

Title: “Children and Gambling: Attitudes, Behaviour,
Harm Prevention and Regulatory Responses”

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Degree of Doctor of Philosophy.

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STATEMENT OF ORIGINALITY

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- M Carran, MD Griffiths, ‘Gambling and Social Gaming: an Exploratory Study of Young People's Perception and Behaviour?’ (2015) 33(1) *Aloma* 101
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ABSTRACT

ABSTRACT

Gambling constitutes an inherent part of British cultural landscape but due to its potential to cause significant detriments it remains controversial. The Gambling Act 2005 liberalised the UK gambling industry and created an environment where commercial gambling, although regulated, can be offered within a relatively free market setting and its consumption can be stimulated by advertising. The task of the law is to provide a framework where the need for customer choice, a flourishing market, and the respect for private liberties can be adequately balanced with the duty to protect vulnerable individuals such as minors.

The Gambling Act has been positioned as containing sufficient protective measures to prevent minors from being harmed by gambling but there is still a relative paucity of research that focuses specifically on how this regime affects this age group. This thesis fills some of the gaps by analysing whether the existing legal and regulatory framework reconciled the conflicting priorities adequately. It uniquely combines legal doctrinal analysis with empirical evidence collected from a sample of British pupils to expose that the liberalisation of gambling has brought severe limitations on protecting minors that are not sufficiently counterbalanced by existing measures.

This thesis demonstrates that the legal definition of prohibited gambling does not incorporate all activities that may lead to gambling-related harm. While the age verification measures adopted by online gambling providers appear to be successful, young people continue to have easy access to gambling in land-based venues and are exposed to significant volumes of gambling advertising that appeals to them but these factors are not sufficiently compensated by any holistic regulatory strategy. However, the thesis indicates that the correlation between fun and real gambling games should not be attributed to overlaps in minor's motivations for engaging in either form or to minors' lack of accurate differentiation between them.

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All errors are exclusively mine.

Ia. Introduction

The ancient provenance of gambling, and its widespread existence across the vast majority of cultures, provided the gambling industry with an argument that gambling is an indispensable part of human life¹. This wide sweeping statement has rarely been challenged in literature but does not ultimately hold true as cultures where gambling was not practiced have been identified². While this in itself does not invalidate the argument that this form of entertainment may be beneficial to people's welfare, or the society's economy as a whole³, it undermines the claim that gambling is an inherent part of human nature⁴.

Rather it suggests that gambling constitutes a social construct, the form of which had been shown in historical analysis⁵ to fluctuate between outright denunciation, silent tolerance and open approval⁶, the last of which is represented by the current approach adopted in the UK. New policy introduced by the Gambling Act 2005 represented a significant move from a regime that treated gambling as tolerated out of necessity but a non-stimulated, discouraged and contained activity, into the environment where gambling was positioned as legitimate entertainment.

The regulatory containment approach did not prevent the UK gaming and betting industry to flourish, as can be seen from the industry being able to attain £7.3 billion in gross yield in 1998⁷. However, many flaws caused the modernisation of gambling laws to be long overdue. Prior regulatory regime was, to a substantial extent, embedded within the Acts of Parliaments. This made them inflexible and difficult to change, and prevented the gambling operators from being able to successfully adapt to the rapid technological advances and hindered the operators' ability to compete at international levels⁸.

¹ Per Binde, 'Gambling Across Cultures: Mapping Worldwide Occurrence and Learning from Ethnographic Comparison' (2005) 5(1) *International Gambling Studies* 1

² Binde (n 1)

³ Patrick Basham, John Luik, 'The Social Benefits of Gambling' (2011) 31(1) *Economic Affairs* 9

⁴ Binde (n 1)

⁵ David Miers, *Regulating Commercial Gambling: Past, Present and Future* (OUP 2004)

⁶ Mark Griffiths, Jonathan Parke, 'The Environmental Psychology of Gambling' in Gerda Reith (ed), *Gambling: Who Wins? Who Loses?* (Prometheus Books 2003) 15-21

⁷ Department for Culture, Media and Sport, *Report of the Gaming Board for Great Britain 2001-2002*, (HC 2001-02/HC1016) para 1.4

⁸ Carl Rohsler, Katherine Conlon, 'An Analysis of the Chief Features of the Gambling Act 2005' (2005) 16(8) *Ent L R* 226

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The combination of these factors provided the necessary impetus for gambling law's reforms that culminated in the Gambling Act 2005. The Act is divided into 18 parts supplemented by 18 Schedules. Section 1 of the Act sets out the overriding licensing objectives that underpin the statutory regime. The first objective intends to prevent gambling from becoming "*a source of crime or disorder, being associated with crime or disorder or being used to support crime*"⁹, followed by the consumer protection objective of ensuring that "*gambling is conducted in a fair and open way*"¹⁰. The third objective is the primary focus of this thesis as it aims to "*protect children and other vulnerable persons from being harmed or exploited by gambling*"¹¹.

Part I of the Act defines the key terms that determine which activities fall within the gambling regulatory remit. Part II creates a new regulator in the form of a Gambling Commission. Part III proscribes generic offences that aim to ensure that only permitted or licensed gambling activities are commercially offered, with Part IV focusing specifically on broadly ensuring that minors are not associated with gambling. Parts V to VIII set the framework for the issuance of operating, personal and premises licence and provides details of appeal process from decisions taken by the Gambling Commission. Part IX sets out the terms when premises can be used for gambling on a temporary basis, with Part XII addressing gambling activities in pubs, clubs, and during travelling fairs. Part X is concerned specifically with addressing issues associated with gambling machines and Part XI sets out the framework for the operation of lotteries other than the National Lottery. Parts XIII and XIV proscribe the meaning of "*prize gaming*" and "*private and non-commercial gaming and betting*" respectively and Part XV grants generous enforcement powers to the Commission. Part XVI removes the previously existing restrictions on advertising of gambling that is lawful and appropriately licensed and Part XVII provides that gambling contracts can be legally enforced. The final main Part addresses issues such as prize competitions, value of prizes, powers of the Gambling Commission to initiate prosecution, etc., and contains typical statutory sections regarding statutory interpretation, commencement, amendments, Crown application, and similar.

⁹ Gambling Act 2005, s 1(a) (later referred to as GA2005)

¹⁰ GA2005, s 1(b)

¹¹ GA2005, s 1(c)

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In contrast with the previous primary gambling laws, many of the Gambling Act's provisions are very broad. They essentially only create a regulatory framework that sets out the policy underpinning new legislation¹². The formulation of the detailed rules was delegated to the newly created regulator. The Gambling Commission was granted wide powers to devise the necessary regulations, in consultation with the relevant stakeholders, and to provide guidance to the gambling industry and local authorities. These are now contained in the "*Licence Conditions and Codes of Practice*". The most recent edition was issued in February 2015 and updated in April 2015. The LCCP has two tier status and contains two types of provisions. The ordinary provisions constitute a requirement for operators to act which, though it is not a licence conditions, can attract a regulatory response. However, the conditions and social responsibility provisions gain statutory force by virtue of the operation of s.24 of the Gambling Act.

The statutory inflexibilities that were inherent in the previous regime, and the inability of the gambling operators to adapt to the technological advances, were effectively rectified by the delegation of regulatory and enforcement powers to the Gambling Commission and by recognising "*remote gambling*" as a licensable form of gambling offering. However, the amendments initiated by the Gambling Act extended well beyond addressing the flaws in the previous legislation. The government took the opportunity to introduce laws that were aimed at enabling the UK to become the "*world leader in all fields of gambling activity*"¹³ and to offer a more diverse and less restrictive choice for adult consumers¹⁴.

Accordingly, the legal framework positioned gambling alongside other types of adult entertainment that should be regulated in order to prevent social harm, but that can be commercially offered and encouraged relatively unrestricted. Gambling should no longer be treated as an inherent vice. The limits on the expansion of the industry were no longer to be imposed by the regulator but determined by market forces¹⁵, and operators were to be allowed to stimulate consumption by commercial advertising and

¹² S Smith (ed), *Smith and Monckom: The Law of Gambling* (3rd edn, Tottel Publishing 2009) 3

¹³ Department for Culture, Media and Sport, *The Future Regulation of Remote Gambling: A DCMS Position Paper* (April 2003) para 16

¹⁴ Department for Culture, Media and Sport, *Draft Gambling Bill: Policy Document* (Cm.6014-IV, 2003) para 2.10

¹⁵ Due to the removal of the "demand test"

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marketing promotions. To this effect, the Gambling Commission was directed to “*permit gambling*” subject only to the licensing objectives¹⁶. Moreover, the “*demand test*” that enabled operating licences to be refused on the basis of lack of demand in a particular area can no longer be applied¹⁷.

This has inevitably created tension between the expected proliferation and legitimisation of gambling and the need to protect the society as a whole, and the younger population in particular. It has been recognised in the Budd Report¹⁸ and by the Joint Committee on the Draft Gambling Bill¹⁹ that expansion of gambling opportunities may potentially cause increase in problem gambling as well as other negative consequences such as “*job loss, absenteeism, poor work/study performance, stress, depression and anxiety, suicide, poor health, financial hardship, debts, asset losses, exposure to loan sharks, bankruptcy, resorting to theft, imprisonment, neglect of family, impact on others, relationship breakdown, domestic or other violence, burden on charities and burdens on the public purse*”²⁰.

Minors have been specifically singled out as being at substantially higher risk of developing gambling-related problems that is the case with adults²¹. The risk may be further exacerbated by being of male gender²², existence of concurrent other delinquency²³, or by having pre-existing vulnerabilities in information processing powers, or having impulsiveness impairment²⁴. Those who suffer from problem gambling during their adulthood nearly always report to have started gambling

¹⁶ GA2005, s 22(b)

¹⁷ GA2005, s 72

¹⁸ Department for Culture, Media and Sport, *Gambling Review Body Report* (Cm.5206, 2001) para 17.7

¹⁹ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) paras 216-221

²⁰ Department for Culture, Media and Sport, *Gambling Review Body Report* (Cm.5206, 2001) para 17.41

²¹ See, e.g., G Meyer, T Hayer, Mark D Griffiths, *Problem Gambling in Europe: Challenges, Prevention and Intervention: Extent and Preventative Efforts* (Springer 2009); RA Volberg ‘and others’, ‘An International Perspective on youth gambling prevalence studies’ 22(1) *International J Adolesc Med Health* 3

²² David Forrest, Ian G McHale, ‘Gambling and Problem Gambling Among Young Adolescents in Great Britain’ (2012) 28(4) *Journal of Gambling Studies* 607

²³ Grace M Barnes ‘and others’, ‘Gambling and Alcohol Use Among Youth: Influence of Demographic, Socialization, and Individual Factors’ (1999) 24(6) *Addictive Behaviors* 749

²⁴ Alex Blaszczyński ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014),

<http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf> accessed December 2014

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early²⁵. It has also been recognised that “*the younger the age of the gambling disorder, the greater the number of negative consequences and severity of later gambling problems*”²⁶.

Accordingly, the Gambling Act’s starting premise is that minors should not typically be engaged in gambling. The Joint Committee on the Draft Gambling Bill agreed with the government that this approach is correct²⁷ and welcomed the imposition of statutory duty to prevent minors from accessing gambling. However, the statutory prohibition of minors’ engagement in gambling is not complete. Children are still permitted to play Category D gaming machines and young people are able to legally play lottery, Scratchcards or participate in football pools.

This was justified by lack of proof that such participation causes harm. However, the Joint Committee’s view was that there is a significant paucity of research regarding minors and gambling, especially in the context of playing Category D gaming machines²⁸, and in respect of the potential harm that may be suffered by young people as a result of playing lotteries or Scratchcards²⁹. It has recommended that further research should be carried out but in the interim period this lack of evidence was accepted as a valid reason to retain the status quo.

The Joint Committee also did not fully consider whether liberalisation of gambling, with the associated consequences, can be compatible with genuine attempt to protect minors. Whether the ubiquity of available, easily accessible gambling opportunities increases the risk of gambling problems remains contested. Some argue that widespread accessibility inherently increase such risk³⁰ while others contest this argument as being unproven³¹. It has also been argued that most people adapt to

²⁵ David Forrest, Ian G McHale, ‘Gambling and Problem Gambling Among Young Adolescents in Great Britain’ (2012) 28(4) *J Gamb Stud* 607

²⁶ Rina Gupta, Jeffrey L Derevensky, ‘Reflections on Underage Gambling’ (2014) 1(1) *Responsible Gambling Review* 37

²⁷ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL630I/HC139-I) para 260

²⁸ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 278

²⁹ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 261-264

³⁰ Frank Campbell, David Lester, ‘The Impact of Gambling Opportunities on Compulsive Gambling’ (1999) 139(1) *The Journal of Social Psychology* 126

³¹ Alex Blaszczynski ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014)

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increased opportunities without suffering any negative consequences.³² The evidence, however, remains inconclusive and the risk remains that for some, the adaptive process may fail. Moreover, the Joint Committee assumed, rather than fully evaluated, that the statutory measures aimed at excluding minors from gambling are sufficiently powerful to counterbalance the legitimisation of gambling and the proposed expansions of opportunities.

While the Gambling Act's planning was thorough, the actual passage of the draft Bill through the parliamentary stages was very rapid³³. The Joint Committee on the Draft Gambling Bill, responsible for scrutinising the draft provisions and making recommendations to the Government, highlighted that many of the draft clauses were not ready in time for pre-legislative scrutiny with the effect that they could not have been fully evaluated³⁴. The pace prevented in-depth parliamentary consideration of the wider implications of the Act and focused the debate on the most contentious areas that related to the creation of large and resort style casinos³⁵. This meant that consideration of the Act's impact on minors received only limited attention.

In this thesis, I argue that this has been detrimental to minors' protection. The liberalisation of gambling has inevitably brought severe limitations on protecting children from gambling-related harm. The Gambling Act strengthened the safeguards that already existed and introduced some additional ones, but they are insufficient to adequately compensate for the effects of increased proliferation of gambling opportunities portrayed as a legitimate and exciting form of leisure. In other words, it is argued that the overall legislative philosophy of the Act is inherently incompatible with the need to protect all minors from gambling-related harm that can, at best, be only partially counterbalanced by regulation.

<http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf>
accessed December 2014

³² Debi A LaPlante, and Howard J Shaffer, 'Understanding the Influence of Gambling Opportunities: Expanding Exposure Models to Include Adaptation' (2007) 77(4) American Journal of Orthopsychiatry 616

³³ Carl Rohsler, Katherine Conlon, 'An analysis of the chief features of the Gambling Act 2005' (2005) 16(8) Ent L R 226

³⁴ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 12-21

³⁵ Carl Rohsler, Katherine Conlon, 'An analysis of the chief features of the Gambling Act 2005' (2005) 16(8) Ent L R 226

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The tone of the Act is already set out in s.1(c). It specifies that one of the licensing objectives is to protect “*children and other vulnerable persons from being harmed or exploited by gambling*”. It is quite remarkable, in light of the available evidence that places young people at the highest risk of developing gambling-related harm, that s.1(c) does not expressly identify all minors as deserving special protection. Instead it only lists children who, by the statutory definition, only include those who are under the age of 16 years and others who are vulnerable, to the exclusion of young persons defined by the Act as those who are between 16 and 18 years old.

While young people may still fall into the category of those who are vulnerable, this cannot be guaranteed. One of the immediate consequences of this omission can be seen in the lack of specific data for those who are 16 and 17 years old, as they are joined with those who are aged 18 to 24 in the current Health Survey for England and the Scottish Health Survey. This is unfortunate as it is difficult to estimate gambling prevalence amongst those who legally are still not allowed to participate in most forms of gambling, and may prevent the identification of issues specific to this age group.

This thesis does not aim to prove that gambling by minors causes harm. Neither does it attempt to make a generic claim that the existing legal liberalisation of the gambling environment will indisputably increase the levels of problem gambling among minors, as there is no evidence that would support such a wide-reaching claim. However, in the absence of satisfactory proof that gambling by minors does not lead to direct or indirect harm, it argues for a precautionary approach to be adopted on the basis that the existing legislation and regulatory strategies are not, in themselves, powerful enough to protect minors from being engaged in gambling.

This thesis accepts Gallighan’s premise³⁶ that success or failure of any normative rule that intends to regulate social behaviour depends on three paradigms. Those are (1) the strength and clarity of statutory provisions, (2) the effective enforcement, and (3) the social acceptance of legal restrictions despite liberalisation. It will be argued throughout the submission that, although many positive features of the Gambling Act 2005 and of the work of the Gambling Commission can be identified, the statutory

³⁶ DJ Galligan, *Law in Modern Society* (OUP 2007)

and regulatory safeguards that are intended to protect minors contain significant shortcomings in all these three aspects.

Ib. Overview of literature

The most important instrument in the UK that measures engagement in gambling by children is the Young People Omnibus. It is the UK's sole study that is carried out in schools on a recurring basis that collects data reflecting a variety of behaviour and opinions of a statistically representative sample of children aged between 11 and 16 years old. The Young People Omnibus entitled "The Prevalence of Underage Gambling: A research study among 11 to 16 years – olds on behalf of the Gambling Commission" aims to identify "*the prevalence of underage gambling and the incidence of problem gambling within this age group*"³⁷.

The most recent survey was published in December 2014. The main findings focused on the proportion of children aged between 11 to 16 years old who gambled in the last seven days preceding the survey; the rates of problem gambling; the profile of those who are engaged in gambling; the most popular forms and how underage customers purchase lottery tickets despite the legal prohibition. The Omnibus also makes comparisons with previous years in order to identify trends or movements.

The most recent report showed that 16% of children aged between 11 and 16 years old gambled during the week preceding the study. 0.7% of children from the same group have been identified as problem gamblers with a further 1.2% falling into the category of "*at risk*" gamblers. In line with the available psychological evidence³⁸ that determines that being of male gender places participants at a higher risk of problem gambling, the Omnibus also reported that boys are more likely to gamble than girls (20% compared to 12%) on all forms of gambling, including free to play 'demo'/social games. However, this excluded playing on fruit machines where the rates of play are comparable between both genders. Within the different age groups, the study identified that 15 years old, who are coming closer to the legal age for lottery

³⁷ Gambling Commission, 'The Prevalence of Underage Gambling: A Research Study Among 11 to 16 Year-Olds on Behalf of the Gambling Commission' later referred to as Young People Omnibus 2014 (December 2014) <<http://www.natlotcomm.gov.uk/assets-uploaded/documents/The%20Prevalence%20of%20Underage%20Gambling%20December%202014.pdf>> accessed January 2015, 2

³⁸ See e.g., David Forrest, Ian G McHale, 'Gambling and Problem Gambling Among Young Adolescents in Great Britain' (2012) 28(4) Journal of Gambling Studies 607

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gambling, were more likely to play on the National Lottery than those who are younger. Those who identified themselves as having difficulties at school were also pointed out to be more likely to gamble than those who are satisfied with their educational achievements.

