Chapter 8
The Use of the Margin of Appreciation in EU Gambling Law

In the previous chapter, it was established that the Court of Justice recognised public interest objectives relating to threefold concerns: concerns relating to criminal activities, concerns relating to public morality and concerns relating to the health of consumers (gambling addiction). The present chapter inquires the use of the margin of appreciation specifically in relation to these concerns. Since the doctrine was introduced and heavily shaped by the ECtHR (Sect. 8.1), a thorough analysis of that court's rich and detailed practice of the doctrine shall establish the principles (Sect. 8.2) and criteria that steer the application of the doctrine in cases relating to crime, public morality and health (Sect. 8.3). The thoroughness of this part of the analysis finds justification in that the doctrine has played a key role in the development of the gambling jurisprudence. Subsequently, the findings are contrasted with the use of the margin of appreciation in the gambling case law of the Court of Justice and the EFTA Court (Sect. 8.5). Chapter 8 exclusively focuses on the margin of appreciation that is a priori granted. Chapter 9 will subsequently take a detailed look at how this general approach has been balanced in the gambling case law by an adequate proportionality review.

8.1 Reasons for Taking a Comparative Look at the European Court of Human Rights

The use of the margin of appreciation in the gambling cases is a delicate issue. The stakes involved are very high and it can be no surprise that government agents demand the widest possible margin of appreciation while private operators advocate the strictest possible review of national restrictions. The use of the margin of appreciation is a complex process as it involves the balancing of various factors. An isolated look at the gambling cases risks to be dominated by personal views that one may have towards gambling issues. Consequently, the use of the margin of

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_8,

appreciation in the gambling cases needs to be viewed in the larger context of the doctrine as a whole.

The ECtHR has shaped the *doctrine* of the margin of appreciation like no other court.[1] In fact, a discussion of this doctrine is hardly imaginable without a comparative look at Strasbourg.[2] At the international level, the first recourse to the margin of appreciation occurred under the Convention system.[3] It was shown that the *raison d'être* of the margin of appreciation is essentially identical in the Internal Market setting and under the Convention system. The doctrine serves to address the universality-diversity dichotomy (see Sect. 3.4.2). Similarly, both the Strasbourg and Luxembourg judiciaries apply a proportionality review to counterbalance the discretion a priori granted.[4] Over decades, the Strasbourg Court has acquired extensive experience in applying the doctrine. It is the *quantity* and the *diversity* of issues that have allowed for the development of a *detailed and diversified case law*.

As Sweeny correctly argued, the case law of the ECtHR can offer helpful guidance in steering the margin of appreciation in Internal Market issues,[5] and the gambling jurisprudence is just one out of many possible applications. In countless cases, the ECtHR has addressed the *justification grounds* raised in relation to gambling issues: crime (confer in the gambling cases: money-laundering or fraud), public morality (confer: moral concerns regarding gambling) and health (confer: protecting consumers from gambling addiction).[6]

8.2 How to Steer the Margin of Appreciation: General Principles

8.2.1 General Considerations

This section presents the general principles that the ECtHR has established and which ensure that the use of the doctrine is steered in a coherent and non-arbitrary manner.

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[1] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*.

[2] Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights".

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

[4] McBride, "Proportionality and the European Convention on Human Rights".

[5] Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights".

[6] The present analysis focuses on the extensive case law of the ECtHR regarding these grounds of justification in order to contextualise the use of the margin of appreciation in the gambling case law of the CJEU. By contrast, the ECtHR has rarely dealt with gambling cases specifically that would have involved a discussion of the use of the margin of appreciation: see Sect. 8.4.3.

In the context of the Convention, the doctrine of the margin of appreciation is better suited for certain rights than for others. The doctrine has been mostly used in relation to emergency cases (Article 15), anti-discrimination (Article 14) and of course the personal freedoms under Articles 8–11[7] as well as the right to property (Article 1 of Protocol No 1).[8] Even though the Court has never expressed a limitation to a *numerus clausus* of Convention rights,[9] it has not applied the doctrine regarding certain rights.[10] The rights enshrined in Articles 2–7 are not well suited to accommodate a classic balancing act of interests and the discretion that may be granted within this balancing act.[11]

The provisions protecting *personal freedoms* (Articles 8–11)[12] are particularly apt to accommodate the doctrine. Similar to the fundamental freedoms in the Internal Market, they enshrine the *characteristic structure of a principle combined with a derogation clause*. The first paragraph states the general principle – a right that any person shall enjoy – while the second paragraph mentions the conditions under which derogations to the general rule are permitted. Comparable to the practice of the Internal Market Courts, exceptions are to be interpreted narrowly also in the Convention system.[13] Limitations must reflect a 'public interest', be 'prescribed by law' and 'necessary in a democratic society'.[14] Accordingly, the following analysis takes into account in particular Articles 8–11 of the Convention. Prior to specific criteria, a few overriding principles are presented that guide the ECtHR's use of the margin of appreciation.

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[7] For a discussion of these articles more specifically, cf. Greer, S., *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights Files, vol. 15, Council of Europe (Ed.), Strasbourg: Council of Europe Publishing, 1997.

[8] Greer, S.C., *The Margin of Appreciation*: *Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files, vol. 17, Council of Europe (Ed.), Strasbourg: Council of Europe Publishing, 2000, at 5.

[9] Macdonald, R.S.J., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *Le droit international à l'heure de sa codification*, *Etudes en l'honneur de Roberto Ago*, 1987, at 192.

[10] de la Rasilla del Moral, I. (2006). "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", *German Law Journal, 7*(6), 611–624; Callewaert, J. (1998). "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?", *Human Rights Law Journal, 19*(6), 6–9.

[11] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 42–43. For Art. 3, cf. e.g. Soering v the UK, Application no 14038/88 [1989], para. 88.

[12] The right to respect for private and family life (Art. 8); freedom of thought, conscience and religion (Art. 9); freedom of expression (Art. 10); and freedom of assembly and association (Art. 11).

[13] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983], para. 97; Klass et alii v Germany, Application no 5029/71 [1978], para. 42.

[14] Cf. e.g. Art. 10(2): "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

8.2.2 The Role of the Motivation of the Decision

The first principle of review is a careful assessment of the motivation of the national decision. Not even the widest discretion would prevent the ECtHR from reviewing the decision. A *thorough judicial review of the motivation* is all the more important where wide discretion is granted to national authorities. According to Judge Villiger, the jurisprudence of the ECtHR shows that a convincing, coherent motivation ties to a considerable extent the hands of the Court. If this is not the case, the Strasbourg Court no longer feels bound to the margin of appreciation a priori granted.[15] The motivation of the decision must be *relevant and sufficient*.[16] The defending government must convincingly establish both the objective and the proportionality of the restrictions.[17]

8.2.3 The Importance of the Convention Right

The width of the margin of appreciation varies between different Convention rights. Some rights take a particularly important role within the Convention system and a detailed review of the national measures is indicated:[18]

> the scope of the margin of appreciation enjoyed by the national authorities will depend […] on the nature of the right involved. […] The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.[19]

The jurisprudence shows that a particular importance is not assigned to a provision as a whole. *Only certain expressions* of the respective provision may be considered particularly important, and as a consequence hardly any margin of appreciation will apply to these expressions. With regard to Articles 8–11, the particularly important expressions involve core aspects of private sphere as well as political debate.[20] At the other end of the spectrum with lesser importance would be for instance the rights of coalitions under Article 11, more precisely activities of trade unions, the conduct of collective bargaining and the right to strike.[21]

The genesis of the Convention explains this prioritisation, which was heavily influenced by the experience of atrocities committed by totalitarian regimes. One of

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[15] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 212.

[16] Handyside v the UK, Application no 5493/72 [1976], para. 50.

[17] Funke v France, Application no 10828/84 [1993], para. 55.

[18] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 137.

[19] Gillow v the UK, Application no 9063/80 [1986], para. 55.

[20] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 141.

[21] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 210.

the key power tools of totalitarism is the suppression of free political debate and the intrusion of the official ideology in all aspects of private life. As such, the ECtHR has given particular importance to those aspects of Article 8 (private life/home) that concern the most intimate aspects of private life, such as the sexual life of a person.[22] Other examples include the integrity of the home, protection of personal data and the professional secrecy between client and counsel.[23]

Parallel considerations apply to the freedom of expression under Article 10. This freedom is especially important since it plays a central role in a democratic society,[24] including the expression of personal views and on public affairs.[25] The Court has also repeatedly underlined the special role of elected representatives and of the press as the public watchdog. The public had a right to receive such information.[26] Similarly, a very narrow margin of appreciation applies generally to the freedom of thought, conscience and religion under Article 9.[27]

Some expressions of Convention rights are therefore considered to be more important than others. Some authors have gone as far as to create a hierarchy of provisions in the form of an atomic or solar system.[28] Any schematic depiction must however consider that it is normally not the provision but only certain expressions of the right that profit from a particularly high importance.[29]

8.2.4 The Nature of the Justification Ground

Similar to the importance of the Convention right, the nature of the justification ground matters greatly. The relevant question is *whether the justification ground is somehow special or different*. Certain characteristics of that nature may justify

[22] Cf. e.g. Dudgeon v the UK, Application no 7525/76 [1981]; Dickson v the UK, Application no 44362/04 [2007], regarding artificial insemination in prison.

[23] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 138. Cf. also Dudgeon v the UK, Application no 7525/76 [1981], para. 65; Gillow v the UK, Application no 9063/80 [1986], para. 55.

[24] Brems, E. (1996). "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 56*, 240–314, at 269.

[25] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 138; Autronic AG v Switzerland, Application no 12726/87 [1990], para. 61; Handyside v the UK, Application no 5493/72 [1976], para. 49.

[26] Sunday Times v the UK, Application no 6538/74 [1979], para. 65; Sunday Times v the UK (No 2), Application no 13166/87 [1991], para. 50; Observer and Guardian v the UK, Application no 13585/88 [1991], para. 59; Castells v Spain, Application no 11798/85 [1992], paras 42–43.

[27] Kokkinakis v Greece, Application no 14307/88 [1993], para. 31.

[28] Yourow, H.C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer, 1996.

[29] Concurring: Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 144.

granting wider discretion to domestic authorities. While most justification grounds do not lead to a wide margin of appreciation, some nevertheless do. This point will be discussed directly in relation to the relevant grounds crime (prevention), public morality and health.

