. *Services and Free Movement in EU Law*, Andenas, M., and Roth, W.-H. (Eds.), Oxford: Oxford University Press, 2002.

<sup>81</sup> Preamble, recital 25 of the Directive. Cf. also Art. 2(2)(h) of the Directive. This book demonstrates that the argument of a special or peculiar nature of gambling is central to considerations of the EU legislative and judicial branches and assesses in relation to gambling addiction whether empirical evidence supports such view (see [Sect. 9.1](#)).

<sup>82</sup> The Swiss Institute of Comparative Law was mandated by the European Commission to compose this report: Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*.

<sup>83</sup> Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2, 13.01.2004, Art. 40(1).

legislative branch. Ironically, a continued political discussion would have been likely to save Member States from countless court cases.<sup>84</sup> Furthermore, it is noteworthy that the current *Green Paper process* takes an approach that is quite similar to that suggested in the original proposal of the Services Directive: it establishes a “report by the Commission and a wide consultation of interested parties.”<sup>85</sup> By integrating gambling services in the Services Directive, the Member States could have preserved their broad regulatory preferences, including the option of entrusting a single operator with exclusive rights.<sup>86</sup> It was even argued that this integration would not have led to a liberalisation, and that the discussion would have taken place within the guidelines so far provided by the Court of Justice.<sup>87</sup>

### 4.3 Results

This chapter established that *competition and state aid provisions* apply to the activities of *both private and state gambling operators*; the Commission has given increased attention to these rules. Article 106(1) TFEU extends the applicability of Articles 101 (cartels) and 102 (dominant positions) TFEU to public undertakings and undertakings to which special or exclusive rights were granted, such as state or private *gambling monopolies*. While Advocates General found that gambling monopolies hardly qualify as ‘undertakings entrusted with the operation of services of general economic interest’, they can constitute ‘*revenue-producing monopolies*’ in the sense of Article 106(2) TFEU. Finally, favourable tax regimes towards national gambling operators can trigger the application of the *state aid* rules. Other provisions of EU primary law were found to be of minor importance. The significance of EU fundamental rights for the gambling jurisprudence is assessed elsewhere in this book.

A number of directives were identified that either apply to gambling services or (partly) exclude gambling services from their scope of application. While some of these directives are of direct relevance for gambling activities, none aims to facilitate cross-border gambling services. In particular were found to be relevant for the gambling sector (to varying degrees): the Information Society Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive and the Directive on Privacy and Electronic Communication.

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<sup>84</sup> Concurring: Littler, *Member States versus the European Union – The Regulation of Gambling*, at 292.

<sup>85</sup> Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(2004) 2, 13.01.2004, Art. 40(1)(b). Note that the quoted wording is from the original proposal for a *Services Directive* (sic!) while perfectly describing the process of the actual Green Paper.

<sup>86</sup> Art. 1(2)-(3) of the Directive: “[...] This Directive does not deal with the abolition of monopolies providing services [...]”

<sup>87</sup> Littler, *Member States versus the European Union – The Regulation of Gambling*, at 293.

The Unfair Commercial Practices Directive specifically defines commercial standards that can be of relevance in relation to responsible gambling advertising, in particular when aimed towards adolescents.

Finally, it was noted that the exclusion of gambling services from the scope of the Services Directive might have produced undesirable results both for Member States and consumers. Ultimately, the European Commission with its Green Paper process pursues a similar road as initially foreseen for gambling services in the draft Services Directive.