Participants in the study engaged most frequently in playing fruit machines (6%), making a private bet for money (5%), and playing cards for money with friends (4%). National Lottery play was reported by 2% of pupils with 11% of children being able to purchase the tickets by themselves. Nevertheless, the majority of underage children reported that they purchase the lottery with the assistance of a person over the age of 16.

Gambling prevalence amongst those who are over the age of 16 years old is measured by the Health Survey for England³⁹. However, as already indicated above, the Health Surveys do not treat those who are between the age of 16 and 18 separately but joins them together with the 16 to 24 age group. The latest Health Survey identified that there are 1.4% of problem gamblers amongst those who are 16 to 24 years old against the average of 0.43% of problem gamblers across all other age groups.

Several recent research papers published within the academia, and on behalf of the Responsible Gambling Trust and the Gambling Commission, focused on gambling-related risks. The most recent one centred on the identification of problem gambling and product- and operator-based harm minimisation interventions⁴⁰, and generally on synthesising the existing literature on the influence of gambling advertising on problem gambling levels⁴¹. They also reviewed the existing evidence relating to the

³⁹ Heather Wardle, Carla Seabury 'Gambling Behaviour' Chapter 7 in *Health Survey for England 2012* <<http://www.hscic.gov.uk/catalogue/PUB13218>> accessed December 2014

⁴⁰ Gambling Machine Research Programme (7 reports for Responsible Gambling Trust 2014) <http://www.responsiblegamblingtrust.org.uk/Research-Publications>> accessed December 2014

⁴¹ 'CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes' (2014) <<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~media/Files/CAP/Reports%20and%20surveys/CAP%20and%20BCAP%20Gambling%20Review.ashx>> accessed November; Per Binde, 'Gambling Advertising: A Critical Research Review' (RTG 2014) <http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014; ASA, 'Public Perceptions of Gambling Advertising in the UK' (October 2014) <<https://www.asa.org.uk/News-resources/~media/Files/ASA/Reports/ASA%20Gambling%20Advertising%20Research%20Agency%20Report.ashx>> accessed December 2014

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impact of free-to-play ‘demo’ and social gambling games on real money gambling uptake⁴².

The overall focus of these papers was on the adult population with less emphasis being placed on issues relating to minors and only certain aspects have been discussed. Blaszczynski et al⁴³ analysed evidence relating to underage prevention. They identified “*staff training*” as one of the most important measures that would contribute to more minors being refused the sale of a gambling product. They also highlighted the potential negative influence of the social environment if an adult is allowed to purchase a gambling product on behalf of a minor. However, by their own admission their study did not include any consideration of the “*technological or legal aspects of enforcement*”⁴⁴. The technological developments were considered by Nash et al⁴⁵ who concluded that online gambling age verification solutions are exemplary but their discussion did not extend to how this has, or has not, been influenced by the legal perspective or how age verification works in land-based venues. In the alternative, Hörnle and Zammit⁴⁶ analysed the age verification issues against the regulatory framework and concluded that it does not deal with problem gambling and age verification adequately.

The actual influence of liberal and permissive laws (as opposed to restrictive ones) on minor’s behaviour and attitudes towards gambling continues to be less explored. The available literature highlights that the prohibition of real money gambling tends to be counterproductive. This is due to the low moral opprobrium attached to gambling

⁴² Jonathan Parke ‘and others’ ‘Exploring Social Gambling: Scoping, Classification and Evidence Review’ (Gambling Commission, 2012)
<<http://www.gamblingcommission.gov.uk/pdf/Exploring%20social%20gambling%20-%20scoping,%20classification%20and%20evidence%20review%20-%20May%202013.pdf>> accessed October 2012> accessed December 2014

⁴³ Alex Blaszczynski ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014),
http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm%20report%20final%20version.pdf
accessed December 2014

⁴⁴ Blaszczynski (n 43) at para 6.1.4

⁴⁵ Victoria Nash ‘and others’, ‘Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry’ (University of Oxford 2014)
<<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

⁴⁶ Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010)

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which no prohibition can ever entirely suppress⁴⁷. Vincents⁴⁸ emphasised the better effectiveness of monitoring and influencing legitimate gambling companies to act within the parameters of the law than it would be the case with attempting to eradicate unlawful providers. Dayanim⁴⁹ and Bogart⁵⁰ concentrated on ‘*unwanted*’ consequences of prohibition, such as the division between urban and rural areas or the development of the often violent black market and its inability to entirely suppress consumption⁵¹.

However, the focus on prohibition is unhelpful as most Western jurisdictions⁵² permit real money gambling to some extent, and regulate it to a varying degree. The undesirability of complete prohibitions does not justify the opposite approach of extensive liberalisation and permission to stimulate demand. Smith and Monkcom⁵³ provides an extensive overview of the existing gambling legislation but their monograph is primarily aimed at practitioners and their main aims are to explain the individual provisions and their application in practice. Miers’ monograph⁵⁴ provided an excellent historical overview of the different legislative framework that applied to commercial gambling in UK but as it was published prior to the introduction of the Gambling Act, it could not have included any consideration of its impact.

Since the introduction of the Act, a large number of legal analyses have been published⁵⁵ but most of them undertake a generic assessment of the influence of current legislative framework on potential levels of problem gambling. There is still relative paucity of studies that focus specifically on minors, or on potentially unanticipated effects of the legislation. Despite clear recommendation made by the Joint Committee on the Draft Gambling Bill that further research on the potential risks associated with minors playing Category D gaming machines, and young people

⁴⁷ Ian Abovitz, ‘Why the United States Should Rethink its Legal Approach to Internet Gambling: a Comparative Analysis of Regulatory Models that Have Been Successfully Implemented in Foreign Jurisdictions’ (2008) 22 *Temp Int’l & Comp LJ* 437

⁴⁸ Okechukwu Benjamin Vincents, ‘Online Gambling: What Regulatory Approach is Singapore Likely to Adopt?’ (2007) 18(8) *Ent LR* 272

⁴⁹ Behnam Dayanim, ‘Internet Gambling Under Siege’ (2007) 11(5) *Gaming Law Review* 536

⁵⁰ WA Bogart, *Permit but Discourage: Regulating Excessive Consumption* (OUP 2011) 15-17

⁵¹ Bogart (n 50)

⁵² Julian Harris & John Hagan (eds), *Gaming Law: Jurisdictional Comparisons* (Thomson Reuters 2012)

⁵³ S Smith (ed), *Smith and Monkcom: The Law of Gambling* (3rd edn, Tottel Publishing 2009)

⁵⁴ David Miers, *Regulating Commercial Gambling: Past, Present and Future* (OUP 2004)

⁵⁵ E.g., Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70(4) *MLR* 626

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being able to purchase lottery tickets is highly desirable, such studies have not as yet been carried out.

The most comprehensive recent review of the comparative effectiveness of the different regulatory regimes was carried out by Planzer and Wardle⁵⁶. Their review did not focus on minors either but they reported that “*there is no published empirical evidence that directly addresses the comparative effectiveness of regulatory approaches to gambling*” and that “*there is extreme paucity of empirical evidence that addresses related questions*”⁵⁷. Some of the associated aspects were addressed by Bogart⁵⁸ who, after providing a comprehensive review of existing evidence, concluded that the most optimum regulatory framework allows for real money gambling to be offered commercially in order to satisfy demand, but does not permit encouragement or stimulation of such demand. Others were considered by Hörnle and Zammit⁵⁹ who emphasised that any regulatory regime has to address the “*cross-border*” nature of the internet and the proliferation of online gambling.

The evidence that relates to the influence of gambling advertising has recently been comprehensively reviewed by Binde⁶⁰ who determined that conclusive evidence on this issue remains elusive. The latest reports published by the Advertising Standards Authority⁶¹ and the Committee of Advertising Practice⁶² concluded that further restrictions on gambling advertising are unwarranted. However, their qualitative focus groups excluded anyone under the age of 18 years old. A wide range of

⁵⁶ Simon Planzer and Heather Wardle, ‘The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling’ (RGF 2011) <<http://ssrn.com/abstract=2045052>> accessed November 2013

⁵⁷ Simon Planzer and Heather Wardle, ‘The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling’ (RGF 2011) <<http://ssrn.com/abstract=2045052>> accessed November 2013 21

⁵⁸ WA Bogart, *Permit but Discourage: Regulating Excessive Consumption* (OUP 2011)

⁵⁹ Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010)

⁶⁰ Per Binde, ‘Gambling advertising: A critical research review’ (RTG 2014) <http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014

⁶¹ ASA ‘Gambling Advertising Review of the ASA’s application of the UK Advertising Codes’ (October 2014) <<http://www.asa.org.uk/News-resources/~/-/media/Files/ASA/Reports/Review%20of%20the%20ASA's%20application%20of%20the%20UK%20Advertising%20Codes%20to%20gambling%20advertising.ashx>> accessed December 2014

⁶² ‘CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes’ (2014) <<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~/-/media/Files/CAP/Reports%20and%20surveys/CAP%20and%20BCAP%20Gambling%20Review.ashx>> accessed November 2014

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academic literature considers the potential impact of gambling advertising on minors⁶³ but many of them contradict each other, and the question as to how British young people receive and react to gambling advertisements remains under-researched.

One potentially unexpected consequence of the liberalisation of online real money gambling relates to the increased ubiquity and popularity of the free to play ‘demo’/social online gambling games. Many studies were able to establish a clear association between such games and real gambling⁶⁴ but the actual reasons behind the correlation remain unknown. The claim that such games cause players to migrate to real gaming is highly contested⁶⁵ and there is some evidence emerging that such games may, in fact, detract players from playing with real money⁶⁶. There is, however, no UK study that has directly asked young people as to what they think about the relationship between such ‘demo’/social gambling games and real gambling in order to gain more direct insight into young people’s experience.

Ic. Aims of the thesis

The above discussion demonstrated that the evidence base relating to minors continues to be limited in several areas, a view that has also been recently confirmed by the Responsible Gambling Strategy Board⁶⁷. In their position paper⁶⁸ the Board also recognised the need to engage young people both formally and informally and to learn from them. The majority of existing studies either focus on the black letter law analysis or on identifying trends in gambling behaviour, or on the risk factors that contribute towards the development of problem gambling. The number of UK

⁶³ See, e.g., Sally Monaghan, Jeffrey Derevensky, Alyssa Sklar, ‘Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendation to Minimise Harm’ (2008) 22 *Journal of Gambling Issues* 252

⁶⁴ Ipsos Mori, Appendix 5 ‘British Survey of Children, the National Lottery and Gambling 2008-09: Report of a Quantitative Survey’, (National Lottery Commission 2009)

<http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf> accessed May 2015, 133; Daniel King ‘and others’, ‘Adolescent Simulated Gambling Via Digital and Social Media’ (2014) 31 *Computers in Human Behavior* 305

⁶⁵ See, e.g., ‘Harvest Strategy Report: A New Industry’s Profile: Digital+Social+Game=Digsogame’ <www.harveststrategy.com.au> accessed November 2014

⁶⁶ Sally M Gainsbury ‘and others’, ‘An Exploratory Study of Interrelationships Between Social Casino Gaming, Gambling, and Problem Gambling’ (2015) 13 *Int J Ment Health Addiction* 136

⁶⁷ Responsible Gambling Strategy Board ‘Young People and Gambling-Related Harm’ (2014) <<http://www.rgsb.org.uk/publications.html>> accessed December 2014

⁶⁸ Responsible Gambling Strategy Board ‘Young People and Gambling-Related Harm’ (2014) <<http://www.rgsb.org.uk/publications.html>> accessed December 2014

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gambling studies that include minors as their main participants is very small and there is even less research that aims to identify how minors understand and construct the phenomena of gambling and associated activities, as opposed to simply collecting quantitative data with regards to their behaviour.

This thesis aims to fill some of the aforementioned gaps in order to further contribute to the available knowledge that should underpin policy and regulatory decisions. It makes a unique contribution in two interrelated ways. Firstly, it addresses research questions that attracted less attention within the existing literature, such as the influence of statutory meaning of gambling on minors' attitude to this form of activity or the weaknesses in the statutory offences, or for which research is still in infancy such as the reasons why 'demo'/social gambling may lead minors to real gambling. Secondly, it uniquely combines legal doctrinal analysis with empirical evidence collected from a group of children and young people who are given a voice to express how they understand, experience, capture and react to gambling, the gambling industry, 'demo'/social gambling and gambling advertisements.

Structure of the submission

The thesis is split into five chapters. The research questions in **Chapter 1** ask whether the statutory definition of gambling is sufficiently inclusive in order to protect minors from all activities that may lead to gambling-related harm. There is very limited existing UK research that considers minors' understanding of what gambling actually is and whether this understanding is influenced by the legal treatment of gambling. These questions are explored by synthesising relevant literature and by drawing from the views collected from minors throughout the duration of this PhD. It will be demonstrated that the Gambling Act adopted a very traditional approach to the definition of gambling, to the exclusion of some novel online activities such as penny auctions that share many structural and psycho-social similarities with gambling and which may lead, amongst minors, to identical consequences to those related to gambling.

Furthermore, it will be argued that the statutory permission for minors to be engaged in many forms of gambling is inherently incompatible with the need to protect them

from gambling related harm. The opportunity theory⁶⁹ and the total consumption model⁷⁰ indicate that liberalisation of any industry leads to higher overall consumption. This in turn leads to the increase of consumptions at problematic levels. This may equally apply to minors in respect of gambling that is permitted to them. The policy makers choose to rely on the lack of evidence that such participation by minors causes actual harm or directly leads to problem gambling⁷¹. However, lack of proof cannot be equated to lack of harm, especially as the lack of evidence is likely to arise from the paucity of research that studies those specific issues, a position that has been explicitly recognised by the Joint Committee on the Draft Gambling Bill. Accordingly, this thesis argues for a precautionary approach to policy making and recommends that all forms of commercial and publicly organised gambling should only be permitted to those who are over the legal age of majority.

Chapter 2 addresses the question as to whether the statutory offences, supplemented by the provisions contained in the Licence Conditions and Codes of Practice that underpin the need to develop, adopt and monitor age verification measures in order to prevent underage access, are sufficiently robust to force the gambling industry into acceptable levels of compliance. Whilst the efforts undertaken by the Gambling Commission and the gambling industry are duly acknowledged, it is submitted that the statutory offences, and the provisions in the LCCP, are insufficient to successfully prevent underage access. Nevertheless, it will be demonstrated that, while age verification measures in land-based establishments continue to be inadequate, the online industry has been largely successful at preventing minors' access to gambling for longer than 72 hours.

Chapter 2 also exposes the environmental risks⁷² of industry efforts being undermined by adults either purchasing gambling products on behalf of a minor, or allowing them to access their online gambling account. This issue has been addressed in the

⁶⁹ Frank Campbell, David Lester, 'The Impact of Gambling Opportunities on Compulsive Gambling' (1999) 139(1) *The Journal of Social Psychology* 126

⁷⁰ Marianne Hansen, Ingeborg Rossow, 'Adolescent Gambling and Problem Gambling: Does the Total Consumption Model Apply?' (2008) 24 *J Gambl Stud* 135

⁷¹ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 260-284

⁷² Also directly recognised by Alex Blaszczyński 'and others', 'Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions' (RGT 2014), <http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf> accessed December 2014

Gambling Act but the relevant statutory provisions lack clarity, are not sufficiently transparent and there is insufficient overall awareness of their existence. Accordingly, it is recommended that a specific “proxy” offence is introduced that would contribute towards minimisation of this risk.

Chapter 3 deals exclusively with the issue of ‘demo’/social gaming and gambling-like activities within video games. Studies have established clear correlation between fun gambling and real money gambling, but the reasons behind the association remain uncertain. This chapter explores whether such correlation may be predicated on minors not fully appreciating the differences in structural mechanics between these two forms of entertainment or due to the extensive overlap between their motivations to engage in each type. No UK study has, as yet, directly asked young people as to what they think about this relationship and in Chapter 3 this area is explored in order to fill this gap.

The analysis in **Chapter 4** relates to the very controversial topic of gambling advertisements’ impact. The legislation and the advertising self-regulatory codes concede that minors may be negatively affected and require that gambling marketing does not target children and that the advertisements do not appeal to them. The research questions of this chapter are confined to the enquiry as to whether the existing regulatory and self-regulatory provisions are capable of achieving their own stated objectives.

This narrower question was recently addressed by the ASA qualitative study but the participants of their focus groups excluded anyone under the age of 18. Typically this question is overshadowed by the wider considerations of whether widespread marketing of gambling does or does not, have adverse impact on the generic population of minors or the levels of problem gambling.

Chapter 4 accepts that a conclusive answer to the broader question is likely to remain elusive and does not aim to prove either way. But, it submits that examination of this narrower and under-explored area can provide a better insight into whether further restrictions of gambling advertising is warranted. Through the synthesis of the available literature and the analysis of the ASA regulatory decisions, underpinned by the insight gathered from the views of pupils, it will be argued that existing regulations are too weak. Minors remain not only frequently exposed to gambling

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advertising but they also often find them attractive and, therefore, further restrictions are recommended. The need to include minors in studies that involve discussion as to what does or does not appeal to them is also highlighted.

Chapter 5 evaluates whether the statutory tensions created by the Gambling Act between a liberal approach to gambling, and the need to protect minors, can be sufficiently counterbalanced by effective regulatory strategy and enforcement. While it is recognised and fully explored that the Gambling Commission works under significant regulatory and enforcement constraints, it will be shown that its activity in relation to minors' protection is still too confined to only ensuring that operators comply with the laws and that the full enforcement powers have not as yet been utilised. More active enforcement and the adoption of a wider, more holistic strategy is recommended.

In **Conclusion**, the main arguments and themes are summarised in order to highlight the most important themes and to identify the areas where further research is needed. As the focus groups' findings on each topic are presented in different chapters where the relevant issues are discussed, the conclusion provides a reflexive review of the overall findings from the empirical data collection. In the final chapter the main recommendations are also summarised.

Disciplinary contribution and purpose of interdisciplinarity.

This research project aimed to be cross-disciplinary, being primarily based in law and regulatory theory, but drawing from some aspects of psychology, especially with respect to the method of data collection. The main contribution, however, is made to the discipline of law. The empirical data collected was essentially used to contribute to the evidence base that could be used by policy makers and the government when making legislative reforms or evaluating reforms that have already been introduced.

Due to the multitude of factors that contribute to the development of gambling-related harm amongst minors, the accurate evaluation of true impact of any normative rule or legislative framework as a whole is notoriously complex. Law forms an inherent part of how social activities are construed but only in addition to the influential force of

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religions⁷³, magnitude of social complexity⁷⁴, individual statutes, and levels of educational attainment⁷⁵ as well as personal propensity and attitude towards risks. Law and psychology can be argued to exist in a continuum whereby legal treatment of a particular activity influences attitudes towards risk and is capable to “*bring about social change*”⁷⁶ while concurrently changes in social norms and people’s perceptions of the given activity influence policy making.