8.3 How to Steer the Margin of Appreciation: Criteria in Relation to Crime, Health and Public Morality

The previous section established a couple of general principles that steer the use of the margin of appreciation. This section now analyses the criteria that have been developed specifically in relation to crime, public morality and health. As the ECtHR's use of the doctrine is extremely voluminous, this section is informed by publications that looked at this issue in great detail.[30]

Since restrictions to the freedom to provide gambling services have been justified on grounds of crime prevention, health (gambling addiction) and public morality, the use of the margin by the ECtHR must be studied in relation to related grounds. Particular attention is paid to health and public morality as these findings will prove to be very instructive for the analysis of the gambling case law.

8.3.1 Crime

The ECtHR has dealt with crime as a justification ground in countless cases. It differentiated between various forms of crime; *not all of them* profit from the same width of discretion.

In the early days of the Convention, both the Commission of Human Rights and the ECtHR applied the doctrine in relation to public emergency cases under Article 15. The very wording of this provision makes it likely that national authorities enjoy wide

[30] For some of the most comprehensive studies, cf. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*; Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*; Christoffersen, *Fair Balance*: *Proportionality*, *Subsidiarity and Primarity in the European Convention on Human Rights*; Kastanas, E., *Unité et diversité*: *notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles: Établissements Émile Bruylant, 1996; Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*; Koch, O., *Der Grundsatz der Verhältnismässigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Schriften zum Europäischen Recht vol. 92, Berlin: Duncker & Humblot, 2003; Muzny, P., *La technique de proportionnalité et le juge de la convention européenne des droits de l'homme*: *Essai sur un instrument nécessaire dans une societé democratique*, Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2005.

discretion in relation to emergency measures.[31] The two characterising elements of public emergency cases are the *time factor*, *namely urgency* ("the pressing needs of the moment")[32] and the *seriousness of the threat* ("[i]n time of war or other public emergency threatening the life of the nation").[33] This *combination of two* special factors justifies a wide margin of appreciation. The doctrine of the margin of appreciation was introduced in the Convention jurisprudence by the Human Rights Commission's report on the *Cyprus case*.[34] At the time, the UK administered the island of Cyprus and pleaded a state of emergency. From the outset, the Human Rights Commission made it clear that while it grants discretion, it also reviews the decision:

> The Commission was in no way precluded by the Convention from reviewing a decision taken by a Government in derogation of the Convention under Article 15 and from examining critically the appreciation of the Government as to the exigencies of the situation. On the other hand, it was a matter of course that the Government concerned was in a better position than the Commission to know all relevant facts and to weigh in each case the different possible lines of action for the purpose of countering an existing threat to the life of the nation. Without going as far as to recognise a presumption in favour of the necessity of measures taken by the Government, the Commission was of the opinion, nevertheless, that a certain margin of appreciation must be conceded to the Government.[35]

The Human Rights Commission continued to use the doctrine in subsequent cases such as *Lawless*[36] and the *Greek Colonels cases*.[37] In the *Greek Colonels cases*, it clarified that the *burden of proof* rested with the government, which had to show that the conditions to derogate from the Convention in Article 15 were met.[38]

With regard to the Strasbourg Court, that body implicitly applied the doctrine in its first case *Lawless* in 1961[39]and continued to do so in subsequent cases.[40] The first express reference to the doctrine by the ECtHR was in relation to Article 8 in *De Wilde*,[41]

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[31] Art. 15: "In time of war or other public emergency *threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent *strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law." Italic emphasis added.

[32] Ireland v the UK, Application no 5310/71 [1978], para. 207.

[33] ECHR, Art. 15(1) *i.i.*

[34] Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, at 15; Report by the Commission in Greece v the UK ('Cyprus case') [1958–59].

[35] Report by the Commission in Greece v the UK ('Cyprus case') [1958–59], 326–7, at pt 318, paras 5–7.

[36] Report by the Commission in Lawless v Ireland [1960–61].

[37] Report by the Commission in the 'Greek case', Application no 3321/67, 3322/67, 3323/67, 3344/67 [1969].

[38] Report by the Commission in ibid., at 70, *i.f.*

[39] Lawless v Ireland (No 3), Application no 332/57 [1961].

[40] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium, Application no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 [1968] where the Court cites the margin of appreciation on several occasions; Wemhoff v Germany, Application no 2122/64 [1968]; Delcourt v Belgium, Application no 2689/65 [1970].

[41] Cases of De Wilde, Ooms and Versyp ("Vagrancy") v Belgium, Application no 2832/66, 2835/66, 2899/66 [1971].

referring to it as the 'power of appreciation'.[42] The Strasbourg Court expanded over time the scope of application of the doctrine from *emergency* cases (Article 15) to *non-discrimination* (Article 14) and *Articles 8 to 11 that contain the characteristic accommodation clause*.[43] Yet, the jurisprudence of the Strasbourg Court shows that the use of the margin of appreciation in emergency cases forms a special category:

> The limits on the Court's powers of review […] are particularly apparent where Article 15 (art. 15) is concerned. […] By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.[44]

In spite of the wide margin, the ECtHR still exercises a European supervision by inquiring whether the state has gone beyond the "extent strictly required by the exigencies."[45] What is more, when governments claim a state of emergency the Council of Europe will proceed to inquiries on the spot.[46]

Regarding the use of the margin in the accommodation clauses of Articles 8–11, there are two justification grounds that stand out. The first is *national security*. The nature of this ground is somehow related to the concerns surrounding public emergency cases. The ECtHR grants an a priori wide margin in such cases too.[47] The second category is *terrorism*.[48] Within the bigger category of 'crime', it forms a special case. The ECtHR's practice is coherent in that authorities taking measures against terrorism regularly need to consider the two characteristic elements of *urgency and severity*:

> Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements.[49]

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[42] At para. 93: "[The Court] then observes […] that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) (art. 8–2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was "necessary" to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others." The expression 'power of appreciation' was used subsequently too (cf. e.g. Golder v the UK, Application no 4451/70 [1975], para. 45).

[43] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights".

[44] Ireland v the UK, Application no 5310/71 [1978], para. 207.

[45] Ibid., para. 207; Lawless v Ireland (No 3), Application no 332/57 [1961], paras 22 and 36–38.

[46] Rupp-Swienty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, at 189.

[47] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 260. Cf. e.g. Leander v Sweden, Application no 9248/81 [1987], para. 59; Klass et alii v Germany, Application no 5029/71 [1978], para. 49.

[48] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 263. Cf. e.g. Murray v the UK, Application no 14310/88 [1994], para. 90.

[49] Klass et alii v Germany, Application no 5029/71 [1978], para. 48.

The close relationship of the fight against terrorism and national security is evident from the case law and the literature. The ECtHR recognised that both grounds can serve as justifications in a case,[50] and the margin of appreciation has been analysed in the literature jointly in relation to both grounds.[51] The grounds of national security and the fight against terrorism generally lead to a wide margin of appreciation.[52] This differs strongly from judgments relating to concerns of crime and disorder more generally.[53] *Crime in general or public order does not lead* to domestic discretion.[54] In these cases, the ECtHR did not mention the doctrine. It also did not grant any particular discretion where this justification ground has been used;[55] other considerations were more relevant such as the special status of a prisoner or military staff that can lead to a widening of the margin of appreciation.[56] Apart from these special relations to state authorities, *crime concerns do not trigger any particular margin of appreciation*.

Starting around the 1990s, the case law shows a certain shift, and the aforementioned description of older case law needs to be adjusted in two regards. First, authors have observed that a wide margin is *no longer regularly granted* in relation to national security and terrorism.[57] In several cases, the doctrine was neither mentioned nor effectively granted.[58] In other cases, the ECtHR argued certain discretion but *with another aspect* such as the special status of the applicants.[59]

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[50] Ibid., para. 46: "The Court, sharing the view of the Government and the Commission, finds that the aim of the [German legislation] is indeed to safeguard national security and/or to prevent disorder or crime." Cf. also Murray v the UK, Application no 14310/88 [1994], paras 90–91.

[51] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 189–190.

[52] Ibid., at 190 fn 252; Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 105.

[53] For an analysis of the case law on 'prevention of disorder and crime' under Articles 8, 10 and 11, cf. Clayton, R., and Tomlinson, H., *Law of Human Rights*, Oxford: Oxford University Press, 2000, 834 *et seq*.

[54] *Ex multis*, Funke v France, Application no 10828/84 [1993]; Murray v the UK, Application no 14310/88 [1994]; Klass et alii v Germany, Application no 5029/71 [1978]; Autronic AG v Switzerland, Application no 12726/87 [1990].

[55] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 262.

[56] For rights of prisoners, cf. e.g. Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983]; for military staff, cf. e.g. Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria, Application no 15153/89 [1994]. In the latter case, the prevention of disorder was justified by the special regime of soldiers. The ECtHR referred to the need of military discipline.

[57] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 191.

[58] Vereniging Weekblad Bluf! v NL, Application no 16616/90 [1995]; Brogan et alli v UK, Application no 11209/84, 11234/84, 11266/84, 11386/85 [1988].

[59] Cf. e.g. Vogt v Germany, Application no 17851/91 [1995], para. 53 (the special status regarded a national civil servant); cf. also Hadjianastassiou v Greece, Application no 12945/87 [1992], para. 46. The review is stricter where important rights are at stake such as political speech: Castells v

Second, *if national security is not the sole ground* on which the ruling is based, the discretion shrinks. Examples include *Observer and Guardian*[60] as well as *Sunday times* (*no 2*).[61] In these cases, national security was only one among other grounds invoked.[62] This is a noteworthy aspect that will be revisited in relation to public morality concerns.

8.3.2 Health

8.3.2.1 Notion

Articles 8–11 of the Convention list the protection of health as one of the recognised justification grounds for restrictions of human rights. The justification ground 'health' is of essential importance for the present analysis as the *protection of consumers' health from gambling addiction* is one of the central justifications in the gambling case law. The term health in the Convention includes the psychological and physical well-being of an individual person or small groups of persons as well as the public health generally.[63] Accordingly, this definition encloses *mental health disorders* such as relating to gambling. Gambling addiction impacts the psychological and physical well-being of a person.[64] The present analysis in relation to health is twofold. It first assesses the use of the margin of appreciation in *cases involving health issues* and second, it takes a close look at the role that has been granted to *medical research and empirical evidence* in the review process.

The health concerns in the gambling cases relate in particular to the protection of vulnerable individuals such as *children and adolescents*.[65] The next chapter will show that adolescents evidence a clearly increased vulnerability towards

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Spain, Application no 11798/85 [1992], paras 42 and 76; Ceylan v Turkey, Application no 23556/94 [1999], para. 34.

[60] Observer and Guardian v the UK, Application no 13585/88 [1991].

