

Chapter 5

Results of Part I

Part I presented the legal framework within which gambling services take place in Europe. Chapter 2 drew attention to the fact that ‘*European gambling law*’ consists of an *interplay* between national gambling regulations and EU law. In heated discussions on gambling, these two legal orders are all too often presented as two antagonistic entities. To the present day, the EU legislator has not used its (*shared*) *competences* to pass legislation in the area of gambling services (Internal Market, consumer protection). Member States are still competent to regulate gambling within their territories. However, due to the *supremacy of EU law* national gambling regulations must be in line with EU law and respect in particular the general law on the fundamental freedoms. While the EU has not specifically regulated gambling, the generally applicable EU law nevertheless *impacts the application of national gambling laws*. National restrictions to the freedom to provide gambling services must serve a public interest objective and be proportionate to the objective.

Moreover, the chapter also clarified that there are *additional constraints* on national gambling regulations beyond EU law. Gambling rules must also comply with requirements stemming from the *national constitutional order*, for instance the respect of fundamental rights and general principles such as proportionality. Further obligations may stem from *public international law*, namely *ius cogens* or international agreements. In particular trade agreements (like the *GATS*) or human rights treaties (like the *ECHR*) may impact national gambling regulation.

Chapter 3 presented the *general law on the fundamental freedoms* since the Court of Justice has dealt with the gambling cases as a matter of EU fundamental freedoms. Due to the central role of the fundamental freedoms of *goods, persons, establishment, services and capital*, Member States can only restrict them under certain conditions. Restrictions can be justified either based on express *Treaty derogations*, namely *public policy, public security and public health*, or so-called *mandatory requirements* in the public interest as recognised in the case law, such as *consumer protection*. Restrictions must further be *proportionate, namely suitable and necessary*, to attain the public interest objective. In areas that have not been harmonised by EU law, the Court of Justice generally leaves it to the Member States

to define the (consumer) *protection level*, which they wish to pursue. Where the Court of Justice does not itself decide on the proportionality of measures, it offers guiding criteria to the referring court.

Since the *doctrine of the margin of appreciation* has played a major role in the gambling jurisprudence, Sect. 3.4 presented its notion, origin, *raison d'être* and relationship to other principles. All European High Courts apply this doctrine, which is an expression of the (broader) *principle of subsidiarity*. Accordingly, these courts use, under certain conditions, self-restraint when reviewing the objective and proportionality of national measures. However, the granted discretion to national authorities always goes hand in hand with judicial scrutiny. It was concluded that the significant differences regarding the *level of integration* and the *role of the judiciary* between the EU/EEA and the Convention system justified a generally smaller margin of appreciation in the jurisprudence of the Internal Market Courts when confronted with similar public interest objectives as the ECtHR.

Finally, Chap. 4 briefly inquired whether *further provisions of EU primary and secondary law* could be applicable to gambling issues. With regard to primary law, the *competition and state aid* provisions are most relevant. These provisions apply to private gambling operators as well as state monopolies; the latter may constitute revenue-producing monopolies in the sense of Article 106(2) TFEU. The potential role of EU fundamental rights in the gambling jurisprudence is assessed elsewhere (Chap. 11). Furthermore, a *number of directives* were identified that are relevant for the gambling sector, in particular the Information Society Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive, the Directive on Privacy and Electronic Communication and the Unfair Commercial Practices Directive. While some directives are of considerable relevance, for instance the Unfair Commercial Practices Directive in relation to gambling advertising, none aims to facilitate cross-border gambling services. Other directives expressly exclude gambling services from their scope such as the *Services Directive*; this has arguably led to undesirable outcomes for Member States and consumers.