Despite this, law and psychology are very rarely brought together although members of Committees called upon to scrutinise proposed legislative reforms need, and typically refer to, evidence collected in studies from various disciplines. Accordingly, the thesis aimed to ascertain whether it is possible to bridge the gap between law and psychology and, to some extent, represented an experiment in multidisciplinary and constituted an original approach. This has proved particularly challenging, especially due to the substantial distinctions between these two disciplines in the analytical techniques and approaches to data collection, but also due to material differences in the underlying philosophy and in the expectations as to what research outcomes should be achieved. This candidate’s very limited experience of the field of psychology further exacerbated the above perplexities. These challenges, to some extent, have been overcome by the candidate auditing modules taught on the MSc in Psychology and Research during the first year of the PhD in order to gain familiarity with terminology, relevant concepts and analytical methods; by undertaking an extensive reading of psychological literature that related to gambling and by supervision input from Professor Mark Griffiths, who is the Professor of Gambling in the field of psychology.

This thesis has been unable to entirely bridge the gap between these two disciplines. Nevertheless, the empirical evidence has been highly beneficial in exploring issues and highlighting findings in areas that previously received very little attention from researchers and has contributed some important insights. These should underpin

⁷³ Per Binde, ‘Gambling Across Cultures: Mapping Worldwide Occurrence and Learning from Ethnographic Comparison’ (2005) 5(1) *International Gambling Studies* 1

⁷⁴ Binde (n 73)

⁷⁵ Ian McLeod, *Legal Theory* (Palgrave MacMillan 2012) 157

⁷⁶ Dorothea Kubler, ‘On the Regulation of Social Norms’ (5 May 2000)

<<http://www.econsto.eu/bitstream/10419/62230/1/723756228.pdf>> accessed May 2013

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policy making and the Gambling Commission's further development of strategy aimed at protecting minors from gambling related harm.

To this effect, this thesis recommends that the Gambling Commission should reconsider its view on penny auctions and incorporate them within the gambling regulatory regime, unless their business model is amended in order to truly remove the element of chance or the financial risks. It will also be suggested that the permission to minors to be engaged in commercial and publicly organised forms of gambling, such as Category D gaming machines and by young people in lotteries, Scratchcards and football pools, should be reconsidered. The thesis does not argue that such participation directly causes harm. However, sufficient evidence emerged to show that legislative treatment of specific forms of gambling does indeed influence how minors perceive this form of entertainment and accordingly, the permissibility of minors to gamble may undermine their willingness to adopt a risk-averse attitude to this form of gambling.

In light of the continuing high levels of non-compliance with age verification requirements in land-based venues this thesis advocates, based on the regulatory and enforcement pyramid theory advanced by Ayres and Braithwaite⁷⁷, that the Commission has now sufficient grounds to involve much tougher forms of regulatory sanctions or criminal prosecution in order to further enhance the deterrent effect of Part IV Gambling Act offences. The regulator should also be more proactive at clarifying and making transparent the liability of adults purchasing gambling products on behalf of minors and a formal statement to this effect should be made. This is supported by the evidence collected by the Young People Omnibus, and during the present study, that those minors who gamble often do it with the assistance of an adult. The discouragement of such behaviour should be an important feature in any strategy that aims to protect minors.

The main contribution in the field of psychology is contained in Chapter 3 that focuses on 'demo'/social gaming and gambling-like activities within video games. The qualitative focus groups highlighted that the pupils from the sample had a very good understanding of the differences between fun gambling and real money gambling and

⁷⁷ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 100

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that their motivations for both activities were materially different. This has highlighted that some of the speculations made within the literature did not hold true for the participating pupils. Furthermore, some evidence emerged that, for some pupils, fun gambling constituted a replacement of real money gambling rather than introduction to it, removal of which could prompt them back into real money gambling. Accordingly, this was used to support the recommendation made in the EU Recommendation 2014/478/EU that fun gambling games should only be permitted if they are truly played only for non-transferable points or in-game credits, that they comply with the same technical specifications as their real gambling equivalents, and that such games should include warnings and social responsibilities measures similar to those that are displayed during real money gambling, but that they should not be unduly restricted from being accessed by minors.

While this thesis recognises that banning advertising is unlikely in the current political climate, it argues that existing regulations are insufficient to ensure that minors are not exposed to gambling advertising, or that they do not appeal to them. Accordingly, a precautionary approach is recommended and it is suggested that gambling operators should be restricted to providing full and accurate information in their gambling advertising without being allowed to appeal to the emotional states of viewers.

Finally, it needs to be noted that, although the impact of gambling-related initiatives of the European Union and cross-border difficulties of enforcement cannot be underestimated, these issues are outside the scope of this thesis and are not discussed.

II. Methodology

In this thesis a doctrinal legal analysis is supported by qualitative empirical evidence collected between April 2012 and July 2014 and by empirical data available within the literature. Most of the relevant primary and secondary legislative sources are referred to. Extensive literature search was carried out throughout the duration of the PhD using all accessible academic databases, daily newspapers, University libraries as well as Google Scholars and the British and Irish Legal Information Institute. A large variety of search terms were used as listed in Appendix A.

Sources were drawn from British and other international jurisdictions. Although the gambling regulation is country specific there are several overlaps between jurisdictions and the invisibility of State borders online makes geographical limitations less important. Furthermore, gambling-related problems, risk factors and protective measures tend to be similar across many jurisdictions, thus making the comparisons directly relevant. Further insight and information were gathered during national and international conferences attended as listed in Appendix B.

Informal discussions with the representatives from the Gambling Commission, Advertising Standards Authority, and with members of ATVOD, Compass Children's Services, Remote Gambling Association and NSPCC further informed the arguments in this thesis. Formal interviews were carried out with four representatives of the online gambling operators and with a representative of NetIDMe⁷⁸, a company that provides age-verification solutions. Ethical approval was granted and the interviews were carried out in accordance with the interview schedule included in Appendix H. The transcripts of the interviews were emailed to the representatives asking for any corrections but no amendments were made. The participants were allocated random names for use in the thesis. Peter and Sally represented large online gambling providers. Jason and Richard represented a small company and a start-up respectively and Maggie represented NetIDMe.

The candidate also carried out a mystery shopping exercise in order to test the effectiveness of the age verification procedures of UK online gambling providers, and to establish whether prepaid cards could be successfully used as a method of payment.

⁷⁸ Permission granted to reveal the name

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Ethical approval was also secured. The operators tested were the ones which were in possession of the remote gambling licence and who were included in the Gambling Commission's depository of all licence holders between 4th and 10th April 2012 and confirmed between 1st and 12th of September 2012. In total 120 websites were included in the exercise. Of those 120 sites, 70 were in possession of a UK gambling licence and a licence from another jurisdiction, and 32 held only an overseas gambling licence.

The first stage involved attempting to register on the site with a fictional name, minor's date of birth, accurate residential address and valid but unregistered mobile number. If registration was permitted, a deposit of the minimum amount was attempted. To avoid duplications with the rolling mystery shopping programme run by the Gambling Commission⁷⁹ the payment was attempted by using prepaid shopping cards with the following logos: "Western Union MasterCard – a gift to you; No:544521100098 2434" and "Visa Debit Gift Card – a gift for you; No:4594700072063349". If any free incentive and bonuses were available, they were used if permitted by the site. No withdrawals were planned. If registration was not permitted with a minor's date of birth, another attempt to register⁸⁰ with an adult date of birth but with the same other details was made. The test ended either when the registration failed or where an attempt to deposit money was either successful or unsuccessful.

Focus groups

The most important component of the data collection consisted of qualitative focus groups carried out with pupils recruited from within schools and youth clubs in London and Kent and conducted during school hours.

Procedure:

The candidate undertook enhanced CRB checks in order to be able to run the focus groups without the supervision of the schoolteachers. A comprehensive list of all London schools was compiled using data available from all London/Kent Borough Council websites. The areas of Brighton and Hove City was included in order to gain representation from a seaside area but no school volunteered to participate from this

⁷⁹ That tested against cards linked to a minor's bank account

⁸⁰ After deleting cookies

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geographical location. Details from the council lists were then cross-referenced with the schools' individual websites.

All identified schools were contacted between December 2012 and April 2013 by email. Full explanation of the aims of the project, funding arrangements, ethical approval and details of the research was provided and the schools were asked to indicate their willingness to participate⁸¹. The original email was then followed up by a secondary email but no further contact was attempted unless the school expressed an interest in the project. Interested schools were normally visited prior to the focus group in order to make the arrangements and to obtain informed consent.

The sessions were conducted during school hours in accordance with the semi-structure focus group schedule as detailed in Appendix E. Individual group sizes varied between three and 30 pupils and lasted between 20 and 90 minutes. Of the 23 focus groups, six of them were carried out in the presence of the teacher. 17 were conducted without the teacher being in the classroom.

Prior to the commencement of the session, the information about the project was read out and written consent forms were distributed to all participants who were allowed to ask any questions. At this stage, pupils were also assured of anonymity and confidentiality and those who did not wish to continue were asked to leave. In total only four pupils left the session at this stage and none left the classrooms during the substantive discussions. Those who remained were asked to sign a consent form, a copy of which was given to them. However, in practice all pupils left their copies behind.

To ensure confidentiality, pupils were asked to choose nicknames for themselves. No real names were used during the sessions and only pseudonyms are used in the analysis. However, as the pupils knew each other, the groups were always reminded to respect the confidentiality of the sessions and not to divulge any details of what had been debated. The first three sessions were treated as "testers", following which the semi-structure schedule was amended to add the topic of gambling advertisements. The discussions were recorded and transcribed verbatim.

⁸¹ The full text of the email included in Appendix C

Sample

The final sample was based on 200 active participants in total⁸². 23 focus groups were carried out at 14 participating institutions. Eleven focus groups were carried out with pupils from Year 10 (14/15 years old), eleven with pupils from Year 12 (17/18 years old) and one focus group was carried out in a youth club (14-19 years old). There were 71 male and 36 female participants from Year 10 and 34 male and 59 female participants from Year 12.

The targeted age groups were 14/15 and 16/17 years old respectively. These two different age cohorts were differentiated by their legal ability to purchase lottery tickets, Scratchcards, or to participate in football pools. The study wished to collect data from those who were legally still below the age for all forms of commercial gambling⁸³ as well as from those who were already allowed to play lottery and who were coming close to the legal age for all forms of gambling. The younger cohort also partially corresponds to the age group targeted by the quantitative Young People Omnibus. This allowed for some comparisons to be made in the analysis.

Some of the participating pupils had already attained the legal age of majority and were over 18 years old at the time of the focus group. Although they were not intended to be part of the target sample, they were selected by the schools and the candidate concluded that it would have been undesirable to prohibit them from participation. The number of pupils from this category was very small and they were allowed to contribute. This has ultimately proved beneficial as some of them provided very useful insights and were typically keen participants.

Despite the substantial initial difficulties in securing schools' cooperation the intended sample was largely achieved. However, all pupils were selected by the school and attended on a voluntary basis. Participation of the schools themselves was also voluntary. Participating schools and pupils were accordingly self-selecting and formed a convenience sample. Moreover, no private schools agreed to participate and no seaside location was represented. The seaside location was deemed to be desirable as it has been indicated within the literature that seaside residents may gamble more often than those from other urban or rural areas due to the higher prominence of

⁸² Defined as pupils who expressed at least one opinion during the discussion

⁸³ Except Category D gaming machines

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entertainment centres at the piers and in town centres⁸⁴. Nevertheless, the sample represented a good cross-section of secondary schools from affluent, medium and deprived socio-economic areas⁸⁵ and included a single gender and co-educational institutions. This accordingly satisfied the study needs.

The majority of students attended mainstream education and this may have created a bias by excluding those who were expelled, truants, and those attending schools with special needs. This was counterbalanced by one focus group that was carried out with socio-economically deprived members of a youth club. No material differences were observed, with the exception of gambling participation, which was higher than in other focus groups.

Rationale for the empirical study

The lack of studies that relate to gambling and minors, highlighted by the Joint Committee on Draft Gambling Bill and the Gambling Commission, coupled with the requirement of the PhD to contribute original work to the wealth of knowledge, provided the original impetus for the collection of empirical data. The position remained after the Gambling Act was passed and the need for such study was further reiterated in the Parliamentary Report which stated that “*there has been insufficient data collected to establish whether or not the 2005 Act has been successful in its aim of protecting children from gambling. This highlights a particular need for more research in this area*”⁸⁶. Moreover, as the current generation of youth is likely to be substantially affected by the legislative change, this candidate wanted to give them the opportunity to express how they understand and construct gambling as opposed to analysing the black letters laws, or considering the issues only from the perspective of how adults think minors react to issues associated with gambling.

Extensive review of literature then identified broad areas which were under-researched and which included questions relating to how children understand and experience land-based and online gaming, including video gaming, fun gambling, and real money gambling; what attracts or discourages them to participate and their

⁸⁴ David Forrest, Ian G McHale, ‘Gambling and Problem Gambling Among Young Adolescents in Great Britain’ (2012) 28 J Gambl Stud 607

⁸⁵ Categorized by reference to the number of pupils in receipt of free school meals

⁸⁶ Culture, Media and Sport Committee, *The Gambling Act 2005: A Bet Worth Taking?* (HC 2012-13/HC421-I) para 39

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attitudes towards the proliferation of gambling opportunities. Detailed consideration, in consultation with the PhD supervisors as to the specific questions posed in the literature, and with regards to what can realistically be achieved through the qualitative focus groups, further narrowed down the topics.

The final study design aimed to be exploratory in nature and the main focus centred on the relationship between ‘demo’/social gambling and gambling-like activities within video games, and real money gambling. Several research studies highlighted a clear correlation between playing in the free practice mode and gambling with real money⁸⁷. However, the actual reasons behind the identified association remained underexplored. Although several reasons were speculated as contributing to this position, most of the speculations were not supported by empirical data. Moreover, the majority of the studies were carried out outside of UK jurisdiction and many did not even involve minors as participants.

Some of the concept papers speculated that the correlation may be due to the substantial structural and psycho-social similarities between these two forms of online gaming, and due to the ‘*gamification*’ of real money gambling. Others focused on the potential overlap in motivations that may cause players to be engaged in both activities, or on lack of understanding of the underlying differences between gaming and real money gambling. For the purpose of the study, the existence of the correlation was assumed in line with the available quantitative data. Accordingly, the study focused on identifying whether any of the speculated suggestions held true for participating pupils and on exploring other reasons that may contribute towards such association. Qualitative focus groups were considered to be the most efficient method to answer these research questions.

The subsidiary purpose intended to ascertain how the participants define and perceive gambling as an activity in order to compare their understanding with the statutory definition, and to highlight issues that should be included within the “*knowledge based*” gambling awareness educational campaigns. In light of the comments made

⁸⁷ Ipsos Mori, Appendix 5 ‘British Survey of Children, the National Lottery and Gambling 2008-09: Report of a Quantitative Survey’, (National Lottery Commission 2009) <http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf> accessed May 2015, 133; Daniel King ‘and others’, ‘Adolescent Simulated Gambling Via Digital and Social Media’ (2014) 31 *Computers in Human Behavior* 305

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by the Joint Committee on the Draft Gambling Bill regarding extreme paucity of research on the impact that playing Category D gaming machines may have on minors, the discussion also aimed to ascertain the view of the pupils as to how they think, if at all, that they were affected by such participation. The contrast between “hard” forms of gambling such as betting or casino gaming, and soft forms such as penny pushers and toy grabbers, was intentionally used to explore whether the legal classification of these has any impact on minors’ reactions and attitudes.

Additionally, during the sessions students were asked about their views of the existing liberal approach towards gambling and of the effectiveness of the age verification procedures adopted by land-based and online gambling providers. These topics were considered briefly, and were merely incidental to the main scope of the study, but nevertheless provided some interesting insight and suggestions.

During the design stage of the study gambling advertisements were excluded from the topics intended to be covered by the empirical data collection. This was amended after the first three focus groups were concluded. It became very apparent that participating pupils wished to express their views on the proliferation of gambling advertising and how it affected them, and the topic was formally added to the focus groups’ schedule.

Rationale for the empirical design

The ultimate choice of qualitative focus group as the main vehicle of data collection resulted from a combination of factors. The original design included a mixed method strategy. A small number of exploratory qualitative focus groups was to be followed by a quantitative survey and ethical approval was sought and granted for both stages of the study. The findings of the focus groups were intended to underpin the development of the questionnaire and the analysis aimed to incorporate findings from both components. However, in the course of the study it became transparent that such mixed approach suffered from flaws on practical and academic levels.

Prior to the commencement of the PhD this candidate was somewhat naïve in thinking that cooperation of the schools would be easily forthcoming. In fact securing schools’ cooperation proved to be the most laborious element of the project. As schools work under tremendous curriculum and organisational pressures, finding a suitable slot was very difficult, even with those that were willing to participate and even though the candidate was able to attend on any date and time offered.

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During the first three months of the project, no school volunteered to participate despite this candidate sending over 600 emails. The vast majority of the schools did not respond. A very small number reacted angrily to the proposal by implying that it would be a waste of their time. However, the majority of schools that responded declined in a polite manner explaining that they are unable to accommodate my project due to large volumes of such requests, or for other reasons. However, after the initial quarter several schools responded in quick succession. In light of the unpredictability of whether the initial interest would translate into an actual focus group the candidate accepted all offers and agreed to specific dates for the sessions to take place. Subsequently it would have been unprofessional to cancel any of the scheduled sessions and, accordingly, all 23 focus groups were carried out. It is perhaps worth noting that once the schools agreed to participate, the pupils themselves were generally very keen.

The practical challenges in gaining access to the targeted age groups meant that focus groups seemed to be the most effective method of collecting the intended data. Securing cooperation of individual pupils would have been even more difficult. With hindsight it is also submitted that the focus groups produced much richer data. The participating pupils were typically from the same form, knew each other well and were keen to engage in heated debates and arguments with each other. Presence of other peers also appear to also make them feel more at ease and comfortable resulting in a much more open discussion. It is unlikely that such engagement could have ever been achieved during interviews with individual pupils.

Following the focus groups the survey has in fact been designed and administered. Although a total of 300 responses have been obtained, the number of participants who answered all questions was substantially smaller. Additionally, the candidate's observation of how the surveys were filled in by pupils raised concerns regarding the reliability of the answers and whether they truly represent the view of the respondents. Several pupils talked to each other about which answer to select, some attempted to "google" the answers and some were ticking the answer boxes at such a rapid speed that there was a high risk that they had not in fact fully read the questions. For the aforementioned reasons, the results of the survey were ultimately disregarded and excluded from the analysis and the final submission.

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The originally planned mixed methodology also caused significant challenges on the academic level. This candidate had prior, albeit limited, experience of qualitative data collection but no prior exposure or proper understanding of quantitative methods. To overcome these shortcomings, the candidate audited modules taught on the MSc in Psychology and Research in order to gain a better understanding of the theory and practicality of empirical research methods. In the course of the study, the candidate's philosophy became more aligned with qualitative paradigm that considers reality to be subjective rather than objective, constructed by the human being and that which require to be interpreted rather than measured⁸⁸. Furthermore, this candidate agreed with arguments made by Sale et al⁸⁹ in the context of health studies that qualitative and quantitative methods effectively consider different issues and, although they can complement each other, they are not appropriate for triangulation purposes. The candidate also wished to avoid the risk identified by Creswell et al⁹⁰, whereby readers of studies that combine both qualitative and quantitative findings may focus more on the positivist quantitative approach at the expense of recognising the value of the former.