[61] Sunday Times v the UK (No 2), Application no 13166/87 [1991].

[62] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 261.

[63] Breitenmoser, S., *Der Schutz der Privatsphäre gemäss Art. 8 EMRK*, Helbing & Lichtenhahn, 1986, cited in: Grote, R., Marauhn, T., and Meljnik, K., *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Mohr Siebeck, 2006, at 810.

[64] Cf. the diagnostic criteria of gambling disorder:
Diagnostic and Statistical Manual of Mental Disorders: DSM-5, American Psychological Association (Ed.), Washington DC/London: American Psychiatric Publishing, 2013, at 585.

[65] Expressly mentioned e.g. in C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, paras 103, 105, 111; C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 60.

gambling addiction (see Sect. 9.1.3.5). Similarly, health concerns regarding children and adolescents have been pleaded in numerous cases before the ECtHR. The other *vulnerable group* involves the health and well-being of *persons of* '*unsound mind*' under Article 5(1)(e) in the context of the deprivation of personal freedom.

8.3.2.2 Protection of Well-Being and Health in Childcare

The childcare cases regard situations where a child was separated from its parents (or one parent) and put in state childcare or where the child was adopted by new legal parents. Article 8 of the Convention protects the (natural) parent(s)' right to family life, inter alia "the mutual enjoyment by parent and child of each other's company."[66] Authorities for their part justify limitations of that right with interests relating to the child's health.[67] The objective of the measure is to protect the child from physical or mental harm.[68]

General Considerations

In its jurisprudence on health concerns, the ECtHR has constantly underlined the importance of combining discretion with the central role of the proportionality

[66] W. v the UK, Application no 9749/82 [1987], para. 59; cf. also H.K. v Finland, Application no 36065/97 [2006], para. 105.

[67] On a linguistic point: The ECtHR does not always expressly refer to the term 'health'. It may also deal with the relevant measures under 'the protection of the rights and freedoms of others'. National authorities, however, expressly argue these cases with the mental and physical health of the child. In the *Olsson* case for instance, the Swedish legislation referred to the aim of the child's health or development: Olsson v Sweden (No 1) Application no 10465/83 [1988]. The Commission of Human Rights for its part considered in that case that the decisions were taken in the children's interest and had the legitimate aims of protecting health or morals and of protecting the rights and freedoms of others (para. 64). The ECtHR then adopted this view, without further distinguishing between the different grounds (para. 65). In *Johansen*, the Norwegian legislation and authorities also expressly referred to the child's mental health: Johansen v Norway, Application no 17383/90 [1996], para. 16.

[68] National legislation and governments regularly refer to the child's health. Alternatively the notions well-being or development may be used. Cf. e.g. Art. 307 Swiss Civil Code: "if the well-being of the child is in danger" or the Swedish legislation, Child Welfare Act 1960 (barnavårdslagen 1960:97), Sect. 25(a), cited in the case Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 35: "[if] a person, not yet eighteen years of age, is maltreated in his home or otherwise treated there in a manner endangering his bodily or mental health, or if his development is jeopardised by the unfitness of his parents or other guardians responsible for his upbringing, or by their inability to raise the child." For a discussion of the case, cf. Howell, C.R. (1995–1996). "The Right to Respect for Family Life in the European Court of Human Rights", *University of Louisville Journal of Family Law, 34*.

review. The motivation put forward had to be relevant and sufficient.[69] A careful weighing of all interests involved needed to be done. In spite of offering particular importance to the best interests of the child,[70] the protection of the child's health interests must be balanced with the interests of the parents. The ECtHR goes as far as to note that "it is not enough that the child would be better off if placed in care."[71] While acknowledging in certain situations a certain margin of appreciation,[72] the ECtHR's review is strict:

> [The Court's] review is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith […] in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient".[73]

The ECtHR seems in particular to *reject a role that would be limited to a mere test of arbitrariness and unreasonableness* as referred to in the earlier mentioned *Wednesbury* test in common law.[74] It insists on a *full proportionality review*.

Very Restrictive Measures Hardly Justifiable

The ECtHR has constantly emphasised the temporary character that measures should take:

> taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child.[75]

Absolute measures, namely measures that deprive the parents of their right to family life, "should only be applied in exceptional circumstances and could only be

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[69] H.K. v Finland, Application no 36065/97 [2006], para. 106; similar in Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 68, as well as in Johansen v Norway, Application no 17383/90 [1996], para. 64.

[70] H.K. v Finland, Application no 36065/97 [2006], para. 109; already in Johansen v Norway, Application no 17383/90 [1996], para. 78.

[71] Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 72. The ECtHR concurred with the view of the Human Rights Commission.

[72] *Ibid*., para. 67; similar in other public care judgments, e.g. in W. v the UK, Application no 9749/82 [1987], para. 60.

[73] Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 68.

[74] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, [1948].

[75] H.K. v Finland, Application no 36065/97 [2006], para. 109. Cf. already in Olsson v Sweden (No 1) Application no 10465/83 [1988], para. 81: "The care decision should therefore have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family." Cf. further Johansen v Norway, Application no 17383/90 [1996], para. 78.

justified if they were motivated by an overriding requirement pertaining to the child's best interests."[76]

Therefore, it is difficult to argue very restrictive measures before the ECtHR, in particular *permanent or absolute measures*.

Time Factor: Urgency

It was noted earlier that the urgency character of public emergency cases (and partly of national security and terrorism issues) may lead the Strasbourg Court to grant wide discretion to national authorities. In line with that criterion, the ECtHR distinguishes between two phases in childcare. It grants a wide margin only in relation to the *initial decision of taking a child into care* but not with regard to the decision to keep it in care. Authorities enjoy a wide margin of appreciation when initially assessing the necessity of childcare, especially in *emergency* situations. Moreover, the assessment of the appropriateness of intervention can vary from one state to another,[77] which reminds of the similar recognition of the Court of Justice that protection levels can vary between Member States (see Sect. 8.5). Many of the childcare cases originated in Nordic countries[78] where the role of the state is more comprehensive and authorities are in charge of many functions that traditionally were fulfilled by parents.[79] By contrast, *measures that do not require urgent action*, such as the decision on the continuation of public childcare or more far-reaching restrictions, *do not profit from widened discretion*:

> a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life.[80]

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[76] Johansen v Norway, Application no 17383/90 [1996], para. 78; similar in H.K. v Finland, Application no 36065/97 [2006], para. 110.

[77] Johansen v Norway, Application no 17383/90 [1996], para. 64.

[78] Ibid. (violation); Sanchez Cardenas v Norway, Application no 12148/03 [2007] (violation); K.T. v Norway, Application no 26664/03 [2008] (no violation); Söderbäck v Sweden, Application no 24484/94 [1998] (no violation); H.K. v Finland, Application no 36065/97 [2006] (violation); Eriksson v Sweden, Application no 11373/85 [1989] (violation); Rieme v Sweden, Application no 12366/86 [1992] (no violation); Margareta and Roger Andersson v Sweden, Application no 12963/87 [1992] (violation); Olsson v Sweden (No 2) Application no 13441/87 [1992] (violation); Olsson v Sweden (No 1) Application no 10465/83 [1988] (violation); Nyberg v Sweden, Application no 12574/86 [1990] (friendly settlement after Human Rights Commission found violation); L. v Finland, Application no 25651/94 [2000] (violation); K. and T. v Finland, Application no 25702/94 [2001] (violation); Nuutinen v Finland, Application no 32842/96 [2000] (no violation).

[79] For a representative statement, for instance in relation to Denmark, cf.: "*Die Dänen und die Andern*", Das Magazin, vol. 48, 2009: "«Family used to be the basis of society», says Jon, «now, it is kindergarten.» Jon says that families could break apart, and in fact they did, in high numbers. Families were not reliable. But the state was." (Author's own translation from the German original.)

[80] Johansen v Norway, Application no 17383/90 [1996], para. 64.

Procedural Rights and Administrative Burden

The ECtHR's willingness to grant wide discretion *has decreased over the years*. More recent decisions show that the Court is less inclined to grant substantial discretion. It assesses carefully whether the parents are duly involved in the process of determining the custody.[81] They must also be given access to information that authorities rely on in their decisions. *Administrative difficulties of authorities are not seen as primarily relevant*. Irrespective of encountering difficulties, the state has, in the ECtHR's view, the positive obligation to involve the parents. The mere fact that a solution chosen by the authorities is *less burdensome on them* when compared to another solution, which would restrict less the right to family life, is almost irrelevant.[82]

8.3.2.3 Persons of Unsound Mind

The second category in which health considerations have played an important role regards the lawful detention of persons of 'unsound mind' under Article 5(1)(e). The term refers to people who suffer from a *mental illness*, either permanently or temporarily. Authorities can lawfully restrict somebody's liberty if that person is a danger to the health of others or to his own health.[83]

Time Factor: Urgency

The time factor plays again an important role in the use of the margin of appreciation. Similar to what was seen in relation to public childcare interventions, the ECtHR offers wide discretion to local authorities in relation to *emergency confinements* of mentally ill persons.[84] However, the wide discretion is to some extent counterbalanced by the fact that the term 'unsound mind' is interpreted narrowly. The objective of Article 5(1) is that no one is dispossessed of his liberty in an arbitrary manner and the exception cannot "be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society."[85]

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[81] Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 65. Cf. e.g. Ignaccolo-Zenide v Romania, Application no 31679/96 [2000].

[82] Clayton, and Tomlinson, *Law of Human Rights*, at 834 and 932–933.

[83] *Ex multis*, cf. the Dutch legislation as cited in the case Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 11 *i.f.*: "the Netherlands courts will authorise the confinement of a "mentally ill person" only if his mental disorder is of such a kind or of such gravity as to make him an actual danger to himself or to others."

[84] Ibid., para. 42.

[85] Ibid., para. 37.