Data Analysis

As the study was exploratory in nature, thematic analysis was adopted as this method is not constricted to any predetermined theoretical framework⁹¹. Given that the aims of the study were to identify how the participants experience real money gambling and gambling-like activity, what their understanding is and how they feel they are affected by permitted and not permitted forms of real money gambling, a realist method was applied to reflect their perceptions and beliefs. Realist method reports “*experiences, meanings and reality of participants*”⁹² without the influence of the researchers' view who “*stands in the background as an uninvolved observer*”⁹³.

⁸⁸ Sotirios Sarantakos, *Social Research*. (4th edn, Palgrave Macmillan 2013)

⁸⁹ Joanna EM Sale, Lynne H Lohfeld, Kevin Brazil, ‘Revisiting the Quantitative-Qualitative Debate: Implications for Mixed-Methods Research’ (2002) 36(1) *Quality and Quantity* 43

⁹⁰ John W Cresswell, Abbas Tashakkori, ‘Differing Perspective on Mixed Methods Research’ 1(4) *Journal of Mixed Methods Research* 303

⁹¹ V Braun and V Clarke, ‘Using thematic analysis in psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77

⁹² Braun (n 91)

⁹³ Sarantakos (n 88) 452

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The analysis was carried out in accordance with the systematic analysis process devised by Kruger⁹⁴. Accordingly, the initial thoughts began to emerge already during the discussions. This also helped with ensuring that any inconsistencies were noted and comments that could have been misunderstood due to the use of youth language or otherwise were further probed in order to gain further clarity. Gaining familiarity continued during the transcription process.

The transcripts of the focus groups was then read and re-read several times to gain comprehensive familiarity and to formulate initial ideas as to how they should be categorised. All relevant comments were extracted in order to identify the themes, paying particular attention to affirmation, contradictions or difference of views within individual focus groups, as well as between the different sets. Comments were coded and repetitions noted. This was completed in order to ensure that all relevant themes were identified, defined and named, and included in the report in this thesis in an objective and accurate manner.

The study produced nuanced results as presented throughout the submission. The qualitative nature of the study prevented any generalisation, and the results reported in the thesis are only indicative of the opinions and feelings of the sample interviewed. Nevertheless, it overall delivered some very important insight that should be of interest to regulators, policy makers and developers of educational programmes. The project also represents one of the biggest qualitative studies on gambling that has been undertaken with pupils in UK since the introduction of the Gambling Act. Most importantly it gave young people the voice to express what they think about the issue of gambling and its proliferation. Accordingly, it is submitted that the study achieved its intended objective.

Limitations:

The risk of young people giving socially desirable answers is always present. Only pupils may have been selected who were perceived by the schools to have the “*correct attitude*”. Peer pressure, fear of criticism, or the need to conform to the majority view within the focus groups carries an inherent risk that some pupils may not have expressed their true opinions. However, this candidates submits that these risks did

⁹⁴ Richard A Krueger, ‘Designing and Conducting Focus Group Interviews’ (October 2002) <http://www.shadac.org/files/FocGrp_Krueger_Oct02.pdf> accessed May 2012

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not seem to materialise within the present sample. Pupils expressed many polarised views during their heated debates and were generally comfortable in admitting to their gambling engagement. Nevertheless, most pupils attended mainstream education and this may have created a bias by excluding those who were expelled, truants, and those attending schools with special needs. As the study targeted mainstream establishments, this does not of itself invalidate the findings, but it highlights that views of minors who fall within the excluded category may have to be studied separately.

There is also a risk that children and young people may not necessarily fully or consciously appreciate how their activities truly influence their current or future behaviour. This may cause divergence between expressed views and the actual impact that activities may have on them. Further longitudinal research should explore this aspect.

Research Ethics

All data collections were approved by the Ethics' Committee of Nottingham Trent University and ethical approval was also endorsed by the Ethics Committee of the Queen Mary University of London. The Ethics' Committee made one non-conditional recommendation. It was suggested that all pupils from Year 12 who were under the age of 18 years old should be advised that if they have gambled they have committed a criminal offence under the Gambling Act. In line with the recommendation, participating pupils were told about it in the course of the discussion. However, in order to ensure that such information does not inhibit students' willingness to discuss the topic openly this was given in a non-judgmental way and towards the end of the sessions.

The Socio-Legal Study Association's Code of Ethical Practice was fully adhered to. To this effect all participants were fully explained the purpose and nature of the study with no hidden aspects or hidden hypotheses. All participation was voluntary. All pupils were assured that this candidate will treat all information in confidence and that no quotes will be attributed to anyone by their real name or with reference to the participating school. Pupils were also reminded that they should also treat the discussion confidentially. Any rare incidental disclosures of real names were disregarded.

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Gambling is a controversial and potentially sensitive topic. The potential risks may include causing distress to participating pupils if, for example, they or anyone from their families have been affected by problem gambling. It may cause offence if they held particularly strong views that may have been challenged during the discussion. The element of peer pressure may have caused some pupils to express the views that were not their own that could have made them feel uncomfortable. There is also the potential risk that such discussions, due to a variety of views and opinions expressed by participants, may attract pupils to gambling even though they may not have been beforehand interested in this form of activity. Such risk is counterbalanced by the potential benefit of challenging the mind-set of those who already gamble.

This candidate was very mindful of the aforementioned challenges. The sessions proceeded in a cautious manner and the candidate aimed to ensure that the focus groups were portrayed and treated as a neutral and non-judgmental forum where pupils were allowed to express their view in an open way without any fears of being reprimanded or criticised. Pupils were also continually observed in order to ensure that nobody became visibly distressed. This candidate's extensive experience of teaching and personal tutoring helped with being able to recognise subtle signs that were treated as cues for diverting the discussion to a different issue.

Contrary to the initial expectation, the pupils, in the main, did not appear to find the topic of gambling to be sensitive. Indeed, the majority of pupils seemed to appreciate such an opportunity and some expressly asked whether it would be possible for this candidate to facilitate a similar session on drugs or alcohol. In the course of the discussion one person admitted to having a "*slight gambling problem*" and another pupil asked privately, after the session, if the candidate was able to talk to her father who had a gambling problem. This pupil was told that, regretfully, this was not possible but the contact details of those who are able to offer help and support were given. A larger, but still a small number of pupils, stated that they knew someone within their close circle of family or friends who experienced a gambling problem but only one pupil appeared to become slightly distressed because of that. As the student did not wish to discuss the point further, the topic was moved onto a different issue and the relevant pupil was happy to continue the conversation.

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Additionally, the candidate offered to run a gambling awareness workshop, either for the students who took part in the focus groups or for others. In total 13 formal gambling awareness workshops were carried out independently of the focus groups. After each focus group some of the issues raised during the sessions were also discussed informally and participants were able to take away hand-outs from the “You Bet” awareness raising campaign that contains details of organisations that offer gambling help and support.

III. Terminology

The gaming studies field suffers from lack of agreed typology of the variety of available games as well as from lack of consistent terminology that is used within the academic literature, by the industry, and in general usage.

For the most part, this thesis uses the terms in accordance with the meaning given to them by the Gambling Act 2005. Nevertheless, certain subtle distinctions need to be highlighted. Accordingly, the words *child* and *children* are used in accordance with the Gambling Act to refer to anyone under the age of 16 years and *young person/persons* is anyone who is under the age of 18 years but over the age of 16 years.

However, *young people, minors, underage, teenagers and adolescents* are used interchangeably to describe anyone under the age of 18 years. It is acknowledged that not all adolescents are minors but for the purpose of this thesis this word refers only to those adolescents who are below the age of majority.

Several terms used in Chapter 3 do not have an easy reference point as the same terms, such as social gaming, denote different meaning depending on the context in which they are used.⁹⁵ Similarly, different terms are used to describe the same phenomenon. Accordingly, a special taxonomy has been developed for the purpose of this thesis in order to expose the relevant distinctions accurately.

Video gaming/games – this term is used inclusively to incorporate all games that are played using existing technological devices regardless of which platform they are being accessed by and irrespective of whether internet connection is required, but excluding any game that falls within the definition of gambling. Video gaming/games therefore includes all games played on computers, mobile phones, portable tablets, games consoles and other technological devices that do not offer any monetary prize or the possibility of cashing out any winnings or payments that may have been made towards the acquisition or playing of the game. Those games can be acquired for free,

⁹⁵ Jonathan Parke ‘and others’ ‘Exploring Social Gambling: Scoping, Classification and Evidence Review’ (Gambling Commission, 2012)
 <<http://www.gamblingcommission.gov.uk/pdf/Exploring%20social%20gambling%20-%20scoping,%20classification%20and%20evidence%20review%20-%20May%202013.pdf>>
 accessed October 2012

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for one-off payment, or can be played via monthly subscription. It also includes ‘freemium games’.

Freemium games is used to describe games that are generally free-to-play but players are invited to pay in order to buy additional boosts or levels in the games, to buy virtual gifts, and to offer it to others, to buy additional gadgets or similar. Those items are not essential in order to play but may make the game more enjoyable.

Video games are subdivided into the categories of fun gambling games, entertainment games and hybrid games. *Fun gambling*, also referred to as *free-to-play games* refer to those games that mirror typical gambling games such as poker, blackjack, roulette or slot machines but which do not offer any financial monetary prizes or pay-outs. *Fun gambling games* are further divided into ‘demo’ gambling games and *social gambling games*. ‘Demo’ gambling refer to those games that are played on online real gambling websites and *social gambling* refer to those that are played on social networking sites. *Gambling-like activities* is used to describe all activities contained within video games that resemble real gambling but which do not provide real prizes outside the game itself.

Accordingly, *entertainment games* refer to all gaming activities that do not include any gambling-like activities within their theme such as *Angry Birds* or *Jelly Defence* while *hybrid games* describe all games or virtual worlds that are predominantly entertainment games but which have either mandatory or optional gambling element incorporated within their overall theme. This gambling component can be *overt* such as mini-casino in *Call of Duty* or *covert* such betting virtual currency on an envelope containing unknown football players with the hope of getting good quality ones but having no way of influencing the outcome as in e.g., *FIFA*.

Real money gambling/gaming is used within its meaning as defined by s.3 of the Gambling Act 2005 and is used interchangeably with terms such as: *for money gambling, true gambling, or monetary forms of gambling*.

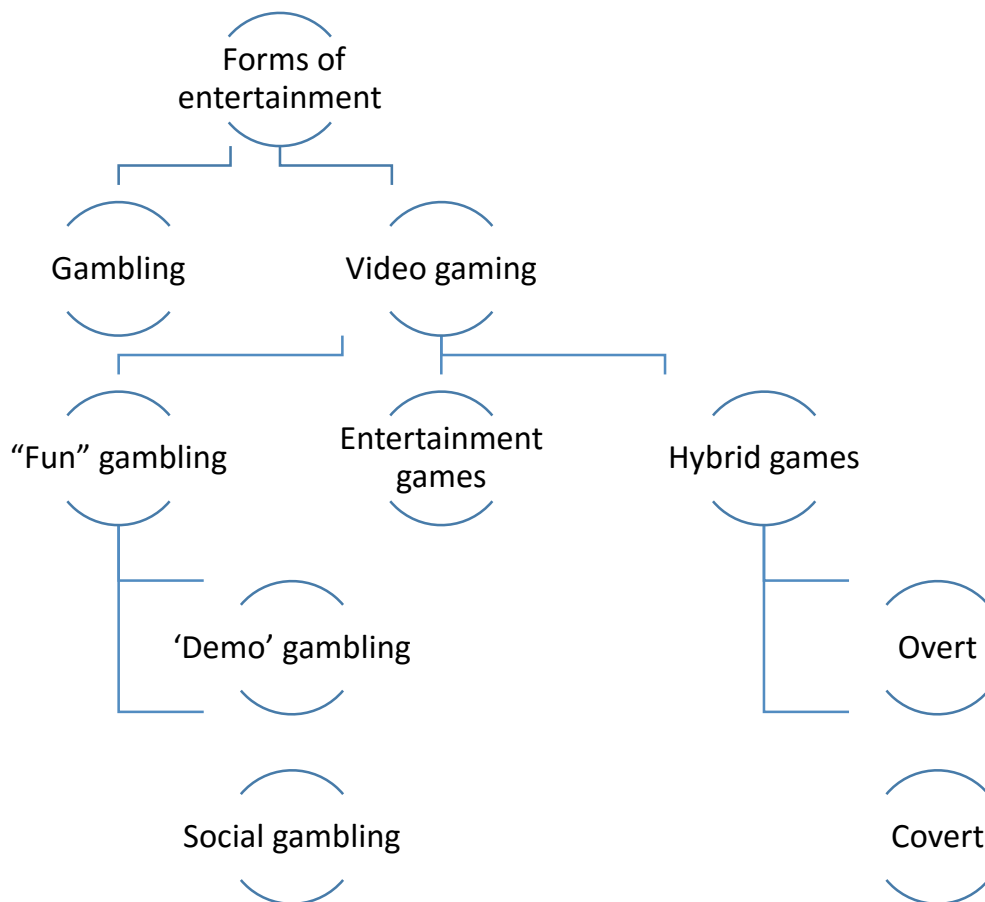
The terms “*social networking sites*” and “*social media*” are used to denote meaning given to them by Parke et al⁹⁶ and they mean “*a website that provides a virtual*

⁹⁶ Jonathan Parke ‘and others’ ‘Exploring Social Gambling: Scoping, Classification and Evidence Review’ (Gambling Commission, 2012)
<<http://www.gamblingcommission.gov.uk/pdf/Exploring%20social%20gambling%20->

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community, allowing users to create their own profile or personal homepage and to develop an online network by linking with other users of that site” and “the broad range of internet based platforms on which users can create and share their own content online, including but not limited to social networking, bookmarking, photo or video sharing” respectively.

The above description can be demonstrated by this diagram



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Finally, the terms “Great Britain” and “British” is used with their correct meaning and Great Britain denotes England, Wales, Scotland, and their associated island while United Kingdom denotes England, Wales, Scotland, Northern Ireland, and their islands. However, the terms “English” or “English law” are used rather loosely to denote “British”.

Chapter 1 – What forms of gambling are minors protected from? The meaning of gambling.

1.1. Introduction.

The statutory meaning of gambling in Great Britain is defined by s.3 of the Gambling Act 2005. S.3 provides an exhaustive description of the activities that are considered to be gambling in law. Those are “*gaming*”⁹⁷, “*betting*”⁹⁸, and “*participating in a lottery*”⁹⁹. The Act further distinguishes between gambling in land-based premises and remote gambling that takes place where the activity is carried out by means of “*remote communication*”¹⁰⁰. This essentially includes all forms of communication other than face-to-face contact. The Act specifically lists the “*internet*”¹⁰¹, “*telephone*”¹⁰², and “*radio*”¹⁰³. It further provides that “*any other kind of electronic or other technology for facilitating communication*”¹⁰⁴ is included. This permits the Secretary of State to include or exclude any system that may be developed¹⁰⁵ thus making the definition “*future-proved*”.

Section 1(c) of the Gambling Act 2005 specifically provides that one of the licensing objectives is to “*prevent children and other vulnerable people from being harmed and exploited by gambling*”. The successful achievement of this objective depends on several factors, one of which is the correct identification of what forms of entertainment may lead to such gambling-related harm. This assessment determines which activities fall under the gambling regulatory regime and which of them should be prohibited to minors.

Correct determination of these two aspects is necessary to select a proportionate legislative response to the potential risks, while also ensuring that vulnerable members of society are properly protected. Accordingly, the legal meaning of gambling is of paramount importance because only the activities that satisfy the statutory definition fall within the comprehensive gambling legislation, and only those that are specifically prohibited by the Gambling Act are not allowed to be accessed by minors, unless they are outlawed by other legislation.

⁹⁷ GA2005, s 3(a)

⁹⁸ GA2005, s 3(b)

⁹⁹ GA2005, s 3(c)

¹⁰⁰ GA2005, s 4(1)

¹⁰¹ GA2005, s 4(2)a

¹⁰² GA2005, s 4(2)b

¹⁰³ GA2005, s 4(2)c

¹⁰⁴ GA2005, s 4(2)d

¹⁰⁵ GA2005, s 4(2)e

Furthermore, the identification of an activity as gambling as opposed to mere risk taking¹⁰⁶ carries with it another, less acknowledged, consequence. It will be argued that many minors continue to have negative perceptions about gambling. Such negative attitudes constitute a socially-based, protective factor that discourages their engagement, but it extends only to those activities that are viewed by them as gambling. Although minors' understanding of gambling somewhat diverges from the statutory definition, the legal classification of an activity as prohibited gambling, non-gambling or as gambling permitted to minors may influence whether, and to what extent, children and young people adopt a risk-averse behaviour.

Although the Gambling Act has never intended to fully insulate minors from participating in all forms of gambling¹⁰⁷, the regulatory framework introduced by the Act should be able to firstly accurately identify what activities may lead to gambling-related harm, and which should be prohibited to those who are underage, and secondly to prevent minors from being engaged in them.

This chapter is concerned only with the first statement and the second aspect is evaluated in Chapter 2. This Chapter aims to demonstrate that the Gambling Act's categorisation of different forms of gambling into “*soft*”, “*medium*” and “*hard*” forms¹⁰⁸ is undesirable because it only partially corresponds to the psychological evidence of the relative riskiness of the different types of gambling products. In other words, it will be argued that all gambling activities identified as representing the most hazardous form have been accurately determined, but this category is not sufficiently inclusive.

This means that some of the activities, despite falling within the statutory definition of gambling, and despite potentially leading to substantial¹⁰⁹ expenditure and other negative consequences, continue to be freely accessible to British young people. It will also be demonstrated that the practical interpretation of the legal definition of gambling adopts a very traditional understanding of its meaning. This is to the exclusion of some novel activities that share many structural similarities with gambling and which may, amongst minors, lead to identical consequences that gambling may do.

¹⁰⁶ Mark D Griffiths, *Adolescent Gambling* (Routledge 1995)

¹⁰⁷ S Smith (ed), *Smith and Monckton: The Law of Gambling* (3rd edn, Tottel Publishing 2009)

¹⁰⁸ Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70(4) MLR 626

¹⁰⁹ Relative to minors' means

CHAPTER 1 – WHAT FORMS OF GAMBLING ARE MINORS PROTECTED FROM? THE MEANING OF GAMBLING.

The terms “*gambling-related harm*” and “*exploitation*” are not defined by the Act but it has been recently reconfirmed¹¹⁰ that harm is not confined to problem gambling or pathological disorder. This is defined and tested by the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)¹¹¹ and Diagnostic and Statistical Manual-IV-Multiple Response-Adapted for Juveniles (DSM-IV-MR-J) and includes “*the adverse financial, personal and social consequences to players, their families and wider social networks that can be caused by uncontrolled gambling*”¹¹².

A distinction can be made between psychological/social harm and economic/financial harm that may be suffered by an individual, or by others who are related to the affected person. Specific harms, identified by young people in a study carried out by Raisamo et al¹¹³, but not unique to minors, include “*feeling guilty or shameful*”, “*having problems with social relationships*”, “*suffering disruption of family life and daily rhythm*” in addition to the financial harms that relate to loss of money or other material possession over and above what is affordable to the specific individual¹¹⁴.

However, the risk of such wider harms is very difficult to discern, not least due to lack of a validated measure that could be utilised for this purpose¹¹⁵. Accordingly, in addition to conceptual frameworks that identify causes of problematic gambling, such as the “*Pathways Model of Problem and Pathological Gambling*”¹¹⁶, the impact of the

¹¹⁰ Heather Wardle, Jonathan Parke and David Excell, ‘Gambling Machine Research Programme: Report 1 – Theoretical Markers of Harm for Machine Play in a Bookmaker’s A Rapid Scoping Review’ (RGT 2014)

<http://www.responsiblegamblingtrust.org.uk/user_uploads/pdfs/report%201%20theoretical%20markers%20of%20harm%20for%20machine%20play%20in%20a%20bookmakers%20-%20a%20rapid%20scoping%20review.pdf> accessed January 2015, 2

¹¹¹ DSM-V for gambling disorder: “A. *Persistent and recurrent problematic gambling behaviour as indicated by four (or more) of the following in the 12-month period: 1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement; 2. Is restless or irritable when attempting to cut down or stop gambling; 3. Has repeated unsuccessful efforts to control cut back or stop gambling; 4. Is often pre-occupied with gambling (e.g., persistent thoughts of past gambling experiences, handicapping or planning the next venture, or thinking of ways to get money with which to gamble); 5. Gambles often when feeling distressed (e.g. helpless, guilty, anxious or depressed); 6. After losing money gambling, often returns another day to get even (‘chasing losses’); 7. Lies to conceal the extent of involvement with gambling; 8. Has jeopardised or lost a significant relationship, job, or educational or career opportunity because of gambling; 9. Relies on others to provide money to relive desperate financial situations caused by gambling; B. the gambling behaviour is not better account for by a Manic Episode”*

¹¹² Responsible Gambling Strategy Board, ‘RGSB Strategy 2012’ (2012)
<<http://www.rgsb.org.uk/publications.html>> accessed April 2014, at pp 9-10

¹¹³ Susanna Raisamo ‘and others’, ‘Gambling-Related Harm Amongst Adolescents: A Population-Based Study’ (2012) 29(2) Journal of Gambling Studies 151

¹¹⁴ Raisamo (n 113)

¹¹⁵ Wardle (n 110)

¹¹⁶ Alex Blaszczynski & Lia Nower, ‘A pathway model of problem and pathological gambling’ (2002) 97(5) Addiction 487

CHAPTER 1 – WHAT FORMS OF GAMBLING ARE MINORS PROTECTED FROM? THE MEANING OF GAMBLING.

Gambling Act's decision as to what to include or exclude within the meaning of gambling has to be assessed with reference to the wider range of negative consequences that may directly, or indirectly, lead minors to harms either in the short or long term.

Under the conceptual framework of "*Pathways Model of Problem and Pathological Gambling*"¹¹⁷ there are three primary pathways that may lead towards excessive gambling consumption. Individuals may develop problematic behaviour because (1) they have been "*behaviourally conditioned*" to become interested and develop unhealthy attachment to gambling; (2) they are "*vulnerable emotionally*" and use gambling as a mean of escape; or (3) they are "*anti-social, compulsive gamblers*"¹¹⁸.

Irrespective of the actual type of gambling, each of the above pathways commences with being engaged in gambling in the first instance. The opportunity theory¹¹⁹ and the total consumption model¹²⁰ indicate that liberalisation of any industry leads to higher overall consumptions that, in turn, may lead to the increase of consumptions at problematic levels. These theories produce constant tension with the social adaptation theory¹²¹ that stipulates that the majority of people adapt to the widespread availability of gambling without suffering negative consequences. While the adaptation process is likely to succeed for most minors because a large proportion of them, in time, will acquire the required level of competence to make reasonable choices¹²², young people are typically more vulnerable due to their cognitive abilities still developing¹²³. If they start gambling too early, their risk of failing to adapt to increasing availability is higher than is the case with adults. Accordingly it is difficult to see how the Gambling Act's exclusion of certain novel activities, as well as its continuing permission for minors to be engaged in certain

¹¹⁷ Alex Blaszczynski & Lia Nower, 'A pathway model of problem and pathological gambling' (2002) 97(5) *Addiction* 487

¹¹⁸ Blaszczynski (n 117)

¹¹⁹ Simon Planzer and Heather Wardle, 'The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling' (RGF 2011) <<http://ssrn.com/abstract=2045052>> accessed November 2013

¹²⁰ Marianne Hansen, Ingeborg Rossow, 'Adolescent Gambling and Problem Gambling: Does the Total Consumption Model Apply?' (2008) 24 *J Gambl Stud* 135

¹²¹ Planzer (n 119)

¹²² Alex Blaszczynski 'and others', 'Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions' (RGT 2014), <http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf> accessed December 2014

¹²³ Margee Hume and Gillian Sullivan Mort, 'Fun, Friend or Foe: Youth Perception and Definition of Online Gambling' (2011) 17(1) *Social Marketing Quarterly* 109

forms of gambling, can be reconciled with the Act's stated aim of protecting minors from short-term and long-term gambling-related harm.

While providing a statutory description of gambling “*for the first time in British law*”¹²⁴, must be seen as a positive contribution of the Act, alongside many other positive provisions that tightened the regulation of gambling, overall the Act has not succeeded in including in the regulatory regime all the activities that it should. In this chapter it is therefore recommended that this position is reviewed in order to ensure that all activities that may lead to gambling-related harm are incorporated within the regulatory framework, and that all commercial and publicly organised gambling is only permitted to those who are over the age of 18 years old. While there is no conclusive proof that gambling automatically harms minors, equally it cannot be safely alleged that soft forms of gambling are certainly harmless. Accordingly, it is submitted that a precautionary approach to policy making in this respect is preferable, especially in light of the evidence that minors are at a higher risk of developing gambling-related problems, and based on the supposition that preventing harm is more effective than attempting to address any potential difficulties with subsequent treatment.

This chapter commences with the evaluation of the statutory definition of gambling followed by the exposition of the activities that are permitted or prohibited to minors. This is followed by the analysis of how a sample of young people understand gambling and what their attitude to this form of entertainment is in order to further reinforce the arguments made.

1.2. Gaming

Gaming represents the broadest category of gambling. It is defined by s.6 as “*playing a game of chance for a prize*”. Three critical components must be satisfied: a player must be engaged in an activity that constitutes a game, this game must contain an element of chance, and the participation must give the player the opportunity to win a prize. General forms of gaming are differentiated from games that are played on gaming machines that are defined and regulated separately.

The Act provides a statutory definition of a “*game of chance*” and of a “*prize*” in s.6(2) and s.6(5)(a) respectively, but no statutory meaning is attributed to the word “*chance*” or

¹²⁴ David Miers, ‘Gambling in Great Britain: Implementing a Social Responsibility Agenda’ (2008) 12(6) Gaming Law Review and Economics 583

to the word “*game*” neither in s.6 itself nor in the Act’s interpretative section 353. Accordingly, in the absence of further regulations that may be issued by the Secretary of State on the basis of the authority of s.6(6), these words must be interpreted in their relevant context and in conformity with their natural and ordinary meaning.

Although any interpretation can ultimately be challenged via the judicial process, the inclusion or exclusion of any disputed arrangement is likely to be influenced by the Gambling Commission’s guidance that has been issued to clarify the scope of the statute and to fill in any existing gaps.

1.2.1. Meaning of “*game of chance*”

The term “*game of chance*”, as defined by s.6(2), is broad and expansive. Essentially, only games with outcomes that are determined entirely by skill and which are not presented “*as involving an element of chance*”¹²⁵ are excluded. Even elimination of the chance element by “*superlative skill*” does not remove it from this category¹²⁶, and only sport has been explicitly excluded¹²⁷.

Whether the outcome of a game depends on pure skill, or a combination of skill and chance, has been deemed by the authority of *Bracchi Brothers v Rees*¹²⁸ to be a question of fact and a matter of degree. Although this decision predates the Gambling Act 2005, it can still be relied upon, as the definition of a “*game of chance*” remained substantially the same throughout the modern legislative history. The Gaming Houses Act 1845 that repealed the provisions of the statute 33 Hen.8, c.9, preserved the unlawfulness of card games unless they consisted of pure skill and the Gaming Act 1960; the Betting, Gaming and Lotteries Act 1963 and the Gaming Act 1968, defined this term in almost an identical manner¹²⁹.

The UK definition corresponds to provisions in some other jurisdictions such as Canada¹³⁰ and benefits from avoiding the interpretative problems experienced by jurisdictions that rely on the preponderance test. This test places an activity within gambling remit only if the chance prevails over skill. This not only significantly reduces the scope of the term but also causes classification difficulties, as the quantification of

¹²⁵ GA2005, s 6(2)a(ii)

¹²⁶ GA2005, s 6(2)a(iii)

¹²⁷ GA2005, s 6(2)

¹²⁸ (1915) 84 LJ (KB) 2022 (Ridley J)

¹²⁹ See Gaming Act 1968, ss 28 and 52(1); Betting, Gaming and Lotteries Act 1963, s 55

¹³⁰ The Criminal Code of Canada, R.S.C.985, s 197

intangible aspects (skill and chance) differs depending on the methodology used¹³¹. Accordingly, the British definition allowed for a relatively straightforward judicial dismissal of the efforts to introduce some quantifying element into the test that were primarily, but not exclusively, attempted in the context of arguing that poker is a game of skill¹³².

Despite poker being traditionally considered as a typical gambling game, the alleged level of skill required for a successful outcome prompted some to assert that poker is not, or should not, be caught by gambling regulation. For example, Fiedler and Rock¹³³ computed critical repetition frequency data¹³⁴ from a survey of 51,761 poker players and concluded that, for the survey's participants, their skills prevailed over chance¹³⁵. Those skills included “*mathematical understanding, analytical intellectual power, attentiveness, memory, ability to make fast decisions, eliminations of emotions from one's decisions* [knowing when to fold or bluff¹³⁶], *knowledge of game theoretic insight, strategic thinking, adaptiveness, enjoyment of continuous learning and self-monitoring*”¹³⁷.

Their core argument centred on the submission that, as games of pure skill do not exist, the literal interpretation of the Act should be abandoned as it leads to absurdity¹³⁸. This assertion was supported by the claim that even a game of chess, which has always been treated as a game of pure skill, contains an element of chance because of “*the entitlement of the first move*”¹³⁹. This has been argued to lead to the conclusion that some quantification is inevitable and, if enough level of requisite skill for poker is proved, then it must be treated as a game of skill.

¹³¹ Steven Heubeck, ‘Measuring Skill in Games: A Critical Review of Methodology’ (2008) 12(3) Gaming Law Review and Economics 231

¹³² Typically by poker club operators or the defendants in related criminal or civil proceedings

¹³³ Ingo C Fiedler and Ian-Phillip Rock, ‘Quantifying Skill in Games – Theory and Empirical Evidence for Poker’ (2009) 13(1) Gaming Law Review and Economics 50

¹³⁴ Critical repetition frequency demonstrates when a game becomes a game of skill rather than a game of chance due to the natural distribution of random events

¹³⁵ See also: Michael A Dedonno and Douglas K Detterman, ‘Poker is a Skill’ (2008) 12(1) Gaming Law Review 31; cf. Gerhard Meyer ‘and others’, ‘Is Poker a Game of Skill or Chance? A Quasi-Experimental Study’ (2013) 29 J Gambl Stud 535

¹³⁶ Comment added

¹³⁷ Fiedler (n 133) 51, Table 2;

¹³⁸ Joseph M Kelly, Zeeshan Dhar, and Thibault Verbiest, ‘Poker and the Law: is it a Game of Skill or Chance and Legally Does it Matter?’ (2007) 11(3) Gaming Law Review 190; arguments of Jan Luba QC in R v Kelly [2008] EWCA Crim 137, [2009] All ER 840

¹³⁹ R v Kelly [2008] EWCA Crim 137, [2009] All ER840

Such arguments have always been rightfully rejected by the British courts. In the early case of *Rex v. Tompson and Others*¹⁴⁰, three defendants who ran a poker and bridge club appealed against their conviction at first instance under the Gaming Housing Act 1845 for assisting, allowing, or using their premises for unlawful gambling that included all card games, unless they were of pure skill and not declared by any other statute illegal. The adduced evidence of poker requiring substantial skills was accepted, but the Appeal Court rejected the submission that quantification of skill versus chance is necessary¹⁴¹.

This was reaffirmed more recently in *Regina v Kelly*¹⁴² by the Criminal Division of the Court of Appeal that dismissed an appeal against a conviction for organising unlicensed games of Texas Hold’Em poker, contrary to the provisions of the Gaming Act 1968. Thomas L.J. explicitly explained that: “*it is clear that Parliament could have adopted a test of preponderance; it did not and we see no reason to write into the 1968 Act a further restrictions or qualification which Parliament could easily have included but which it did not*”¹⁴³. A similar attempt in Canada was met with the same outcome in *Ross, Banks and Dyson v R*¹⁴⁴, where it was emphasised that additional words cannot be read into the statute where the statutory provisions in themselves are not ambiguous.

The alleged absurdity is avoided by the application of the ancient *de minimis non curat lex* principle. This rule that literally translates into the sentence “*the law does not concern itself with trifles*”¹⁴⁵, provides that negligible aspects of any substantive provisions of law or actual conduct can be ignored. The use of the rule does not deviate from the statutory literal interpretation and it has always been applicable in the gaming context in the same way as in all other areas of substantive British law. When referring to a game of chess it was stated that the minimal element of chance should be ignored in a game “*in which the element of chance is so small as to render the game one which can properly be said to be a game of mere skill*”¹⁴⁶. The applicability of the rule in the gambling context was also directly confirmed by Thomas L.J. who declared that “*the only circumstances where chance should not be taken to make a game of skill and chance a game of chance is where the element of chance is such that it should on ordinary principles be ignored – that is to*

¹⁴⁰ [1943] KB 650

¹⁴¹ Tompson (n 139) 664

¹⁴² [2008] EWCA Crim 137, [2009] All ER 840

¹⁴³ Kelly (n 142)

¹⁴⁴ [1968] SCR 786,789

¹⁴⁵ Max L Veech and Charles R Moon, ‘De Minimis Non Curat Lex’ (1947) 45 Michigan L Rev 537

¹⁴⁶ Kelly (n 142)

*say where it is so insignificant as not to matter*¹⁴⁷. The chance element of poker is certainly higher than what would be allowed under the *de minimis* doctrine.

Due to the longevity of the widespread public recognition of poker as a traditional gambling game, and irrespective of its legal categorisation, the risk of it being treated by minors as anything other than a gambling game is negligible. Indeed, this has been demonstrated by a study carried out by Buczkiewicz et al¹⁴⁸ with 2,576 UK adolescents, where poker and other card games were cited most frequently by young people when asked to recall what gambling games they were aware of. Accordingly, any protective responses that young people may have been taught in respect of gambling are likely to be invoked with a game of poker or other types of card games such as blackjack.

1.2.2. Penny auctions

However, this may not necessarily be replicated to other, more novel forms of online inventions. This can be demonstrated by ‘*penny auctions*’ sites such as WellBid.com. These still represent a relatively new development¹⁴⁹ and their business model utilises an adapted version of an online auction without reserve¹⁵⁰. Prospective bidders are enticed into the sites by the possibility of obtaining goods at a fraction of the retail price and many items are, in fact, sold for a heavily discounted amount. This makes such auctions potentially very attractive to adolescents whose financial means are often limited, but who typically desire branded or otherwise expensive gadgets.

Penny auctions differ from other online auctions in two material ways. While traditional online auctions¹⁵¹ typically allow bidders to place the bids for free, with the sites deriving their income from the commissions paid by the sellers, those who wish to participate in penny auctions need to purchase in advance the bids/points¹⁵² bundle, the price of which varies between individual packages¹⁵³. Such purchased bids/points are then used in the auction and each incremental bid increases the price of the goods by one penny only. Secondly, traditional online auctions run for a limited period of time, the duration of

¹⁴⁷ Regina v Kelly [2008] EWCA Crim 137, [2009] All ER 840

¹⁴⁸ Martin Buczkiewicz, Mark D Griffiths and Jane Rigbye, ‘Adolescent Attitudes Towards Gambling: Some Preliminary Findings’ (2007) 25(1) Education and Health 6

¹⁴⁹ The first penny auction appeared in 2005

¹⁵⁰ Where there is no minimum amount reserved below which the product cannot be sold

¹⁵¹ Such as eBay

¹⁵² Depending on the term used by the site

¹⁵³ E.g., WellBid.com prices ranged between 2.75 and 4 pence per bid but FunBid.com costs ranged from 52 and 65 pence per point

which is set at the commencement of the auction, and is not dependent on the bids themselves, whereas each bid in penny auctions also restarts the timer to enable others to increase their offers.

The auction concludes when the countdown finally reaches ‘zero’. The shopper with the highest bid “wins” the merchandise and, in order to receive the goods, s/he is required only to pay the final amount plus any shipping cost that may be due. Other participants’ options, who have not won despite already spending some money, depend on the auction’s format. If the site offers the ‘buy-now’ feature, bidders may use the value of the lost bids towards the cost of purchasing the product that has been bid on, or another one from the same website at the displayed retail price¹⁵⁴. Those who do not wish to purchase any products at a retail price, or those who participated in auctions with no ‘buy-now’ feature, do not have any other avenue and the funds that were spent on purchasing bids are lost.

1.2.3. The issue with penny auction

Some scholars argue that this novel “*entertainment shopping*” is “*gambling in all but name*”¹⁵⁵. From a psychological perspective these sites appear to represent gambling due to many commonalities in terms of structural characteristics and their effect on psychological wellbeing of participants.

Participation in penny auctions invariably requires an expenditure of money and there is a possibility of winning the ‘prize’, i.e., the desired product. Other similar features have been non-exhaustively listed by Griffiths¹⁵⁶. These include suspension of judgment, ‘near misses’, multiple bidding on the same item and the possibility of ‘auto-play’. From an economic perspective, Kakhbod¹⁵⁷ highlighted that participants’ purpose for bidding is the same as for gambling, and Robinson et al¹⁵⁸ refers to penny auction’s addictive properties.