Review of Consistency of Policy

The Strasbourg Court reviews strictly whether the measures *truly serve the purpose* pleaded by the government. In *Aerts*, the plaintiff could not be held criminally responsible for certain offences. He was detained in the psychiatric wing of a prison. The ECtHR found that if the exception clause of unsound mind was argued, the detention of that person had to take place in an *appropriate institution where the relevant treatment* could be offered.[86]

> [T]here must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution […] The reports […] show sufficiently clearly that the Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind, the latter not receiving either regular medical attention or a therapeutic environment. […] The proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient.[87]

The ECtHR thus stresses the consistency of a policy. If health concerns are pleaded, the relevant measures or programmes *must convincingly reflect these health concerns*, and they must be suitable to address the concerns. It emphasises the decisive role of the policy as it is *practised*, not simply as it is foreseen in the law. Similarly, it underlined in *Ashingdane* that the lawfulness of the measures was not simply about the correctness of the initial order but also about matters such as the place, environment and conditions of detention.[88] The institution should ensure physical safety with adequate therapeutic and recreational programmes and continuous contact with the outside world.[89]

> [N]o detention that is arbitrary can ever be regarded as "lawful". […] there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.[90]

Central Role of Medical Science and Empirical Evidence

In the context of the gambling cases, a further aspect of the jurisprudence of the ECtHR is highly instructive: the *central role that it assigns to science*. Repeatedly, it underlines the essential role of empirical evidence and its evolving nature. Unsound mind is

> a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness

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[86] Aerts v Belgium, Application no 61/1997/845/1051 [1998], para. 46.

[87] *Ibid*., paras 46–49.

[88] Ashingdane v the UK, Application no 8225/78 [1985], para. 44.

[89] Bartlett, P., Lewis, O., and Thorold, O., *Mental Disability and the European Convention on Human Rights*, Leiden/Boston: Martinus Nijhoff Publishers, 2007, at 28.

[90] Ashingdane v the UK, Application no 8225/78 [1985], para. 44.

> changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.[91]

A restriction of liberty preconditions "medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation."[92] Confinement can only be continued if the disorder persists.[93]

A position that reflected broadly accepted research findings two decades ago may not reflect *current international scientific knowledge*. With certain time lag, newly gained scientific knowledge first affects the scientific discourse and only subsequently the general perception in society. The Strasbourg Court underlines the role of science and empirical evidence as it is a means to *objectivise the decision-making process*. Medical evidence is a substantial *safeguard against arbitrariness* and the abuse of Article 5 for other purposes.[94]

> The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.[95]

Medical Discretion

While the ECtHR insists on the central role of science, it *offers discretion to the medical personal and the authorities when assessing complex facts*. It refers to established principles of medicine,[96] psychiatric principles generally accepted at the time as well as to medical necessity;[97] it underlines that "it is for the medical authorities to decide, on the basis of the recognisable rules of medical science, the therapeutic methods to be used."[98] The ECtHR relies on the medical expertise *except if there are reasons to doubt the professional assessment*.[99] In *Winterwerp* for instance, it had "no reason whatsoever to doubt the objectivity and reliability of the medical evidence."[100] A clinic or a doctor thus enjoys wide discretion in determining the relevant data.[101] However, 'medical discretion' is not granted if the ECtHR has

[91] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 37.

[92] Ibid., para. 39.

[93] Ibid., para. 39.

[94] Rakevich v Russia, Application no 58973/00 [2003], para. 32.

[95] Herczegfalvy v Austria, Application no 10533/83 [1992], paras 82–83.

[96] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 117.

[97] Herczegfalvy v Austria, Application no 10533/83 [1992], para. 83.

[98] Ibid., para. 82.

[99] Similarly, the CJEU too grants wide discretion where it has to deal with complicated, technical questions for which the relevant authority has special expertise: Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 26.

[100] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 42.

[101] M.S. v Sweden, Application no 20837/92 [1997], para. 49; Anne-Marie Andersson v Sweden, Application no 20022/92 [1997], para. 36.

indications that the diagnosis was not reached by a *suitably qualified expert* or that there were other indications, which made the ultimate decision not objective or professional. It departs from the results of a diagnosis if it was made in bad faith or for a collateral purpose.[102]

Complex Factual Assessments

It is principally for the local authorities to evaluate the evidence before them as they are *better placed to evaluate the evidence*.[103] The Court simply reviews their decisions. The local authorities enjoy the direct contact with the interested parties and can hear them in person.[104] They are "in a better position than the European judges in striking a fair balance between the competing interests involved."[105] Domestic authorities, including courts, "had the benefit of reports from child psychiatrists and a psychologist as well as from specialised agencies."[106] Medical assessments are part of the fact-finding process. The ECtHR's general policy is to rely on facts that are established by the national courts and to apply deference to medical opinions.[107] Medicine does not always offer clear answers; this is further reason for granting discretion to domestic authorities.[108]

Professional Standards

The question remains how the ECtHR can effectively review national measures if it offers discretion regarding medical expertise. The Court underlines the central role of *best practice* and *empirical evidence*. While the ECtHR cannot itself establish the exact state of the art of best medical practice, it can strictly review whether the

[102] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 44.

[103] Winterwerp v the Netherlands, Application no 6301/73 [1979], para. 40.

[104] Similarly, the Court of Justice too grants wide discretion where the relevant decision-making authority is in a better position or has a higher overall competence to decide on the issues: Lilli, *The Principle of Proportionality in EC Law and Its Application in Norwegian Law*, at 26.

[105] Söderbäck v Sweden, Application no 24484/94 [1998], para. 33.

[106] Olsson v Sweden (No 2) Application no 13441/87 [1992], para. 87.

[107] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 43.

[108] Cf. e.g. Johnson v UK, Application no 22520/93 [1997], para. 61 where the Court notes that "in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science." Hence, the responsible authority was entitled to exercise discretion in deciding whether the patient could already be left at large (para. 63).

authorities and experts applied *professional standards*.[109] These obligations include the duty to take careful notes of the patient's state of health. In *Keenan v UK*, the Court was

> struck by the lack of medical notes concerning Mark Keenan, who was an identifiable suicide risk and undergoing [.] additional stresses […]. Given that there were a number of prison doctors who were involved in caring for Mark Keenan, this shows an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process.[110]

Substantive medical *professionalism* serves as safeguard for the Convention rights.[111] In this context, the Council of Europe enshrined a duty to keep medical notes in one of its recommendations. Article 13(2) stipulates that "[c]lear and comprehensive medical and, where appropriate, administrative records should be maintained for all persons with mental disorder placed or treated for such a disorder."[112] The Recommendation further describes in its Articles 11 and 12 professional standards and general principles of treatment.[113]

Role of Domestic Court

The Strasbourg Court takes a holistic view: it considers the whole judicial scrutiny process, which also includes domestic courts. The latter's role in the review process may depend on the discretion enjoyed by other authorities. In areas where

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[109] For two relevant publications, cf. van der Wal, G., "Quality of Care, Patient Safety, and the Role of the Patient" in *Health Law*, *Human Rights and the Biomedicine Convention*, *Essays in Honour of Henriette Roscam Abbing*, Gevers, J.K.M., Hondius, E.H., and Hubben, J.H. (Eds.), Leiden/Boston: Martinus Nijhof Publishers, 2005, and Hubben, J.H., "Decisions on Competency and Professional Standards" in *Health Law*, *Human Rights and the Biomedicine Convention*, *Essays in Honour of Henriette Roscam Abbing*, Gevers, J.K.M., Hondius, E.H., and Hubben, J.H. (Eds.), Leiden/Boston: Martinus Nijhof Publishers, 2005.

[110] Keenan v UK, Application no 27229/95 [2001], para. 114.

[111] Bartlett, Lewis, and Thorold, Mental Disability and the European Convention on Human Rights, at 28.

[112] Art. 13(2) Recommendation REC(2004)10 of the Committee of Ministers to Member States Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder.

[113] For conventions containing rights relating to health, cf. ibid., at 112 fn 3; Universal Declaration of Human Rights, 1948, Art. 25 available at http://www.un.org/en/documents/udhr/; International Covenant on Economic, Social and Cultural Rights, 1966, Art. 12 available at http://www.unhcr.org/refworld/docid/3ae6b36c0.html; Convention on the Elimination of all Forms of Discrimination against Women, 1979, Art. 12 available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm; United Nations Convention on the Rights of the Child, 1989, Art. 24 available at http://www2.ohchr.org/english/law/crc.htm; Council of Europe; European Social Charter of the Council of Europe, Principle 11 and Art. 13; Convention on Human Rights and Biomedicine, 1997, Art. 3 available at http://conventions.coe.int/Treaty/en/Treaties/html/164.htm.

parliamentary scrutiny is weak, the ECtHR demands strict judicial review. An effective control was especially needed *where the executive enjoyed wide discretionary powers* and parliamentary scrutiny was low.[114]

> [A]n interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[115]

8.3.2.4 Results

Over all, the analysis of the ECtHR's case law in relation to health concerns shows that the Strasbourg Court does *not grant any particular margin of appreciation*. It does however grant wider discretion where situations show *urgency*. This is the case in relation to the *initial decision* of taking a child into care or a person of unsound mind into detention. The Strasbourg Court heavily emphasises the *central role of science*, *empirical evidence*, *best practice and professionalism*. This serves to *objectivise the decision-making process and to avoid arbitrariness*.

8.3.3 Public Morality

8.3.3.1 General Approach

Handyside is arguably one of the most prominent decisions of the ECtHR. Mr Handyside, an English Publisher, delivered bookstores with 'The Little Red Schoolbook', which was mainly aimed at school children, age 12 and above. The book was seized due to its controversial content regarding certain passages that described actions that could appear as morally questionable or illegal.[116] *Handyside* is the role model of a public morality case. It exclusively concerned that justification

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[114] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983], para. 90.

[115] Klass et alii v Germany, Application no 5029/71 [1978], para. 55.

[116] The judgment cites *inter alia* two passages: "Maybe you smoke pot or go to bed with your boyfriend or girlfriend – and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret. Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'."

"Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed. But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before."

ground, and the UK authorities argued protecting a particularly *vulnerable* population group: *children and adolescents*. The ECtHR granted wide discretion:

> it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place […]. 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 requirements […]. Article 10 […] 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.[117]

The Strasbourg Court applies a wide margin of appreciation in relation to public morality concerns,[118] as well illustrated in *Handyside*. Certainly, the wide discretion granted in *Handyside* was also likely due to the fact that the book was primarily aimed at school children. The Human Rights Commission and the ECtHR have more readily accepted an intervention by the state when the authorities aim at protecting youth.[119] This motivation was also central in the case *Müller* versus *Switzerland*, which concerned the exhibition of sexually explicit art. The ECtHR noted that the exhibition was open to everybody, including children.[120]

The special characteristic justifying a wide discretion is linked to the fact that pure questions of morality are, by their very nature, *not open to an objective assessment*. Views on moral issues vary strongly by culture, time, geography, religion and, last but not least, individually. Are questions of morality thus exempt from judicial review?