¹⁵⁴ Depending on the auction sites, e.g., MadBid.com permits the funds to be used for any product from the site but other providers expects the product that was bid on to be purchased or no such feature is available

¹⁵⁵ E.g., Mark Griffiths, ‘Online ‘Penny Auction’ Sites: Regulation Needed’ (December 2008) E-finance & Payments Law & Policy 14

¹⁵⁶ Griffiths (n 155)

¹⁵⁷ Ali Kakhbod, ‘Pay-To-Bid Auctions: To Bid or Not To Bid’ (2013) 41 Operation Research Letters 462

¹⁵⁸ Stacey G Robinson, Michael D Giebelhausen, June Cotte, ‘Shopping, Gambling or Shambling? Penny Auctions’ (2013) 66 Journal of Business Research 1612

Penny auctions have been compared to slot machines because “*like a slot machine, the bidder deposits a small fee to play, aspiring to a big payoff (obtaining the item well below its value)*”¹⁵⁹; to a form of betting because the participants bet that their last bid will not be outbid by another player, and to lotteries because, although penny auctions do not depend on random events¹⁶⁰, their outcomes are still determined largely by chance.

Despite the above arguments, the UK Gambling Commission formally announced¹⁶¹ that penny auctions operators are not required to be in possession of a gambling licence as in their assessment “*such sites [do not amount] to the provision of facilities for gambling under the Gambling Act*”. The rationale behind this statement was not explained and this determination has not, as yet, been tested in judicial proceedings. Legally this conclusion can only be legitimate if it is established that penny auctions lack one or more of the required statutory characteristics of gambling.

1.2.4. Theoretical analysis of penny auctions as gambling

Although the legislation has to draw a line between gambling and mere risk taking¹⁶², certain common components can be identified to characterise all forms of gambling. These include transfer of material possession from the losers to winners, typically without either party contributing any substantial work, and the outcome as to who wins and who loses is determined by an event that contains an element of chance¹⁶³.

In light of the discussion that related to poker, it is submitted that penny auctions, in substance, satisfy both elements and the element of chance is more than *de minimis*. The element of chance arises from the incomplete set of available information. Participant’s knowledge is limited¹⁶⁴ to the retail price of the product, the sale price of similar items on closed auctions, the shipping cost of the product, the cost of their individual bid, the value of the latest bid placed by other bidders, the remaining time on the countdown timer, and

¹⁵⁹ Brennan C Platt, Joseph Price, Henry Tappen, ‘The Role of Risk Preference in Pay-To-Bid Auctions’ (2013) 59(9) Management Science 1526

¹⁶⁰ Toomas Hinnosaar, ‘Penny Auctions are Unpredictable’ (2013) <<http://carloalberto.it/assets/working-papers/no.305.pdf>> accessed January 2014

¹⁶¹ Gambling Commission’s official statement in reply to frequently asked questions <http://www.gamblingcommission.gov.uk/frequently_asked_questions_fa_lotteries_and_fundraising/do_i_need_a_licence_to_run_a_p.aspx> accessed November 2013

¹⁶² Mark D Griffiths, *Adolescent Gambling* (Routledge 1995)

¹⁶³ Griffiths (n 162)

¹⁶⁴ Assuming that the information provided by the relevant website is accurate at any given time. This assumption is contentious. Many commentators argue that penny auctions are simply online scams

the approximate or maximum time which has elapsed from the commencement of the auction.

Penny auction shoppers can also assess how many bidders are taking part at any given time. However, as there are no restriction on bidders joining or leaving the auctions during their duration, this is not meaningful information as nobody is able to ascertain the value to which others are prepared to bid, and whether someone will not join in the last minute. This aspect causes any prior plans, predictions or strategies to be meaningless and, as has been pointed out by MacDonald¹⁶⁵, it introduces even more uncertainty than it exists in a traditional game of poker. Even the operators themselves acknowledge that “*it is not possible to provide precise odds of winnings as each auction is unique*”¹⁶⁶. Under the British definition no quantification is required but, even so this element makes penny auctions more based on chance than is the case with poker or sports betting, where precise odds are often given by bookmakers and typically do not depend on the number of players.

This analysis is contested, especially by penny auction operators who insist that the whole process is based on pure skill, and that customers can develop successful strategies in order to minimise the element of chance. Cited methods include knowing the time of day with the least volume of internet traffic in order to maximise the chances¹⁶⁷ or bidding on less popular items¹⁶⁸. However, such strategies do not indicate actual skills and are more likely to propagate the illusion of control amongst participants than increase their chances of success.

Lazarus and Levi¹⁶⁹ offered an alternative argument. They distinguished between internal and external parameters and argued that penny auctions are purely skill-based because any chance element is endogenous of the activity itself and influenced only by the action of other human beings, unlike for example in a game of poker, where the draw of the cards influences the probability of winnings. This means that bidders are always able to

¹⁶⁵ Colin Blake MacDonald, ‘The Economics of Penny Auctions’ (2010, Summer Research Paper 29) <http://soundideas.pugetsound.edu/summer_research/29> accessed December 2013

¹⁶⁶ QuiBids Terms and Conditions: Odds of Winning Auctions, <<http://www.quibids.com/en/help/terms.php>> accessed December 2013

¹⁶⁷ Victor Cobb, ‘Penny Auctions: Auctions, Gambling or Entertainment Shopping?’ (2013) 17(5) Gaming Law Review and Economics 350

¹⁶⁸ Cobb (n 167)

¹⁶⁹ Morden C Lazarus and Cory R Levi, ‘Our 2c About Online Penny Auctions’ (2013) 17(6) Gaming Law Review and Economics 406

win the auction and the only thing they need to do is to outbid others. However, their argument can be challenged on two levels.

Firstly, it is submitted that the results of a sport betting is also influenced by other human beings (both other bettors and the actual sport persons/teams on whom the bets are made), but this has not removed such betting from the definition of gambling. Secondly, the ability to outbid others also essentially applies to poker, as a weak hand does not prevent a player with sufficient funds from forcing others into a flop by aggressively raising the stakes. However, this assumes that players know the financial abilities of others, or that their resources (both financial and in terms of time that can be dedicated to the game) are unlimited – both of which are frequently incorrect. Furthermore, the endogenous versus indigenous distinction was accepted in the United States¹⁷⁰ but no such acceptance was replicated in the UK, and lack of quantification requirement makes it unlikely that this argument could succeed.

Crucially, none of these arguments relate to the fact that in auctions with a ‘*buy-now*’ feature any chance element is removed because the bidder is always entitled to purchase the desired product at the recommended retail price. It is unlikely that any bidder enters the auction with the intention of actually purchasing the goods at the full price but formally this removes the chance element from the penny auction and, technically also removes it from the statutory definition of a “*game of chance*”¹⁷¹. However, this justification cannot apply to auctions where no ‘*buy-now*’ feature is available and, even in auctions where the ‘*buy-now*’ feature is present, acceptance of this argument would favour technical over substantive interpretation of the mechanics of such auctions and is not recommended.

It may also be argued that penny auctions escape being caught by the Gambling Act because they do not, in fact, constitute a game, or that participants do not play a game within the meaning of the statute. Although not explicitly highlighted by the Act, a “*game of chance*” must in fact constitute a “*game*” that is being played. Despite the lack of statutory definition of the terms “*game*” or “*playing a game*”, the core activities are unlikely to be disputed so card or video games would certainly fall within the definition as would sport, but for its specific exclusion by s.6(2)b.

¹⁷⁰ *United States v Rich*, 90 F. Supp62, 627 (E.D.III.1950); but note that USA relies on preponderance test as explained earlier

¹⁷¹ But not from the definition of betting

The uncertainties lie at the boundaries. What constitutes a game and what constitutes playing a game has been debated in a variety of judicial decisions. In the most recent decision taken in *Revenue and Customs Commissioners v IFX Investment Co Ltd (IFX Investment)*¹⁷², the Upper Tribunal held that attempting to construe the words “game” and “chance” individually is wrong in principle and “*the real task is to construe the composite phrase “the playing of any game of chance”*”¹⁷³.

Previous authorities have not established a definitive test and any arrangement must be determined as a question of fact¹⁷⁴. However, certain characteristics are likely to remain sufficiently important as to constitute an essential part before an activity would be deemed to fall within s.6. These include the need for a player to be actively involved in the game by making some decisions or by undertaking some positive act¹⁷⁵. If the game is played by more than one person some means for joint communication should be present¹⁷⁶. If the game is played individually it should include “*move and response, or a succession of related moves*”¹⁷⁷ with the player having sufficient interest in the outcome to generate excitement or feelings of suspension¹⁷⁸ as otherwise the activity is more likely to constitute a pastime¹⁷⁹. The game itself should resemble a form of contest with a set of rules applicable to all players¹⁸⁰ but the main purpose of the game should be the actual participation, even if a secondary reason is to win a prize¹⁸¹.

Penny auctions are subject to a set of rules and, although participants do not typically communicate with each other, they are aware of other people’s bids and they need to be actively engaged if they wish to win. Accordingly, on this basis the activity appears to be a form of contest that provides for a definitive outcome. However, penny auctions’ participants bid in order to acquire a good deal on a desired product, and are highly unlikely to treat the participation in the auction as “*an end in itself*”¹⁸². The processes undertaken by bidders also do not give the appearance of an activity that would typically be understood as a game, despite the term being commonly used in published articles

¹⁷² [2014] UKUT 398 (TCC), [2015] STC 294

¹⁷³ IFX Investment (n 172) para 5

¹⁷⁴ *Armstrong v Director of Public Prosecutions* [1965] AC 1262

¹⁷⁵ *Armstrong* (n 174)

¹⁷⁶ S Smith (ed), *Smith and Monckton: The Law of Gambling* (3rd Edn, Tottel 2009) 214-218

¹⁷⁷ IFX Investment (n 172) para 22

¹⁷⁸ *Director of Public Prosecutions v Regional Pool Promotions Ltd* [1964] 2 QB 244

¹⁷⁹ IFX Investment (n 172) para 23

¹⁸⁰ Smith (n 176)

¹⁸¹ Smith (n 176)

¹⁸² IFX Investment (n 172) para 21

when describing penny auctions¹⁸³, but are more akin to bargain shopping on a bazaar or deal hunting online, which may legally justify the Gambling Commission’s interpretation when only relying on lack of chance cannot.

The decision in the *Revenue of Customs Commissioners v IFX Investment Co Ltd*¹⁸⁴ was a reversal of the decision of the lower tribunal and is currently under appeal. The lower tribunal did not analyse the composite phrase but looked at the meaning of the word “game” and “chance” separately. In the absence of a statutory definition it referred to the natural and ordinary meaning of the words and concluded that the activity in question constituted a game¹⁸⁵. While it is not possible to predict the Court of Appeal’s decision, it is unlikely to affect the above arguments, even if the words are construed individually, as penny auctions are unlikely to constitute games in themselves.

1.2.5. Recommendations relating to penny auctions

Nevertheless, and irrespective of the legal validity of the above arguments, it is submitted that the Gambling Commission’s interpretation represents the traditional understanding of gambling and ignores that participation in penny auctions may lead to identical harm as that of gambling. Indeed, some sites have already adopted “*responsible bidding policies*” which are directly borrowed from “*responsible gambling policies*”, in recognition of the addictive potential of the auctions and the risk of significant financial loss for no tangible reward. Yet, penny auctions’ operators are under no obligations to age verify their customers, or to be proactive at ensuring that minors are excluded from participation, despite such sites being potentially particularly attractive to adolescents due to the allure of getting an expensive gadget at a fraction of the price.

Understandably, not all potentially harmful activities can be incorporated under gambling regulations, but the psycho-social and structural similarities between penny auctions and traditional forms of gambling, and the financial risks taken in both circumstances, are sufficiently comparable to justify its inclusion. Although minors are entitled to avoid the contract for the purchase of bids under the generic principle of contract law¹⁸⁶ before or

¹⁸³ Stacey G Robinson, Michael D Giebelhausen, June Cotte, ‘Shopping, Gambling or Shambling? Penny Auctions’ (2013) 66 Journal of Business Research 1612

¹⁸⁴ IFX Investment (n 172)

¹⁸⁵ The “Spotting the Ball” Partnership v The Commissioners for Her Majesty’s Revenue & Customs [2013] UKFTT 210 (TC), [2013] SFTD 1004

¹⁸⁶ Proform Sports Management Ltd v Proactive Sports Management Ltd [2006] EWHC 2903 (Ch), [2007] Bus LR 93 - contracts with minors are voidable unless they are for necessary goods (Sale of

shortly after attaining their age of majority, reliance on generic contract law is unlikely to be particularly helpful due to minors' lack of knowledge as to their rights, or lack of ability to exert their rights from the penny auction providers.

Bringing it under gambling regulation would have the further benefit of imposing an active duty on the operators to ensure that auction participants are age verified, and only those who are over the age of 18 years old are permitted to bid. It would also have the added advantage of highlighting to minors the potential dangers of this shopping format.

Accordingly, if the Gambling Act truly aims to regulate all activities that may lead to gambling-related harm, it is important that all activities, and not only the traditional forms of gaming that may lead to such harm, are encompassed by the regulation. Penny auctions should be included, and minors' participation in such auctions should not be allowed, unless the operators remove the chance element or the financial risks from their business models.

1.2.6. Gaming participation

The game of chance must be actively played by the participant by being engaged in the game processes and a mere observation will not suffice. In order to ensure that gambling with or against a computer is included, s.6(3) specifically provides that engagement is not dependent on the participation by, or the existence of, other players¹⁸⁷ and irrespective of “*whether or not a computer generates images or data taken to represent the action of other participants in the game*”¹⁸⁸.

This enables the inclusion of virtual card games, virtual slot machines, and other casino games played by a single player on a personal computer or any other internet enabled device. The players will participate even if they are not required to pay or risk something of value in the form of stakes¹⁸⁹, but the participation must give them the opportunity to win a prize¹⁹⁰.

Goods Act, s 3) or for necessary services of education, apprenticeship or employment and are not “*harsh, prejudicial or oppressive*”

¹⁸⁷ GA2005, s 6(3)a

¹⁸⁸ GA2005, s 6(3)b

¹⁸⁹ GA2005, s 6(4)b

¹⁹⁰ GA2005, s 6(4)a

1.2.7. The meaning of a prize.

In contrast to the expansive meaning of a “*game of chance*” the “*prize*” is narrowly defined as “*money or money’s worth*”¹⁹¹. This expression is a popular English phrase that has always been interpreted restrictively as something that is “*equivalent to money*” and “*being something essentially material [to the exclusion] of any emotional or spiritual rewards*”¹⁹². In the gaming context, it statutorily includes “*a prize provided by a person organising the gaming and winnings of money staked*”¹⁹³ but it excludes everything without an intrinsic monetary value.

The right to exchange one soft toy for another soft toy of the same value, or two soft toys for another toy of a higher value, was held not to be “*money’s worth*” in *R v Burt & Adams*¹⁹⁴. Similarly, neither was the compensation or commission paid for participating in or losing a casino game in *Aspinalls Club Ltd v Revenue and Customs Commissioners*¹⁹⁵ treated as prizes for the purpose of calculating gaming duties.

‘Demo’/social gambling and gambling-like elements in hybrid video games, or within virtual worlds, do not offer any formal possibility to cash out any potential winnings or withdraw any payment that may have been made towards the acquisition or subscription of the game. Some of the games, and in particular ‘demo’ games on gambling websites, do not offer anything more than in-game points that can be accumulated in the course of playing and that represent nothing more than a potential high score on a leader board.

However, some games offer players the possibility to accumulate virtual goods or virtual money. Depending on the type of the game, such virtual goods or currency can be earned in the course of the game by playing, can be purchased with real money or via in-game purchases. In some cases it may be won in games of chance that may be incorporated within the overall plot or integrated within a virtual world. For example, in *Habbo Hotel*¹⁹⁶, a Finish social networking game aimed at teenagers, subscribers decorate their rooms with their chosen ‘*furni*’¹⁹⁷. These can be purchased by the players with real money

¹⁹¹ GA2005, s 6(5)a

¹⁹² Gideons International Services Mark [1991] RPC 141 (Mrs Justice Douglas)

¹⁹³ GA2005, s 6(5)b

¹⁹⁴ [1998] UKHL 14, [1999] AC 247

¹⁹⁵ [2013] EWCA Civ 1464, [2015] Ch 79

¹⁹⁶ www.habbohotel.co.uk

¹⁹⁷ “*Furni*” describes virtual furniture that is used to furnish virtual rooms in Habbo Hotel

but they can also be won from other subscribers by, for example, playing a dice game that is a typical game of chance.

Whether ‘demo’/social gambling or gambling-like activities within video games entice minors to real money gambling is further explored in Chapter 3. Here, however, it is imperative to consider whether these virtual goods, currency, or in-game credits such as Habbo ‘*furni*’ that can be won from within the game represent “*money or money’s worth*”. An affirmative answer to this question would mean that games with such elements should be included under the gambling regulation and restricted to minors, while a negative answer would relegate them to mere “*gambling-like*” activities that can be offered outside the gambling regulatory remit.

The orthodox position of the gaming industry relies on the “*no cash-out*” argument. As players are only allowed to use real money to purchase in-games valuables¹⁹⁸ but are not allowed, at least officially, to remove those valuables from outside the virtual environment, it is argued that they do not have any “*real life*” value¹⁹⁹, but represent a mere electronic code with no independent existence outside the game itself²⁰⁰.

The legal position is less certain. Although in the United Kingdom no direct judicial precedent proclaimed that winning virtual goods in a virtual game of chance represents “*money or money’s worth*”, there is indirect case law in the UK and in foreign jurisdiction, as well as a vast literature, that supports the proposition that virtual items can constitute legal property that deserves protection and can be “*alienated for value*”²⁰¹.

For example, Abramovitch and Cummings²⁰² highlighted that China already affords criminal protection to virtual property by recognising in their case law that such property may be stolen²⁰³. Taiwan expressly declared in their Criminal Code that “*virtual objects are considered property*”²⁰⁴. In the US case of Blacksnow Interactive v Mythic

¹⁹⁸ Including virtual currency, virtual goods and other virtual entitlements

¹⁹⁹ Marcos Charif, ‘Show Me the Money: Social games, Virtual Currency and Gambling’ (iGaming Business, March 2011) <http://www.harrishagan.com/wp-content/uploads/bsk-pdf-manager/80_39.pdfZ000010023.162.FECCF_.pdf> accessed November 2013

²⁰⁰ J Purewal, ‘The converging worlds of social gaming and gambling’ (2012) June WOGL 7

²⁰¹ Purewal (n 200)

²⁰² Susan Abramovitch, David Cummings, ‘Virtual property, real law: the regulation of property in video games: Part 2’ (2010) 21(2) Ent LR 52

²⁰³ Joshua Fairfield, ‘Virtual Property’ (2005) 85 BULRev.1047

²⁰⁴ Abramovitch (n 202)

Entertainment, Inc²⁰⁵ it was claimed, and implicitly accepted by the developer²⁰⁶, that “*virtual property may have some utility in the real world*”.