The answer is found in *Open Door and Dublin Well Woman v Ireland*,[121] another role model case of public morality. Several Irish organisations provided counselling to pregnant women in Ireland regarding abortion facilities outside of Ireland. In Ireland, abortion was banned. A court injunction prohibited those organisations to provide information on abortion facilities abroad. Before the ECtHR, the Irish government argued that the former should refrain from reviewing moral considerations. However, the Court reviewed the measure and found the Irish limitation of the freedom of expression disproportionate:

> The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable.[122]

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

[118] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 211. For further illustrative examples, cf. Müller et alii v Switzerland, Application no 10737/84 [1988], as well as Otto-Preminger-Institut v Austria, Application no 13470/87 [1994].

[119] Kaering-Joulin, R., "Public Morals" in *The European Convention for the Protection of Human Rights*, Delmas-Marty, M. (Ed.), Dordrecht/Boston/London: Kluwer Academic Publishers, 1992, at 83, 87.

[120] Müller et alii v Switzerland, Application no 10737/84 [1988], para. 36.

[121] Open Door and Dublin Well Woman v Ireland, Application no 14234/88 and 14235/88 [1992]. For a discussion of the case, cf. Thompson, A. (1994). "International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Women Centre v. Ireland", *Boston University International Law Journal, 12*, 371.

[122] Open Door and Dublin Well Woman v Ireland, Application no 14234/88 and 14235/88 [1992], para. 68.

The Strasbourg Court's outspoken reply is evidence of its conviction that discretion does not exclude a review of the aim and of the proportionality in relation to public morality concerns. In the Irish case, it was decisive that the national measures were overbroad; they imposed an absolute and permanent restraint. Moreover, the measure was found to be not even suitable as Irish women could get the respective information through other channels too. They went in significant numbers to the UK to receive abortion services.[123]

The ECtHR recognises the *special nature of public morality* issues and acknowledges *an* a priori *wide margin of appreciation* to national authorities. On the whole, public morality concerns generally lead to more significant self-restraint on the part of the Court than in cases where national security is pleaded.[124] At the same time, the ECtHR insists on reviewing the aim and the proportionality of the measures.

8.3.3.2 Limitations: Pure Question of Morality? European Consensus?

Two important limitations of the wide margin of appreciation must be noted as they both serve as safeguards against the abuse of the public morality justification. First, the ECtHR grants wide discretion only if the case relates to a pure question of public morality, that is, when there is *no other justification ground* in view. This is consistent with what has been mentioned earlier in the context of crime, more precisely, national security and emergency cases. Public morality concerns do not lead to a wide margin of appreciation if they are not the *sole justification* in the case.[125]

This approach of the Strasbourg Court is *consistent with the twofold model of public morality concerns* that was suggested in Sect. 7.3. Cases involving questions of morality essentially fall in two categories. In the first category, the moral disapproval concerns the activity *as such* ('core cases of morality'). Were an international court to impose its own moral views, it would take a big risk of hampering the acceptance of its case law. By contrast, the second category of moral concerns does not disapprove of the activity as such but of the *detrimental consequences* that the activity potentially involves. In relation to this latter category, science can play a constructive role by *objectivising a discussion on risks*. Nevertheless, it must be acknowledged that the scientific paradigm also has its

[123] For further illustrative cases, cf. Müller et alii v Switzerland, Application no 10737/84 [1988] on the confiscation of pictures of the Swiss artist Müller, which depicted sodomy and blasphemy, and Otto-Preminger-Institut v Austria, Application no 13470/87 [1994] relating to a blaspheme film where the Austrian government relied on moral considerations since religious feelings, which got hurt, could possibly lead to public disorder.

[124] Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, at 209.

[125] Silver et alii v the UK, Application no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 [1983]; Olsson v Sweden (No 1), Application no 10465/83 [1988].

limits. In the very last, it has established methods to distinguish the objective appearance of information from subjective reactions to it.[126]

The second limitation pertains to the fact that the ECtHR does not grant wide discretion if it can identify a common moral position, a *consensus among the Signatory States*. While the ECtHR accepts that different states may have different views on questions of morality,[127] it does not approve when a Signatory State is clearly lagging behind. Consensus may be witnessed not only in law but also in practice. If the Strasbourg Court notes such consensus, it narrows down the initially granted wide margin of appreciation. This criterion can be understood as an *attempt to assess something objectively*, namely morality, which is generally hard to assess in any objective way. The ECtHR has repeatedly used this criterion,[128] which also illustrates well the dynamic method of interpretation of the ECtHR. The Strasbourg Court interprets the Convention as a living instrument in the light of present day conditions.[129] The extent of discretion thus depends on the presence of a consensus.[130]

8.3.3.3 The Universality-Diversity Dichotomy and Cultural Relativism

The Strasbourg Court offers substantial discretion to national authorities in cases that exclusively relate to public morality concerns. However, public morality is a very diffuse and accordingly complicated justification ground.[131] The challenge for the ECtHR is to accommodate cultural, religious and moral differences while avoiding that this justification ground is arbitrarily abused. As noted earlier, the doctrine of the margin of appreciation and the principle of subsidiarity are in a relationship of *lex specialis* and *lex generalis*,[132] with the principle of subsidiarity showing a more comprehensive character and addressing the universality-diversity

[126] Regarding the problem of causality of information and its legal dimensions, cf. Gasser, U., *Kausalität und Zurechnung von Information als Rechtsproblem*, Doctoral thesis submitted at the University of St.Gallen, Munich: Verlag C.H. Beck, 2002.

[127] The ECtHR noted that there was no such consensus regarding the question of assisted suicide. While some countries like Switzerland approved or at least tolerated assisted suicide, other Signatory States of the Convention defended a contrary policy: Haas v Switzerland, Application no 31322/07 [2011], para. 55. For a comment, cf. Hottelier, M., Mock, H., and Puéchavy, M., *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed., Geneva/Zurich/Basel: Schulthess Médias Juridiques SA, 2011, at 83–88.

[128] Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", at 256.

[129] Baudenbacher, C., "Introduction to: Methods of Interpretation – Judicial Dialogue" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008c, pp. 171–174, at 173.

[130] Handyside v the UK, Application no 5493/72 [1976].

[131] Grote, Marauhn, and Meljnik, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, at 810.

[132] Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights.

dichotomy more broadly.[133] What does this dichotomy consist of? Human rights are supposed to be of universal validity, as they are assumed to be inherent to a person's existence. However, there are substantial cultural differences between different countries and regions. Ultimately, the dichotomy relates to the question of the *manner in which universal human rights can and should be applied in a culturally diverse world*.

A broader perspective shows that the dichotomy is not limited to human rights. In the EU and the EEA, the corresponding principles are the 'universally' applicable fundamental freedoms. Here, cultural diversity is a challenge to the homogenous nature of the Internal Market. Likewise, the dichotomy also arises before the WTO judiciary, even though the panels and Appellate Body apply a more contractual interpretation rather than a 'constitutional' balancing exercise. This finds expression in a methodology of the WTO judiciary that is dominated by a grammatical interpretation.[134]

In sum, the *dichotomy* represents a *double-edged challenge* to an international judicial mechanism. If the cultural diversity is not taken into account, the respective court risks having its acceptance hampered. If the argument of cultural diversity is granted too much weight, the universality of the 'principles', that is, human rights or fundamental freedoms, is at risk. Resorting to 'cultural relativism' can therefore water down these guarantees and subject them to arbitrary determinations.[135] The *challenge of cultural relativism* is best seen in cases involving morality concerns. The approach of the ECtHR to deal differently with cases that exclusively regard moral questions compared to others where morality is only one of the justification grounds seems an appropriate answer to the challenge. The approach also reminds of the earlier described twofold model, which distinguishes between core cases of morality and cases of mere disapproval of detrimental side effects (see Sect. 7.3).

8.4 Summarising the Principles and Criteria and Double-Checking Them in Gambling Cases Before the European Court of Human Rights

The two previous sections have elaborated the *principles and criteria that steer the Strasbourg Court's use of the margin of appreciation*. The identified principles and criteria are briefly summarised before their application is double-checked with the rare cases before the ECtHR that involved games of chance.

[133] For a detailed study of this dichotomy, cf. Brems, *Human Rights*: *Universality and Diversity*.

[134] Sacerdoti, G., "Methods of Interpretation by the Appellate Body of the WTO" in *The Role of International Courts*, Baudenbacher, C., and Busek, E. (Eds.), Stuttgart: German Law Publishers, 2008, pp. 175–183.

[135] The CJEU has struggled with similar tensions, e.g. in C-41/74 Yvonne van Duyn v Home Office [1974] ECR 1337; C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

8.4.1 General Principles

The margin of appreciation is always *embedded in the broader process of judicial scrutiny*. Irrespective of the extent of the margin granted, *the aim and the proportionality of the national restrictions are always* carefully reviewed. If the motivation of the national decision is not convincing and consistent, *the ECtHR no longer feels bound to the margin of appreciation* a priori *granted* and is inclined to impose its own balancing of interests. The margin of appreciation is further informed by the *importance of the Convention right* (for instance, certain aspects of private life) and the *special nature of the justification ground* (for instance, morality).

8.4.2 Criteria Regarding Crime, Health and Public Morality

It was analysed whether the ECtHR grants a somewhat wider margin of appreciation in relation to the justification grounds relevant in the gambling case law. The practice is relatively easy to observe since the ECtHR has been very explicit about its use of the doctrine in relation to crime (prevention), health and public morality and has offered a detailed catalogue of criteria. The Court of Justice is often less explicit about its use of the doctrine, partly due to the different and shorter drafting style of the judgments. Nevertheless, the literature identified criteria of the Court of Justice, which are often reminiscent of those of the Strasbourg Court.[136]

8.4.2.1 Crime

Within the category of crime in the large sense, one situation clearly stands out: *public emergency cases* under Article 15. Such situations are characterised by the time factor *urgency* and the *severity* of the threat. This particular combination of factors that are challenging to any government justifies in the ECtHR's view a wide margin of appreciation. Nevertheless, the ECtHR reviews the aim and proportionality in these cases too.

There are two more categories of concerns that may be summarised under prevention of crime, which in the past profited from a wide margin (even though not

[136] Criteria commonly used by both courts include: urgency of situation, importance of objective pursued, technicality of subject-matter, degree of expertise required, severity of impact of measure, search for less restrivte means, temporary versus permanent measure: Tridimas, T., "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny" in *The Principle of Proportionality in the Laws of Europe*, Ellis, E. (Ed.), Oxford/Portland: Hart Publisher, 1999, pp. 65–84, at 76–77.

as wide as in emergency cases): *national security and terrorism*. This is coherent in that situations relating to these concerns may involve the two aforementioned characteristic elements of urgency and severity. In more recent years, the Court has nonetheless *narrowed down* the margin in these situations. If national security is *not the sole ground* on which the ruling is based, the margin is further narrowed down. In relation to *all other forms of crime* — and consequently those forms of crime of relevance in the gambling cases (fraud, money laundering) — *the ECtHR does generally not mention the doctrine and does not grant a particular margin of appreciation*.

8.4.2.2 Health

Most cases touching upon health concerns before the ECtHR relate to enforced childcare by the state and the deprivation of freedom of persons of unsound mind. In regards to the former, the ECtHR proceeds to a careful weighing of all interests. It is in particular not enough to merely consider that the child would be better off if placed in care. Permanent or absolute restrictions can hardly ever be justified. The ECtHR only grants wide discretion for the *initial decision of placing* the child in public care. Mere *administrative burdens* are not seen as primarily relevant considerations.

Regarding the detention of persons of unsound mind, the time factor of *urgency* is again decisive to grant authorities wide discretion for the decision of the *initial detention*. The term 'unsound mind' is interpreted strictly. By contrast, the margin is narrowed down for the question of keeping the person in detention. In particular, the consistency of the effectively practised policy is closely reviewed. Programmes and institutions need to be *suitable*, from a medical perspective, to address the person's mental health problem by ensuring *adequate therapeutic and recreational programmes* as well as contact with the outside world.

Medical research, *empirical evidence*, *best practice and professionalism* play a central role in the considerations of the Strasbourg Court. The ECtHR sees these points as *effective safeguards against arbitrariness* and the abuse of the derogation for other purposes. The Court demands that the constantly evolving best international science is relied on. Nonetheless, it grants so-called *medical discretion*: in principle, it is for the medical authorities to decide the therapeutic methods. Similarly, the ECtHR grants some discretion to authorities when complex facts must be assessed and balanced as local authorities are usually better placed to strike a fair balance.

The ECtHR imposes on both public authorities and medical personal high professional quality standards. This includes the duty to carefully observe the development of a disease and to keep careful record. Finally, the ECtHR demands *strict judicial control where the executive has far-reaching discretionary powers*. Overall, the ECtHR does *not grant a particular margin of appreciation* in relation to health concerns.

8.4.2.3 Public Morality

For good reasons, the Strasbourg Court grants wide discretion in relation to public morality issues. Views on moral questions are *necessarily subjective and hard to objectivise*. The ECtHR reviews the aim and proportionality of the restrictions in these cases too. The policy of granting wide discretion experiences two limitations that serve as safeguards against the abuse of the public morality justification. First, the ECtHR grants wide discretion only if the facts of the case *exclusively concern public morality* and no other justification ground. This is reminiscent of the approach in relation to *national security and emergency cases*.[137] Second, a wide margin is no longer granted if a *common European consensus* can be identified among the Signatory States on this moral issue.

8.4.3 Double-Checking the Principles and Criteria in Gambling Cases

The present analysis of the use of the margin of appreciation has focused on the extensive case law of the ECtHR regarding the grounds of justification of crime, health and morality concerns. The ECtHR has rarely dealt with cases that involved the use of the margin of appreciation in relation to games of chance specifically. In the following, it will nevertheless be double-checked how the ECtHR used its principles and criteria in these cases as well.

Among the cases that appeared to be relevant for the present analysis,[138] it can be observed that most of them involved no margin of appreciation. Often, they related to gambling tax issues and aspects of fair trial under Article 6 ECHR.[139] Other cases included the question whether the Convention or domestic law granted a right to provide gambling services or to acquire gambling goods (see Sect. 11.3.1). The mere *presence of games of chance did not trigger the ECtHR to apply a margin of appreciation*, and even less, a wide margin of appreciation.

In the rare cases where discretion for domestic authorities was discussed, the use of the margin of appreciation was argued on other grounds. The decision in *TIPP 24 AG v Germany* regarded a German operator that offered online intermediation of betting. It had to cease its remaining activities as of January 2009 due to an online gambling ban introduced by a State Treaty between the German Länder. The ECtHR granted a wide margin of appreciation in this case. The discretion, however, was not argued with the presence of games of chance but the Convention rights concerned.

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[137] See further the proposed model referring to 'core cases' of morality at Sect. 7.3.

[138] A search in the ECtHR's collection of documents with the terms 'gambling', 'gaming' and 'games of chance' (in judgments and decisions) found 75 hits. However, the large majority was irrelevant for the present discussion. Most hits resulted from excerpts of facts and national laws cited in the judgment or decision that had little or nothing to do with the outcome of the case.

[139] *Ex multis*, Liborio Garofolo v Switzerland, Application no 4380/09 [2013].

The ECtHR noted that domestic authorities enjoyed wide discretion in striking a fair balance between public interest objectives and *company property rights* (*Article 1, Protocol No 1*) *as well as freedom of speech in commercial matters* (*Article 10 ECHR*).[140] The Court's decision is in line with a much older decision of the Commission regarding the revocation of an Irish licence to operate amusement arcades (Article 1, Protocol No 1).[141] Similar to the domestic practice of national courts, the ECtHR also applied a more lenient review as regards questions relating to *classic exercise of administrative discretion*, involving aspects of *expediency or specialised expertise* (see also environmental or planning matters).[142]

The approach is perfectly consistent with the ECtHR's general case law. Discretion involving questions of expediency or specialised expertise was noted in relation to 'medical discretion' or 'complex factual assessments' as well (see Sect. 8.3.2.3). The analysis further established general principles that apply irrespective of the justification ground. One principle is that the width of the *margin of appreciation varies between different expressions of Convention rights* (see Sect. 8.2.3). Examples of particularly important expressions where hardly any margin of appreciation can apply include for instance core aspects of private sphere as well as political debate.[143] It was noted that expressions of lesser importance included for instance the rights of coalitions under Article 11;[144] the same applies to company property rights and commercial speech (advertising).

8.5 The Margin of Appreciation in the Gambling Case Law of the Court of Justice of the EU

This section discusses the use of the margin of appreciation in the case law on gambling. First, the *development of the practice* of the margin of appreciation before the Court of Justice is outlined. In the next stage, the practice is compared with the use of the margin of appreciation by the EFTA Court. Finally, these approaches are contrasted with the principles and criteria established in the previous section in relation to the doctrine as applied by the ECtHR (Sect. 8.5.5). Section 8.5 solely examines the overall use of the margin of appreciation in the gambling cases. A detailed analysis of the proportionality review is reserved for the subsequent Chap. 9.

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[140] TIPP 24 AG v Germany, Application no 21252/09 [2012], paras 32, 35, 39.

[141] Colm McKenna v Ireland, Application no 16221/90 [1991].

[142] Sigma Radio Television Ltd. v Cyprus, Application no 32181/04 and 35122/05 [2011], para. 153; Kingsley v the UK, Application no 35605/97 [2000], para. 53 (referred to Grand Chamber but solely on the point of costs).

[143] Rupp-Swienty, Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, at 141.

[144] Villiger, "Proportionality and the Margin of Appreciation: National Standard Harmonisation by International Courts", at 210.

8.5.1 Early Case Law: Unlimited Margin of Appreciation

In its early case law in *Schindler*,[145] *Läärä*,[146] *Zenatti*[147] and *Anomar*,[148] the Court of Justice practised a virtually unlimited margin of appreciation and did de facto not review the proportionality of the measures.

The first case, *Schindler*, concerned the UK legislation on lotteries that banned large-scale lotteries at the time. The Court of Justice granted an unlimited margin of appreciation due to the '*peculiar nature*' of lotteries that it noted. The peculiar nature was concluded from the following elements: lotteries like other types of gambling involved moral, religious or cultural aspects. They further involved a high risk of crime or fraud. They also incited people to spend, which could have damaging individual and social consequences. It was not without relevance that lotteries were used to finance benevolent or public interest activities.[149]

> Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[150]

The Court of Justice continued the policy of an unlimited margin of appreciation in *Läärä*. This case was significantly different in that the relevant gambling services (slot machines) were not banned, but the right to offer such games was reserved to a state operator. The Court revisited what it had referred to in *Schindler* as "a sufficient degree of latitude:"

> However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment […]. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict. In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted

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

[146] 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.

[147] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289.

[148] C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621.

[149] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 60.

[150] Ibid., para. 61. Regarding lottery regulation in the EU, cf. Kingma, S.F., and van Lier, T., *The Leeway of Lotteries in the European Union – A Pilotstudy on the Liberalisation of Gambling Markets in the EU*, Amsterdam: Dutch University Press, 2006.

> to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.[151]
>
> The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States.[152]

The approach of the Court in *Schindler* and *Läärä* was remarkable in that it significantly differed from its general practice. Under the preliminary ruling procedure of Article 267 TFEU, the Court is called to offer guidance to the referring court. As Advocate General La Pergola noted in *Läärä*, the Court is required

> to reach an interpretation of [Union] law which gives the national court as complete and useful guidance as possible.[153]

The Court of Justice usually discusses the proportionality of the measure. Sometimes, it then decides itself whether the measures were proportionate. Often, it will leave it to the referring court to answer this question while providing criteria that are aimed to guide the national court's decision on this point.[154]

The decisions in *Schindler* and *Läärä* are very different in this regard. The Court granted an *unlimited* margin of appreciation, therefore giving Member States a 'carte blanche' in this area of law. It did not proceed to a discussion of the proportionality of the measures. *It concluded itself* in both cases that the measures were proportionate and did not leave the answer to that question to the referring court.

The next two cases did not significantly change that picture. The *Zenatti* ruling confirmed the wide discretion enjoyed by the Member States. However, Advocate General Fennelly had pointed at inconsistencies in the Italian gambling regime and the Court of Justice took up this point:

> However, as the Advocate General observes […], such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.[155]

This remained an isolated statement. The Court of Justice did not engage in a more detailed discussion of this point nor did it hold the Italian measures

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[151] 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 35–36.

[152] Ibid., para. 39.

[153] Opinion of Advocate General La Pergola in ibid., para. 23.

[154] For an illustrative example, cf. C-434/04 Criminal Proceedings against Jan-Erik Anders Ahokainen and Mati Leppik [2006] ECR I-9171, para. 39.