In the UK, in the unreported case of *R v Ashley*²⁰⁷, the defendant was charged and found guilty under s 1 of the Computer Misuse Act 1990. He was sentenced to two years imprisonment for stealing £7m worth of virtual poker chips from Zynga with the intention of selling them on *Facebook* at a profit. Similarly, in *R v Burrell*²⁰⁸ the defendant was found guilty of accessing the accounts of 3,872 online *Runescape* gamers in order to steal their gaming goods, and of actually succeeding at modifying 105 players’ accounts. These cases were decided under the Computer Misuse Act 1990 and do not *per se* demonstrate that virtual goods are deemed to be “*money or money’s worth*”. However, they can be taken as an indication that the courts may be willing, in appropriate cases, to recognise their economic value and to refuse to treat them as having no intrinsic worth²⁰⁹.

1.2.7.1. Should virtual goods be considered “*money or money’s worth*” in the gambling context?

There are several reasons why the attributes of virtual property should be reconsidered, not least to ensure that the law does not fall too far behind commercial developments²¹⁰.

Many virtual games²¹¹ not only permit, but positively encourage, the accumulation of virtual goods that can be possessed in the online world to the exclusion of others. These virtual items can often be customised according to the preference of the players and

²⁰⁵ *Blacksnow Interactive v Mythic Entertainment Inc.*, No.02-00112 (C.D. CA, 2002) cited in Julian Dibbell ‘Black Snow Interactive and the World’s First Virtual Sweat Shop’ (2003) <<http://www.juliandibbell.com/texts/blacksnow.html>> accessed January 2014

²⁰⁶ The case was settled. The settlement may imply that the case was not worth pursuing either due to the potential high cost of litigation (or other reasons) or because the developer accepted that there was a case to be answered

²⁰⁷ *R v Ashley* (Exeter Crown Court 3 February 2011) charged under the Computer Misuse Act 1990, s.1, <<http://www.computerevidence.co.uk/Cases/CMA.htm>> accessed September 2014

²⁰⁸ *R v Burrell* (Northampton Magistrate Court 28 November 2013), <<http://www.computerevidence.co.uk/Cases/CMA.htm>> accessed September 2014; the defendant was charged under s 2 of the Computer Misuse Act 1990 for unauthorised access with intent and under s 3 for unauthorised modification.

²⁰⁹ Echo Huang, ‘Online Experience and Virtual Goods Purchase Intention’ (2012) 22(3) *Internet Research* 252

²¹⁰ R Mackenzie, ‘Virtual Money, Vanishing Law: Dematerialisation in Electronic Funds Transfer, Financial Wrongs and Doctrinal Makeshifts in English Legal Structures’ (1998) 2(1) *Journal of Money Laundering Control* 22

²¹¹ E.g., *Habbo Hotel*

displayed for admiration of others that increases the players' statuses amongst their peers²¹².

The majority of End-User Licence Agreements that regulate rights between the creators of the game and the game's subscribers reserves any potential ownership rights to the developers²¹³. However, evidence suggests that many people (and especially adolescents) increasingly become attached to their online property and often attribute to them an economic value in a similar way to how they treat their physical counterpart²¹⁴.

Accordingly, if such virtual property can be won or lost in the course of a mini-game of chance within the overall game, minors may psychologically experience a loss or gain that is comparable to how they would experience a similar gain or loss in a real casino. This can also lead to real financial losses if the virtual property has initially been purchased with real money and then gambled away. As such instances are not classified as gambling in law, they are unlikely to be included in any data that aims to measure gambling-related harm and, accordingly, any negative consequences that minors may suffer as a result may continue unnoticed.

The current generation of young people has often been described by the term “*digital natives*” and, although the assumption that children naturally acquire digital literacy remains a myth²¹⁵, they are generally comfortable and feel safe when using cyberspace as a means of satisfying their needs when seeking out tools to learn, communicate with others, make contact with new people, reinforce existing relationships, for self-expression, and for entertainment²¹⁶. This may include the creation and projection of personal virtual image as well as establishing individual self-esteem that, in some circles, includes the performance in games that may be demonstrated by their collection of virtual goods.

²¹² Echo Huang, 'Online Experience and Virtual Goods Purchase Intention' (2012) 22(3) Internet Research 252

²¹³ Susan Abramovitch, David Cummings, 'Virtual Property, Real Law: The Regulation of Property in Video Games: Part 2' (2010) 21(2) Ent LR 52

²¹⁴ Samtani Anil 'and others', 'Virtual Property – A Theoretical and Empirical Analysis' (2012) 34(3) EIPR 188

²¹⁵ Sonia Livingstone 'and others', 'Net children go mobile: the UK report' (LSE 2014) <<http://eprints.lse.ac.uk/59098/>> accessed October 2014

²¹⁶ Jorge Tolsa Caballero, Xavier Brinque Sala, 'Leisure, Interpersonal Relationship, Learning and Consumption: The Four Key Dimensions for The Study of Minors and Screens' (2002) XXV(1) Communication Y Sociedad 253

Young people typically have limited financial means but a substantial amount of free structured and unstructured leisure time²¹⁷. Existing data is clear that in the UK playing video games constitutes a significant part of an adolescent's life. In 2009 it was reported that 79% of children aged three to sixteen years old played some sort of video game at least several times a week, and 37% played every day, either alone or with their family and friends²¹⁸. This data is consistent with findings produced by Livingstone et al²¹⁹ in 2011 which stated that 83% of nine to sixteen-year-olds play online games with 44% of them playing games with other people on the Internet. Those whose spend several hours a week on a game where the aim is the collection of virtual goods are also more likely to have an emotional attachment to such property and, accordingly, winning or losing it may to them psychologically equate to winning or losing real money.

The findings from the focus groups tentatively support the proposition that collectable virtual goods should be distinguished from mere in-game points or non-alienable in-game goods, and that they are perceived by some young people to have real value. Some pupils' comments highlighted that, while any material possession that belongs to children is normally attributed to the wealth of their parents/guardians, virtual goods "*earned*" represent achievement of their own, frequently long-lasting, efforts. This enhances even more the potential emotional attachment and further blurs the line between real and virtual possession.

Pupils whose virtual goods had been stolen or lost due to technology crashes felt personally violated in an equivalent manner, and some in an even more intense way, than when their real property was misappropriated. One pupil expressly stated that he would be *more* upset by the loss of the item for which he "*worked*" very hard in the game and a similar view was also supported by a few of the other pupils. Although their views were very small in numbers, this may be attributed to the negligible number of pupils in the

²¹⁷ Susan Moore and Keis Ohtsuka, 'Youth Gambling in Context: The Structure of Young People's Leisure Time and Their Gambling Behaviour' (2000) 17 *Behaviour Change* 167

²¹⁸ 'Futurelab Gaming in Families Research: Parents' and Children's Views On and Experiences of Gaming' (Ipsos MORI, 30 September 2009)

<http://www2.futurelab.org.uk/resources/documents/project_reports/becta/Gaming_in_Families_survey_analysis.pdf> accessed March 2013

²¹⁹ Sonia Livingstone 'and others', 'Risks and Safety on the Internet: The Perspective of European Children' Full Findings' (EU Kids Online, LSE, 2011)

<<http://www.lse.ac.uk/media%40lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/EUKidsOnlineIIRreports/D4FullFindings.pdf>> accessed January 2015

sample who engaged in games where virtual goods may be collected to the exclusion of others.

The qualitative and exploratory nature of the focus groups, coupled with the small number of pupils playing such games, prevented any conclusive insight as to whether a sufficient distinction can be made between points/in-game credits and virtual property as to warrant differentiating treatment or further legislative response. However, the view of those pupils who played such games suggests that the impact of gambling within such environments deserves further investigation.

Another reason why the value of the virtual property should be recognised is the increasingly ubiquitous possibility of trading virtual goods, as well as some virtual currency, for other game items, game points, and/or real currency. Despite the fact that many virtual worlds and social gaming sites formally prohibit such trading, there is more than mere anecdotal evidence²²⁰ that such exchanges take place on dedicated trading websites²²¹ as well as on generic online market places²²². For example, on the 6th of December 2013, sellers at eBay offered a varied selection of different games' items for sale either by auction or at 'buy-now' prices with all auction items having active bidders²²³.

The uncertainty of whether a purchaser will be found for the offered product, and the overall remoteness between the gaming act and the financial rewards, does not defeat the main argument, as similar delays and uncertainties occur in real gambling as well as in other commercial trading. The worth of intellectual property right or values of shares in publicly traded companies constantly fluctuate depending on the market forces, availability of interested purchasers and the economic health of the individual companies,

²²⁰ Contrary to the view of Jonathan Parke 'and others' 'Exploring Social Gambling: Scoping, Classification and Evidence Review' (Gambling Commission, 2012) <<http://www.gamblingcommission.gov.uk/pdf/Exploring%20social%20gambling%20-%20scoping,%20classification%20and%20evidence%20review%20-%20May%202013.pdf>> accessed October 2012, 23

²²¹ E.g., *BoboMarket*, <www.virtualtrades.net> accessed in November 2013. On this website, it is possible, amongst others, to buy or sell Habbo furniture for Litecoins or Bitcoins that are then in turn capable of being spend as a real currency in selected outlets

²²² E.g., *eBay* is a generic market place that assists commercial and private parties with selling and buying goods including virtual goods/points in some popular games

²²³ The candidate checked only *Habbo* furniture and FIFA points. Several offers were available. Many for FIFA points with a price ranging between £4.99 to £11.99 and three for *Habbo* Hotel furniture. *Habbo* throne was offered for £18, *Joke* and *Habbo Furniture* were offered by way of auctions with the price standing at £5.05 (6th December 2013) after 13 bids and *Habbo Metal Patches* with the price standing at £11 with 18 bids

but it does not stop them being recognised as money's worth. In light of the emerging evidence that some minors may be at risk of gambling-related harm from such games of chance for virtual property, coupled with the increasing push towards monetisation of video games and rapid increases of creative technological inventions, it is submitted that the issue of recognition of the 'prize' value of virtual goods within the meaning of s.6 of the Gambling Act should be revisited.

Ultimately, it is for the legislator to attribute economic value to all, some, or no virtual property in appropriate contexts, but a conclusive determination is now due. The Gambling Commission should not allow for this issue to remain uncertain and should bring a test case against a relevant gaming provider in order to provide clarification to all interested parties and, if appropriate, force parliamentary intervention, or silence the critics. If the risk of harm arising from such circumstances deserves to be addressed the solution could be relatively simple.

The Gambling Commission could devise a new form of licence applicable to such in-game gambling. The providers who allow typical games of chance to be part of a game, or a virtual world where alienable goods can be collected, should then be required to apply for such a licence and to ensure that all players are age verified in order to remove minors from the gambling parts of the game. If they do not wish to be subjected to such supervision they can remove the relevant parts of the game altogether.

1.2.8. Exempted gaming

An activity that satisfies all three characteristics ((1) it is a game, (2) the game contains an element of chance that is more than mere negligible, and (3) participation of which gives the opportunity to win money or money's worth) constitutes gaming within the meaning of s.6 of the Act. *Prima facie*, this means that such gaming should only be offered by those who are in possession of a valid licence and minors should be prevented from accessing it, but exceptions exist. The majority of them are subject to a very complex set of conditions that, in the view of this candidate, are convoluted, often impossible to enforce in practice, and do nothing to emphasise the need to protect children.

The list of such exceptions is quite extensive but, broadly, they can be divided into two types. The first category only dispense with the need for a licence before gaming can be offered but minors are still not allowed to participate. This includes the permission given

to specific types of organisation/institutions that can offer gaming facilities without a licence, provided that the arrangements comply with the prescribed conditions.

These are private members clubs and their equivalents²²⁴, commercial clubs and their equivalents²²⁵, and miners' welfare institutes²²⁶. The prescribed conditions dictate that they do not deduct any fees from stakes and prizes although they are allowed to charge for participation itself; the game offered must be of equal chance not linked to any other premises and any stakes, prizes and fees must not be higher than the amounts that may be determined by the Secretary of State²²⁷.

Although s.46 that criminalises “*inviting, permitting or causing*” a child or young person to gamble in such venues, still applies²²⁸, this is not restated in the conditions themselves. Such remainder would be beneficial as the large number of venues, and the *ad hoc* nature of such gaming, makes the conditions, in practice, very difficult to enforce, especially if a parent or the organiser has a positive attitude towards gaming and may not see anything inherently wrong with, for example, introducing the child, or permitting the child to be introduced, to a game of poker. Although children are unlikely to habitually visit such premises themselves they may accompany parents and if gaming is taking place, they may be exposed to a casino-like environment that they should otherwise be protected from. Pubs and clubs that are open to the public and that are licensed to sell or supply alcohol are also permitted to offer gaming. However, it is specifically mentioned in their conditions that children and young people must be excluded from participation²²⁹.

However, the second category relates to children and young people being permitted to take part in specific forms of gaming. These include non-commercial and private gaming, “*prize gaming*” and equal chance gaming at specified venues.

1.2.8.1. Non-commercial and private gaming

Gaming is considered private if it is carried out on premises with no access for members of the public²³⁰ and where players are not required to pay for participation²³¹, but stakes

²²⁴ As defined by GA2005, s 267

²²⁵ As defined by GA2005, s 268

²²⁶ As defined by GA2005, s 269

²²⁷ GA2005, s 269

²²⁸ As it has not been specifically excluded

²²⁹ GA2005, s 121

²³⁰ GA2005, sch 15, s 5

²³¹ GA2005, sch 15, s 3(1)

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in the game are not considered to be payment²³². Private gaming must be of equal chance²³³ unless it is domestic or residential, in which case non-equal games are also permitted²³⁴. Domestic gaming occurs when it is carried out on a domestic occasion and in a private dwelling²³⁵ whereas residential gaming is one that “*takes place in a residential hostel, hall or residence or similar establishments which is not administered in the course of a trade or business, and where more than half of the participants are resident of the hostel, hall or establishment*”²³⁶.

As it has been pointed out by Miers²³⁷, policing private arrangements is almost impossible but this argument alone cannot explain the exception. It has to be supported by the policy of not interfering in a private life, unless the risk of harm is sufficiently high as to justify such intervention. Many examples can be given where acts or conducts are prohibited, regardless of whether they take place in public or behind closed doors. For instance, supplying a child, or anyone else, with a controlled drug is illegal regardless of whether this occurs in public or at home²³⁸, as it is to cause, with a purpose of gaining personal gratification, a child to watch sexual activity²³⁹.

Gambling is not considered sufficiently harmful to justify intervention in a private life and, accordingly, it is not illegal to engage minors in gambling at home. While the potential of direct harm to minors materialising as a result of such gambling is likely to be negligible, the Gambling Act’s consistent reinforcement of the message that gambling by minors should not be encouraged or facilitated by adults is missing.

The introduction of gambling-related, explicit proxy offences is advocated in Chapter 2, paragraph 2.2.1.1.1, but here it must be noted that lack of such a consistent message may contribute to the overall relaxation of the attitudes towards this form of entertainment²⁴⁰. This, in the long term, may substantially undermine the protection of those minors who

²³² GA2005, sch 15, s 3(1)e

²³³ GA2005, sch 15, s 4(1)

²³⁴ GA2005, sch 15, s 4(2)

²³⁵ GA2005, sch 15, s 2(1)

²³⁶ GA2005, sch 15, s 2(2)

²³⁷ David Miers, ‘Gaming Machines in Great Britain: A Century of Change’ (2003) 7(2) Gaming Law Review 131

²³⁸ Misuse of Drug Act 1971, s 4

²³⁹ Sexual Offences Act 2003, s 12

²⁴⁰ Per Binde, ‘Gambling advertising: A critical research review’ (RTG 2014)

<http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014

could find themselves believing that everyone is engaged in gambling and who may, as a result, become unable to successfully adapt²⁴¹ to wide proliferation of gambling.

1.2.8.2. Other permitted gaming

Furthermore, children and young people are permitted to participate in “*prize gaming*” as long as it takes place either at a non-licensed family entertainment centre²⁴² or at a travelling fair²⁴³, and if the games represent only ancillary addition to the overall amusement of the fair²⁴⁴, or if the game is of equal chance and is offered under the prize gaming permit²⁴⁵, or such equal chance gaming takes place at a licensed family entertainment centre²⁴⁶.

Prize gaming is defined by s.288 as a game “*where neither the nature nor the size of a prize played is determined by reference to – (a) the number of persons playing, or (b) the amount paid for or raised by the gaming*”. Prize gaming can take the form of any game including bingo, roulette or another typical casino game. The prize on offer may include monetary payment or non-financial entitlement, but must not exceed limits that may be prescribed by the Secretary of State²⁴⁷, the game can be entered²⁴⁸ and played on allocated one day only²⁴⁹, the results are announced on the same day and in the same premises where the game was played²⁵⁰, and the participation does not “*entitle the player or another person to participate in any other gambling*”²⁵¹.

Equal chance gaming is defined by s.8 as a game that “*does not involve playing or staking against the bank*²⁵² [regardless of how the bank is described²⁵³ or who controls it²⁵⁴] *and the chances are equally favourable to all participants*²⁵⁵”. Players must not be charged more than £8 per day in order to cover any charges, and the total value of the prizes must

²⁴¹ Debi A LaPlante, and Howard J Shaffer, ‘Understanding the Influence of Gambling Opportunities: Expanding Exposure Models to Include Adaptation’ (2007) 77(4) American Journal of Orthopsychiatry 616

²⁴² GA2005, s 46(2)h

²⁴³ GA2005, s 46(2)i

²⁴⁴ GA2005, s 292(c)

²⁴⁵ GA2005, s 46(2)f

²⁴⁶ GA2005, s 46(2)g

²⁴⁷ GA2005, s 292(4); but no current limits are prescribed

²⁴⁸ GA2005, s 293(3)(a)

²⁴⁹ GA2005, s 293(3)(b)

²⁵⁰ GA2005, s 293(3)(c)

²⁵¹ GA2005, s 293(5)

²⁵² GA2005, s 8(1)(a)

²⁵³ GA2005, s 8(2)(a)

²⁵⁴ GA2005, s 8(2)(b)

²⁵⁵ GA2005, s 8(1)(b)

not exceed £600 in any given day, that is increased to £900 if there is a series of games in that all participants play a part²⁵⁶. Equal chance gaming, like prize gaming, may take the form of many different types of games, including typical casino card games such as poker, as long as there is no bank involved.

Such activities have been traditionally offered during fun fairs and special events. Similar to private gaming, the risk of direct harm from participation in such activities is likely to be negligible due to their occasional occurrence and their incidental nature to other social activities²⁵⁷ and, accordingly, they may appear harmless enough. However, in light of the overall liberalisation of gambling, the continuation of inclusion of activities that may cause financial loss, and may function as an introduction to gambling that can relatively easily be continued²⁵⁸ at a commercial betting shop typically found close to the location of the fun fair, is undesirable. As such games may take the form of typical casino games, the excitement resulting from such participation may initiate unhealthy desire for a similar thrill to be experienced on a more regular basis. This further demonstrates that the protection of minors from gambling is far from absolute. Apart from economic considerations and historical tradition, there are no other justifications as to why gambling games should be offered alongside thrill rides, inflatables or paintballing fun, music or seasonal concerts/fetes. The availability of alternative, non-gambling forms of entertainment make these gambling games unnecessary and their continuing permissibility for children should not be supported.