[155] C-67/98 Questore di Verona v Diego Zenatti [1999] ECR I-7289, para. 36.

disproportionate. It had expressly held the measures to be proportionate in *Schindler* and *Läärä*. In *Zenatti*, it left it to the national court to verify

> whether […] the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.[156]

In *Anomar*, the Court found the Portuguese legislation to be similar to the Finnish legislation as discussed in *Läärä*. It limited its ruling for large parts to simply referring to the unlimited discretion of national authorities. The Advocate General noted that the Court of Justice had substantially relaxed the principle of proportionality in *Läärä*, "which normally applies to implementation of the provisions of the freedom to provide services."[157] The Court's reference to the principle of proportionality remained rhetoric. It neither engaged in a proportionality test nor did it instruct the national court to further look at this point:

> the Court has held that national measures which restrict the freedom to provide services […] must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it […].
>
> Nonetheless, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict […] and which have been deemed compatible with the Treaty.
>
> […] the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.[158]

8.5.2 Gambelli and Lindman: Limitation of the Margin of Appreciation

Within one week, the Court of Justice handed down the decisions in *Gambelli*[159] and *Lindman*.[160] It was the first time that a significant change was applied in the use of the margin of appreciation. Hatzopoulos and Do concluded that these decisions brought an end to the Court of Justice's tendency to turn a blind eye to protectionist justifications in the field of gambling.[161] According to the Court in *Gambelli*, national measures could only be suitable if they were "consistent and systematic."

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[156] Ibid., para. 37.

[157] Opinion of Advocate General Tizzano in C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) et alii v Estado português [2003] ECR I-8621, para. 71.

[158] Ibid., paras 86–88.

[159] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[160] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519.

[161] Do, T.U., and Hatzopoulos, V. (2006). "The Case Law of the ECJ concerning the Free Provision of Services: 2000–2005", *Common Market Law Review, 43*(4), 923–991, at 971.

If national authorities incited and encouraged consumers to participate in gambling primarily in view of the financial benefit for the public purse, they could not invoke public order concerns.

Gambelli was the first decision to contain some element of proportionality review. More precisely, it discussed the suitability of the measures. The referring Italian court had noted that Italy practised a policy of expansion of games of chance, while claiming a goal of limiting gambling opportunities. In this case, the Court could hardly avoid being outspoken. Inconsistencies of the Italian gambling regime had already been critically noted by Advocate General Fenelly in *Zenatti* and Advocate General Alber in *Gambelli*.

> In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.[162]

The Court of Justice also gave some guidance regarding the compatibility of the Italian tender licensing procedure with Union law and as regards the proportionality of the criminal penalties imposed on unlicensed operators. The Court's decision even seemed to leave the door somehow open for a certain degree of mutual recognition of licences.[163] *Gambelli* differed significantly in that the Court *for the first time engaged in a discussion* of the referred questions. The Court of Justice left it ultimately to the national court to decide whether the Italian legislation "actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims."[164]

As opposed to *Gambelli*, the decision in *Lindman*[165] received little attention in the literature and with the interested stakeholders. This is because it was handed down only one week after *Gambelli* and the latter was seen as a major step in the case law on gambling. Also, the facts of the case concerned rather straightforward discriminatory measures. Lottery revenues with foreign lotteries were subject to taxation while revenues from Finnish lotteries were not. Notable was not the outcome of the ruling but an interesting *obiter dictum*.[166] The Court stated that the case file did not disclose any *statistical or other evidence* on the *gravity of the risks* connected to playing games of chance. Since the Court added this criterion without any need to do so, it suggested that authorities needed to provide empirical evidence when arguing gambling-related risks. Hereby, the Court not only underlined the *burden of proof*, which was with the Member State, but also suggested that empirical evidence and accordingly a scientific perspective on gambling-related risks could take a central role in future cases.

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[162] C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031, para. 69.

[163] Ibid., paras 72–73.

[164] Ibid., para. 75.

[165] C-42/02 Diana Elisabeth Lindman [2003] ECR I-13519.

[166] An *obiter dictum* is a remark made in a judgment, which is not necessary to decide the case. Instead, the case serves as the opportunity to make that statement in view of future cases.

8.5.3 Subsequent Case Law: A Mixed Picture

The decisions in *Gambelli* and *Lindman* held the potential to significantly change the direction of the case law. For the first time, the margin of appreciation had been limited. Under the suitability test, a consistent and systematic policy had been demanded. Moreover, the Court had pointed at the role of evidence in relation to gambling-related risks.

However, the post-*Lindman* decisions show a mixed picture with regard to the use of the margin of appreciation. Decisions with an approach seemingly similar to that in *Gambelli*, for instance *Placanica*,[167] altered with other decisions whose standard of review was reminiscent of the early case law, for instance *Liga Portuguesa*.[168]

Chapter 9 will closely assess the other side of the coin: the proportionality review.[169] Overall, it can already be noted that the margin of appreciation in the gambling cases remained very wide in the post-*Gambelli* decisions. The Court of Justice largely stuck to the special use of the margin of appreciation specific to games of chance.[170] This overall view must, however, be split in different aspects: the use of the margin as well as the corresponding proportionality review vary between different aspects. In general terms, the practice of the Court since *Placanica*[171] can be summarised as follows.

There are some aspects for which Member States enjoy unlimited discretion. This is the case for the desired protection level against gambling-related risks, such as gambling addiction and various forms of crime. In principle, Member States are furthermore free in their choice of the regulatory licensing model. A Member State can prohibit gambling offers or allow them. If it decides to legalise them, it enjoys almost unlimited discretion with regard to the regulatory model. It can install an exclusive right holder with public or private ownership, a tightly or more liberally regulated licensing model or even a model that does not require an authorisation. Member States can allow some games while prohibiting others (for example, online games); they can regulate some types of games more strictly than others. Ultimately, it is up to the Member States' discretion whether they want to recognise the standards ensured by regulation and surveillance in other Member States.

For other aspects of games of chance or under certain conditions, this unlimited margin of appreciation may be narrowed. The Court narrows the margin of appreciation where inconsistencies become obvious in the national policy on games of chance. Where governments allow their own operators(s) to significantly

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[167] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

[168] 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.

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

[170] Becker, T., and Dittmann, A., "Gefährdungspotentiale von Glücksspielen und regulatorischer Spielraum des Gesetzgebers" in *Aktuelle Probleme des Rechts der Glücksspiele – Vier Rechtsgutachten*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, pp. 113–151, at 139.

[171] C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891.

expand or heavily advertise their offers while claiming public policy concerns like gambling-related crime, the Court of Justice no longer feels bound to the very wide margin of appreciation. Similarly, the Court of Justice held in recent decisions such as *Zeturf* or *Dickinger & Ömer* that gambling monopolies could only be justified in relation to a particularly high level of consumer protection. The Court appeared to narrow the margin of appreciation where the justification ground related to crime concerns rather than gambling addiction concerns (namely, addiction concerns relating to online gambling). The Court of Justice still grants very wide discretion when it comes to games of chance played via the Internet.

The margin of appreciation is small in relation to licensing procedures. If the Member State does not opt for an exclusive right holder, the Court reviews the national measures much more closely. The duties of transparency and non-discrimination play a central role in this context. Similarly, where a licensing system involves restrictions to prevent forms of crime, such as seat requirements for companies or a ban on stock-registered companies, the margin of appreciation becomes small.

Overall, the Court of Justice has still applied a wide margin of appreciation in the case law since *Placanica*. Some aspects enjoy an unlimited or hardly limited margin of appreciation while others are granted a narrower margin. In more recent cases, however, a relativisation of the wide margin of appreciation and occasionally a change of tonality could be observed, including in *Markus Stoss*, *Zeturf*, *Dickinger & Ömer* and *Costa & Cifone*.

8.5.4 EFTA Court

The EFTA Court dealt in two cases with gambling services, one direct action[172] and one advisory opinion.[173] The direct action concerned the compatibility of the Norwegian nationalisation of the gaming machine market; the advisory opinion related to all other forms of games of chance in Norway.

In relation to the use of the margin of appreciation, the EFTA Court quoted the Court of Justice with the latter's statement that gambling involved cultural, religious and moral aspects and harmful consequences.[174] The EFTA Court also granted a certain margin of appreciation to national authorities:

> Moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming, may serve to

[172] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8.

[173] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86.

[174] The formula was already adopted in C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039. The EFTA Court referred to two out of three factors by which the CJEU had argued a wide margin of appreciation: the moral, religious and cultural conglomerate and the harmful consequences. It did not refer to crime concerns to justify the margin of appreciation.

> justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order. The EEA Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures they impose must satisfy the conditions laid down in the case law of both the Court and the Court of Justice of the European [Union] as regards their proportionality […]. In that respect, the burden of proof is on the State responsible for the restriction.[175]

As will be shown in more detail in Chap. 9, the EFTA Court combined the margin of appreciation with an *effective proportionality review*.[176] In the direct action procedure, a somehow stricter review could be expected for procedural reasons. In this procedure, the EFTA Court was not only handing down an interpretation of EEA law, it was in the possession of all facts and under the legal obligation to decide on the merits of the case. Interestingly, the EFTA Court applied a stricter standard of review in the advisory opinion.[177] That ruling took a close look at potential inconsistencies and offered substantial guidance to the referring Norwegian court.

In *EFTA-Ladbrokes*, the EFTA Court made an express statement in relation to the extent of the margin of appreciation. The agents for the Norwegian government had pleaded that judicial review was limited in the area of gambling. The courts could assess the necessity of the measures only if they had reasons to believe that the national provisions were discriminatory or protectionist.[178] Similarly, in *ESA* versus *Norway*, the government position had been that it was only for the national authorities to assess the necessity, notwithstanding the fact that this was a direct action case.[179] The EFTA Court commented in detail on the use of the margin of appreciation in the area of gambling:

> This cannot be accepted. Even though the Contracting Parties do have discretion in setting the level of protection in the field of gambling, this does not mean that the measures are sheltered from judicial review as to their necessity […].

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[175] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 42.

[176] The stricter review – in comparison to the CJEU – prompted a Norvegian scholar to ask whether the EFTA Court was more Catholic than the Pope: Fredriksen, H.H. (2009). "Er EFTA-domstolen mer katolsk enn paven? – noen betraktninger om EFTA-domstolens dynamiske utvikling av EØS-retten og streben etter dialog med EF-domstolen", *Tidsskrift for Rettsvitenskap, 122*(4–5), 507–576.

[177] This EFTA Court case is referred to as '*EFTA-Ladbrokes*' to avoid confusion with the '*Ladbrokes*' case decided by the CJEU.

[178] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, para. 55.

[179] E-1/06 EFTA Surveillance Authority v Norway [2007] EFTA Court Report 8, para. 22: "the Defendant asserts that if a national gambling restriction is found to be legitimate and suitable, then, as a consequence of the margin of appreciation conferred on them, it is for the national authorities to assess whether it is also necessary."

> To the extent the legislation at issue is deemed suitable, it must be assessed whether the measures at issue go beyond what is necessary to meet the aims pursued. As with regard to suitability, the necessity of the measures must, at the outset, be assessed in relation to each legitimate objective. […]
>
> The necessity test consists in an assessment of whether the exclusive rights system is functionally needed in order to achieve the legitimate objectives of the legislation at the level of protection chosen by the Contracting Party concerned, or whether this could equally well be obtained through other, less restrictive means […]. Thus, where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection."[180]

In contrast to the approach of the Court of Justice, the EFTA Court underlined that it needed to be shown that a regulatory model such as a monopoly was *functionally needed to achieve a certain objective*.[181] It also referred to "other, less restrictive means," the characteristic test behind the notion 'necessity', which the Court of Justice has normally avoided to mention.[182]

The guidance offered by the EFTA Court in *EFTA-Ladbrokes* was much more substantial than in the gambling case law of the Court of Justice at that time. This could be particularly well observed in relation to the criterion of a *consistent and systematic policy* and the protection level that was sought *in practice*:

> The restrictions placed on the monopoly provider must be taken into account when identifying the level of protection actually sought by Norwegian authorities under the current exclusive rights system. A low level of protection exists if the Norwegian authorities tolerate high numbers of gaming opportunities and a high level of gaming activity. Important factors in this regard are restrictions on how often per week or per day games are on offer, restrictions on the number of outlets which offer games of chance and on sales and marketing activities of the outlets, as well as restrictions on advertising and on development of new games from Norsk Tipping.
>
> With regard to marketing, several factors have to be taken into account by the national court. In particular, it will have to look into the extent and effect of marketing and development of games of chance, inter alia how much Norsk Tipping spends in that regard as well as the form and content of the marketing and the susceptibility of the targeted groups. Moreover, the national court must ascertain whether the advertising of the gambling and betting services is rather informative than evocative in nature.

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[180] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, paras 55–58.

[181] The CJEU finally adjusted its approach towards this direction in C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069; C-212/08 Zeturf Ltd v Premier ministre [2011] ECR I-5633.

[182] Cf. however C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, para. 84; cf. also the 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, para. 27.

> In its assessment of necessity the national court will have to examine, in particular, whether Norsk Tipping has less economic incentives to breach the rules regulating the sector of games of chance or less of an interest in an aggressive marketing strategy than a commercial operator under a licensing system. Furthermore, the national court will have to evaluate whether effective control may be exercised and is actually being exercised by the State on Norsk Tipping and whether private service providers operating under a licensing system cannot be subjected to the same kind of control.[183]

It follows that the *margin of appreciation applied by the EFTA Court in the area of gambling differed*, overall, from that practised by the Court of Justice. For some aspects, the margin of appreciation was *narrower*, and the proportionality of the measures was generally more closely reviewed.

8.5.5 Principles and Criteria from the European Court of Human Rights Applied to the Gambling Case Law of the Court of Justice of the EU

8.5.5.1 General Considerations

Sections 8.2, 8.3 and 8.4 established the principles and criteria that the Strasbourg Court has followed in its use of the margin of appreciation. They serve to avoid an arbitrary and incoherent use of the doctrine. It is now examined whether these principles and criteria support the width of the margin of appreciation as practised by the Court of Justice in its gambling jurisprudence. The established overriding principles of the ECtHR relate to the motivation of the decision, the importance of the right concerned and the possible existence of a special nature of the justification ground.

The fundamental freedoms form part of the essential principles of the Single Market and are of central importance. Absolute, permanent or otherwise far-reaching restrictions are generally strictly reviewed and seldom approved. The Court of Justice went as far as to define EU fundamental freedoms as supreme to fundamental rights protected under national constitutional law.[184] Even though that position was later relativised by the development of EU fundamental rights in the case

[183] E-3/06 Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food [2007] EFTA Court Report 86, paras 60–62. An emphasis on how the public monopoly is run *in practice* could also be noted in the opinion of Advocate General Mazák in C-186/11 and C-209/11 (Joined Cases) Stanleybet International Ltd (C-186/11), William Hill Organization Ltd, William Hill Plc, and Sportingbet Plc (C-209/11) v Ypourgos Oikonomias kai Oikonomikon, Ypourgos Politismou, Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP) [2013] nyr, paras 49–53.

[184] C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

law,[185] the protection of the fundamental freedoms certainly enjoys utmost importance within the process of European integration.

The next overriding principle concerns the possible existence of a special nature of the justification ground. The ECtHR only recognises this in relation to a few grounds. In this context, it is noteworthy that the Court of Justice since *Schindler* has referred to *gambling services as showing a peculiar nature*. According to the Court, there were "particular factors" that justified a "sufficient degree of latitude."[186] These factors were threefold and regarded "moral, religious or cultural aspects of gambling," "high risk of crime or fraud" and "damaging individual and social consequences."[187] The Court of Justice summarised various concerns under two main justification grounds in the gambling cases: consumer protection and the maintenance of order in society. The concerns behind these grounds relate to health issues (gambling addiction), the prevention of crime and public morality.

It must be assessed whether these concerns are of a special nature. According to the jurisprudence of the ECtHR, the former concerns, namely health and crime, do not show a special nature that would a priori justify a wide margin of appreciation. With regard to public morality, this may be different. In the following, the criteria in relation to these three concerns are briefly revisited and applied to the situation of the gambling jurisprudence.

8.5.5.2 Crime Concerns

While certain forms of crime (in the broadest sense) profit or may profit from a wide margin of appreciation (public emergencies; to a lesser extent national security and prevention of terrorism), *other forms of crime do not*. Two characteristic elements justify a wide margin of appreciation: *the time factor* (*urgency*) *and the severity of the threat*. These two factors are typical for public emergency cases and may also be present in constellations regarding national security or terrorism. By contrast, the forms of crime commonly referred to in the gambling jurisprudence are *fraud and money laundering*. Particular urgency and severity are not characteristic for policies relating to these two forms of crime. They do *not show a special nature* that would justify a wide margin of appreciation.

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[185] More recently, the CJEU has engaged in lengthy balancing exercises involving EU fundamental freedoms and EU fundamental rights. Cf. e.g. C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609; C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659.

[186] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 59 and 61.

[187] Ibid., para. 60.

8.5.5.3 Health Concerns

The jurisprudence of the ECtHR in relation to the well-being and health of persons shows that very restrictive measures, such as permanent or absolute measures, are hard to argue on health grounds. Situations where health concerns justify a wide margin of appreciation involve an element of *urgency and severity*: the initial decision to put a child in public care when serious mental or physical harm is imminent or the initial placement of a mentally unsound person in an institution when the person may harm himself or others.

No particular margin is granted for other situations that do not involve those characteristic features of urgency and severity. Yet, the ECtHR grants what is referred to as '*medical discretion*'. Medical authorities enjoy wide discretion in deciding upon the therapeutic methods. Where state authorities have to *weigh complex facts*, some degree of discretion is granted too.

The Court of Justice has repeatedly dealt with gambling and the addiction to games of chance as showing a peculiar nature. As to the addiction to gambling, it still needs to be inquired whether this disorder effectively shows a peculiar nature (see Sect. 9.1.1). So far, the considerations regarding the criteria in relation to health do not justify a wide margin of appreciation in the gambling case law – *except if a peculiar nature* of gambling addiction were to be discovered in the following chapter. Apart from this *caveat*, gambling addiction concerns do not generally involve the factors of urgency and severity. It was previously noted that addiction to games of chance is an old and well-known phenomenon. The severity of this disorder will be studied in Sect. 9.1.2.2.

Important is the notion of *medical discretion*. Under certain conditions, there are good reasons to offer wide discretion to medical experts and national authorities when assessing scientific findings and medical options. This discretion is subject to criteria that will be closely assessed in the next chapter on the practice of the proportionality review.

8.5.5.4 Public Morality Concerns

Public morality concerns have been pleaded in the gambling cases. Among the three group of concerns assessed here, this is the sole justification ground seen by the Strasbourg Court as showing a *special nature*; this could justify a wide margin of appreciation. The specificity of this ground is that issues of morality can hardly be assessed in an objective way. Moral views are *subjective* and vary by culture, time, geography and religion.

This general policy of granting a wide margin knows two limitations that serve as safeguards against the abuse of the public morality justification. The ECtHR grants wide discretion only if the facts of the case *exclusively concern public morality* and no other justification ground; in the language of the earlier presented

twofold model: *core cases of morality*. Furthermore, no wide margin applies if there is a broad consensus as regards this issue of morality.

In regard to the first limitation, it is clear from the outset that the gambling cases do not exclusively involve public morality concerns. The main concerns repeatedly argued by the parties, the Advocates General and the Court of Justice as well as the EFTA Court relate to gambling addiction and crime concerns. Section 7.3 inquired whether gambling-related risks were an issue for public morality. While the Court of Justice did indeed use language that occasionally left the impression that gambling-related risks were primarily a moral issue,[188] it was concluded that science was better suited to inform policies in relation to these risks. The auxiliary role of moral concerns regarding gambling was illustrated in a model consisting of two categories of public morality concerns. Concerns about gambling relate to *potential detrimental side effects* but not to the activity as such. Gambling does not constitute one of the core cases of morality to which the wide discretion of the ECtHR would apply. Consequently, the wide margin of appreciation granted by the Court of Justice in the gambling jurisprudence does not find support in the criteria relating to public morality concerns.

8.5.5.5 Results

The wide margin of appreciation, and for some aspects even unlimited margin, which the Court of Justice has applied in the case law on gambling, is not supported by the doctrine on the margin of appreciation as practised by the ECtHR. The criteria that steer the use of the margin of appreciation do not support the view that gambling is (primarily) a matter for public morality. The urgency and severity factors that are sometimes identified in relation to certain crime and health concerns are also not present. It remains to be assessed *whether Chap. 9 will establish a peculiar nature of gambling* that – according to the criteria of the ECtHR – could justify a wide margin of appreciation.

The use of the *margin of appreciation by the EFTA Court* finds more support in the criteria of the ECtHR. While the EFTA Court did a priori grant some discretion to national authorities, it combined it with an effective proportionality review. It *offered substantial guidance* to national courts by outlining, in quite some detail, the meaning of certain criteria, such as 'consistent and systematic policy'. As a result, the EFTA Court gave the discretion enjoyed by national authorities primarily in the hands of the *national courts* (see Sect. 8.5.4). These aspects will be more closely analysed in the following chapter.

[188] The CJEU has used expressions such as 'a social evil', 'an activity of questionable morality' or 'squander money on gambling'.