1.3. Gaming machines

1.3.1. Why separate treatment?

Gambling on gaming machines deserves special consideration as the statutory provisions in this area vividly exemplify the divergence between the law's attitude towards this form of entertainment and psychological evidence that suggests that playing on slot machines represents one of the most addictive forms of gambling.

Unlike the examples from paragraph 1.2.8 that sit at the periphery of importance in the context of minors' protection, the preservation of the long standing, but uniquely British

²⁵⁶ See <<http://www.adur-worthing.gov.uk/licensing-and-permits/gambling/bingo/>> accessed March 2014

²⁵⁷ By analogy to the risk factors associated with other forms of gambling

²⁵⁸ As it will be argued in Chapter 2 the age verification in betting shops continue to be inadequate

amongst the western world²⁵⁹, permissibility of Category D gaming machines to be played by anyone, regardless of age, deliberately ignores the available empirical evidence, and directly undermines minors’ protection from gambling-related harm. The removal of Category D gaming machines from locations where supervision is likely to be very limited alone does not constitute a sufficiently robust counter-measure. The legislators chosen focus on lack of proof that such machines in themselves lead to dependency²⁶⁰ is unjustified. This is because it comes at the expense of recognising immediate negative consequences that may result from such play, as well as the potential for long-term behavioural conditioning²⁶¹, that may lead to incorrect perception amongst some minors that gambling does not involve substantial risks and that there is no need for any specific risk averse attitude to be adopted.

1.3.2. What is a gaming machine?

A gaming machine is confined by s.235(1) to “*a machine which is designed or adapted for use by individuals to gamble*” regardless of any other uses and that does not fall into any of the listed exceptions²⁶². In other words, the purpose of the apparatus²⁶³ must be to play gambling games or host gambling software, even if it may also be used for other reasons. The first listed exemption excludes domestic and dual use computers, even though they can be used to access remote forms of gambling²⁶⁴. Other types of communication equipment such as telephone (including mobiles), faxes, or tablets are also excluded by s.235(2)b. This means that slot machines that are offered online for gamblers to play from their chosen location, using their own internet enabled devices, fall within the definition of gaming, discussed in the previous section, and are not considered to be the equivalent of a gambling machine in land-based venues.

Other exceptions include devices that only distribute lottery tickets without determining the outcome of the lottery itself and without announcing the results immediately upon

²⁵⁹ Quaker Action on Alcohol and Drugs, Letter to Sarah Heath to Select Committee in response to the call for evidence on children’s gambling; <http://www.qaad.org/wp-content/pdf_files/CMSadditionalevidence.pdf> accessed May 2015

²⁶⁰ Joint Committee on the Draft Gambling Bill, Draft Gambling Bill (HL 2003-04, HL63-I/HC139-I) para 278

²⁶¹ Alex Blaszczyński ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014), <http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf> accessed December 2014

²⁶² GA2005, ss 235(2)a, 235(2)b and 235(2)c (joint reading)

²⁶³ GA2005, s 235(3)

²⁶⁴ GA2005, s 235(a)

dispensation of the ticket²⁶⁵; machines designed purely for playing bingo either generally²⁶⁶, or under prize gaming rules²⁶⁷ in accordance with the appropriate bingo operating licence, or under family entertainment centres gaming machines permit or prize gaming permit. Outside the definition's scope is also equipment that only enables gamblers to play a real, as opposed to a virtual, game of chance. Such a device may, for example, shuffle cards for poker players or distribute the cards to the gamblers.

1.3.2.1. The meaning of “chance” and “prize”

The meaning of a game of chance on a gaming machine is identical to generic gaming but the definition of prize differs.

Prior to the 1968 Act the “*English rule*” meant that the games played on automatic gaming machines only constituted gambling if the outcomes of the game were determined wholly by chance and even a relatively modest amount of skill would render them games of skill²⁶⁸. The reversal was initiated by the Gaming Act 1968 and preserved by the Gambling Act 2005. Accordingly, the game will be a game of chance if it is either presented as a game of chance or contains an element of chance that is not sufficiently insignificant as to be disregarded.

Therefore, if the outcome of the game is determined by skill in a consistent manner and does not utilise “*gambling type language, tasks or signage*” it will be classified as a “*skill with prize machine*”, and thus outside the scope of the gambling regulations²⁶⁹. The expected skill must be realistically achievable “*by a suitably skilful player*”. A game that purports to be determined by skill but that imposes unrealistic timescales, or where the same application of skills produces inconsistent results thus preventing participants from mastering the game, will be considered as a mere sham and will still be treated as a game of chance²⁷⁰. The Gambling Commission also warned operators that “*skill with prize machines*” that advertise a prize of a value over £50 will be treated with suspicion as such

²⁶⁵ GA2005, ss 235(2)d(i) and 235(2)d(ii)

²⁶⁶ GA2005, s 235(2)e

²⁶⁷ GA2005, s 235(2)f

²⁶⁸ *Pessers, Moody, Wraith & Gurr Ltd v Catt* 77 JP 429 (Lord Justice Williams) on appeal; *Fielding v Turner* [1903] 1 KB 867

²⁶⁹ Gambling Commission, ‘Skill With Prize Machines – a Quick Guide for Licensing Officers’ (Info 13/57) <<http://www.gamblingcommission.gov.uk/pdf/skill%20with%20prize%20machines%20-%20a%20quick%20guide%20for%20licensing%20officers.pdf>> accessed January 2015

²⁷⁰ Gambling Commission, ‘Is Prize Machine a Gaming Machine?’ (July 2010) <<http://www.gamblingcommission.gov.uk/pdf/is%20a%20prize%20machine%20a%20gaming%20machine%20-%20july%202010.pdf>> accessed January 2015

machines are unlikely to be commercially viable if true skills are involved²⁷¹. The mere introduction of a random element does not necessarily import an element of chance but this random element must be introduced only in order to test the players' skills or knowledge²⁷².

The prize includes money, an article, right or service won, or a right to choose a product from the shop up to a given amount. A reward will constitute a prize, regardless of the actual name or description used²⁷³, but it excludes the right to play the machine again²⁷⁴.

1.3.2.2. Types and locations of gambling machines

Gambling machines are subdivided into four main categories (A, B, C and D) depending on the cost of playing and the size of potential winnings under the Categories of Gaming Machine Regulation 2007, as amended firstly by the Categories of Gaming Machines (Amendment) Regulation 2009, and more recently by the Categories of Gaming Machine (Amendment) Regulation 2014.

Categories A, B and C machines are not permitted to be played by minors. Category A machines are all other machines that do not fall under any of the other categories. No specific restrictions are imposed on Category A machines with regards to the values of stakes or prizes. Category B machines are divided into B1, B2, B3, B3A and B4. A B3A machine is specifically designed for the playing of a lottery and can only be made available at members' clubs or in miners' welfare institutions²⁷⁵. Both B3A and B3 machines can have stakes of up to £100, with a jackpot of £500, while B1 machines can charge up to £5 per game. The new maximum prize has been increased from £4,000 to £10,000²⁷⁶. Category C machine's stakes and maximum prizes are £1 and £100 respectively²⁷⁷.

Category D machines can currently be played by anyone regardless of age. They must not exceed their maximum stake levels (between 10 pence and £1) and relatively low prize value of any potential winnings (up to £5-£10 in cash or up to £50 in non-monetary prizes)

²⁷¹ Gambling Commission, 'Is Prize Machine a Gaming Machine?' (July 2010) <<http://www.gamblingcommission.gov.uk/pdf/is%20a%20prize%20machine%20a%20gaming%20machine%20-%20july%202010.pdf>> accessed January 2015

²⁷² "Is prize machine a gaming machine?" (n 271)

²⁷³ GA2005, s 239(a)

²⁷⁴ GA2005, s 239(b)

²⁷⁵ Categories of Gaming Machines Regulations 2007, amended, SI 2007/2158, reg 5(3)b

²⁷⁶ Categories of Gaming Machines Regulations 2007, amended, SI 2007/2158, reg 5

²⁷⁷ Categories of Gaming Machines Regulations 2007, amended, SI 2007/2158, reg 4

as otherwise they would lose Category D status²⁷⁸. Non-monetary winnings are still classified as financial prizes if they can be exchanged for cash or used to exchange for other goods or services offered in the premises where the machine is located.

All types of gaming machines can only be displayed for use under either the operating licence or a permit. Such permits are no longer available in places where practical supervision is likely to be limited such as takeaways, cafes, minicab offices, or non-arcade premises²⁷⁹. But in addition to Family Entertainment Centres, pubs continue to be permitted on the basis of their premises licence to make available up to two Category D or C gaming machines. Clubs are entitled to apply to their local authority for permission to make available up to three gaming machines that fall into the category B3A or below. This means that such machines continue to be widespread and easily accessible to all.

1.3.3. Why gambling machines continue to give rise to specific concerns in the context of minors' protection.

In the words of Whittlesea Interagency Taskforce on Gambling²⁸⁰, gaming machines “*are programmed to win and designed to addict*”, and to mislead players into believing that they won when in reality they lost²⁸¹. Substantial academic literature supports this allegation and explains the reasons behind their addictive properties. For example, Parke and Griffiths²⁸² argued that the introduction of specialist play features in slot machines increased their video game quality by giving players the illusion of being more involved and having more control, thus facilitating more intense and longer players' engagement.

Those features include ““*nudges*”, “*hold*”, and “*gamble*” buttons as well as features such as “*lapper*”, “*trail*”, “*hi-lo ladders*” and “*grid*”. A concept of “*near miss*”, frequently utilised in gaming machines, has also been identified as having the effect of prolonging play. “*Near misses*” occur when a player gets a result that can be interpreted as being

²⁷⁸ Categories of Gaming Machines Regulations 2007, amended, SI 2008/2158, reg 3

²⁷⁹ Gambling Commission, ‘Illegal Siting of Gaming Machines: A quick Guide for Small Businesses’ (Info 12/09) <<http://www.gamblingcommission.gov.uk/pdf/Illegal-siting-of-gaming-machines-a-quick-guide-for-small-businesses.pdf>> accessed January 2015

²⁸⁰ New Zealand, Whittlesea Interagency Taskforce on Gambling, ‘Fact Sheet’ <www.pokermachinesharmwhittlesea.org> accessed January 2015

²⁸¹ The machine misleads players when “*it plays ‘the winning music and flashes lights to suggest when you have won, when you have actually lost. For example, you bet 50 credits and win back 20 which is a loss of 30 credits but the machines lights up the bells go off to tell you that you have won*” (n 278)

²⁸² Jonathan Parke, Mark Griffiths ‘The Psychology of the Fruit Machine: The Role of Structural Characteristics (Revisited)’ (2006) 4 Int J Ment Health Addict 151

close to the actual winning and gives the impression to the players that they “*nearly won*” as opposed to simply losing²⁸³.

Dowling et al²⁸⁴ argued that the rapid nature of the game, with only a brief period of time between the play and the outcome; frequent interim wins and positive ambient characteristics such as light, colour and sound effect, reinforce positive feelings of enjoyment that further reinforce playing habits. As the game progresses the audio stimulants tend to get faster and louder, causing players’ physical changes such as increased heart rate due to the release of the adrenaline hormone, making it harder to pause or stop altogether until the game ends by itself, or the money runs out²⁸⁵.

Although participating in any gambling activity may lead to harmful behaviour, the onset of problem gambling amongst gambling machines’ players appears to arise significantly faster than is the case with other forms of traditional gambling²⁸⁶. Breen reported that “*pathological gambling for EGM [Electronic Gaming Machines] gamblers begin after a mean of 1.08 years versus 3.58 years for traditional table and racetrack gamblers*”²⁸⁷. The more recent reports produced by NatCen²⁸⁸ emphasised the multitude of factors that may contribute to the development of problem gambling amongst slot machines’ and electronic gaming machines’ players, but nothing in their findings would detract from the overall riskiness of this form of gambling. Indeed, with regards to young people, the report from a follow-up study²⁸⁹ indicated that a substantial number of young adults²⁹⁰

²⁸³ Kevin A Harrigan, ‘Slot Machine Structural Characteristics: Creating Near Misses Using High Award Symbol Ratios’ (2008) 6 Int J Ment Health Addiction 353

²⁸⁴ Nicki Dowling, David Smith & Trang Thomas, ‘Electronic gaming machines: are they the “crack-cocaine” of gambling?’ (2005) 100 Addiction 33

²⁸⁵ Bradley S Fiorito, ‘Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling’ (2006) 100 Nw ULRev 1325

²⁸⁶ Robert B Breen, Mark Zimmerman, ‘Rapid Onset of Pathological Gambling in Machine Gamblers’ (2002) 18(1) J Gamb Stud 31

²⁸⁷ Cited in Fiorito (n 285)

²⁸⁸ Heather Wardle, Jonathan Parke and David Excell, ‘Gambling Machine Research Programme: Report 1 – Theoretical Markers of Harm for Machine Play in a Bookmaker’s A Rapid Scoping Review’ (RGT 2014)

<http://www.responsiblegamblingtrust.org.uk/user_uploads/pdfs/report%201%20theoretical%20markers%20of%20harm%20for%20machine%20play%20in%20a%20bookmakers%20-%20a%20rapid%20scoping%20review.pdf> accessed January 2015

²⁸⁹ Heather Wardle & Dan Philo, ‘Changes in Machine Gambling Behaviour: Headline Findings From a Follow-Up Study of Participants to the Health Survey for England 2012; Scottish Health Survey 2012 and the British Gambling Prevalence Survey 2010’ (RGT, 26 November 2014)

<http://www.responsiblegamblingtrust.org.uk/user_uploads/pdfs/changes%20in%20machine%20gambling%20behaviour.pdf> accessed December 2014

²⁹⁰ Wardle (n 289) 9% on machines in bookmakers and 11% on slot machines for those aged 18-24 years old

began to play slot machines upon reaching majority, thus indicating that interest in such machines is not declining.

While the above evidence does not necessarily relate directly to Category D machines, there is an ample literature that highlights the risk of these machines to children²⁹¹. The latest Young People Omnibus 2014²⁹² reported that, although overall playing on fruit machines has declined since 2008/2009, there were still 5% of children aged between 11 and 15 years old who admitted to playing such machines in the last seven days preceding the survey²⁹³.

The government continuing classification of these machines as “*soft*” types of gambling due to their low stakes/low prizes is unconvincing, especially in light of the recent increases in stakes and prizes for the combined money and non-money Category D machines. The stakes and prizes remain low but they are not sufficiently different from other gambling products to justify more liberal treatment on financial grounds alone.

Some lottery products (e.g., Health Lottery²⁹⁴ and the National Lottery) may be purchased for £1 or £2 only; the stakes on sport betting can be as low as £1 per bet and it also costs as little as £1 for a single online spin on a roulette. Although the maximum prizes on these forms of gambling can be much higher, the more common pay-outs typically are small with major jackpots being a significantly rarer occurrence than the publicity surrounding them may indicate. Financial considerations are also relative to a child’s age and means. The House of Lords²⁹⁵ in *R v Burt and Adams Ltd*²⁹⁶, when interpreting a similar provision under s.34(3) of the Gaming Act 1968, confirmed that the limits on stakes and prizes refer to “*any one game*”. This means that there is nothing in the legislation itself stopping minors from spending whole days in amusement arcades and accumulating substantial combined winnings, or incurring large cumulating losses.

Miers tended to be highly critical of children being allowed to play Category D gaming machines and of the way the limits are calculated, arguing that it significantly undermines

²⁹¹ See e.g., early literature review in Mark D Griffiths, *Adolescents Gambling* (Routledge 1995) 75

²⁹² Young People Omnibus 2014

²⁹³ Young People Omnibus 2014

²⁹⁴ The Health Lottery aims to raise funds to eliminate health inequalities between different geographical locations in the United Kingdom. It manages 51 society lotteries in rotation; <https://www.healthlottery.co.uk/> accessed August 2014

²⁹⁵ Now the Supreme Court

²⁹⁶ [1998] UKHL 14, [1999] AC 247

the aims of protecting children from gambling-related harm²⁹⁷. In this thesis his criticisms are firmly supported. Children tend to have more free time than adults and, for some of them, playing games in arcades can pre-occupy a substantial period of their time²⁹⁸. This may be especially true in deprived areas where other forms of entertainment can be perceived to be unavailable or too expensive²⁹⁹. This is not too dissimilar to the more recent findings in respect of bookmakers' machines that reported higher estimated levels of those starting to play these machines amongst people on lower incomes³⁰⁰.

Due to their limited resources, minors are unlikely to significantly suffer financially in real terms, unless they are self-dependent, and their early exposure to this form of gambling may not necessarily lead them into being interested in “harder” forms of gambling in later life. Nevertheless, in addition to the risk of developing an unhealthy attachment to this form of leisure *per se*, and of being introduced to gambling³⁰¹, minors may also suffer immediate negative consequences, such as feeling stressed out during the play, getting into trouble with parents/guardians or losing lunch money and going hungry³⁰².

Some support for this argument emerged during the focus groups' discussions. Of 200 pupils only five indicated that they had never been to an arcade at any point in their life, and only one pupil stated that he never played them because he found them “so boring”³⁰³. The significantly larger number of pupils admitting to playing such machines during focus groups, in comparison to the Young People Omnibus, is to be expected. This is because the survey asked children to indicate their engagement within the 7 days preceding the survey, whereas in the focus groups engagement at any point in life was noted.

²⁹⁷ Davis Miers, 'A British View of European Gambling Regulation', in Cyrille JCF Fijnaut & Alan Littler (eds) *The Regulation of Gambling: European and National Perspective* (Brill 2006) 90-112

²⁹⁸ Susan Moore and Keis Ohtsuka, 'The Structure of Young People's Leisure Time and Their Gambling Behaviour' (2000) 17 *Behaviour Change* 167

²⁹⁹ Mark D Griffiths, *Adolescent Gambling* (Routledge 1995)

³⁰⁰ Heather Wardle & Dan Philo, 'Changes in Machine Gambling Behaviour: Headline Findings From a Follow-Up Study of Participants to the Health Survey for England 2012; Scottish Health Survey 2012 and the British Gambling Prevalence Survey 2010' (RGT, 26 November 2014)
<http://www.responsiblegamblingtrust.org.uk/user_uploads/pdfs/changes%20in%20machine%20gambling%20behaviour.pdf> accessed December 2014

³⁰¹ Roy Light, 'The Gambling Act 2005: Regulatory Containment and Market Control' (2007) 70(4) *MLR* 626

³⁰² Mark D Griffiths, *Adolescents Gambling* (Routledge 1995)

³⁰³ This question was asked in the negative. Pupils were asked to come forward if they haven't played any of the toy grabbers and penny pushers

Others admitted to playing mostly penny pushers and toy-grabbers (exactly the ones for which stakes and prizes have been increased by the Categories of Gaming Machine (Amendment) Regulation 2014) during their trips to the seaside, bowling centres or more specifically *Trocadero* (Piccadilly, London). Their motivations to start playing these machines centred on fun and entertainment. However, the desire to get a particular toy, or becoming completely immersed in the activity, especially penny pushers, was cited as the reasons for persevering and spending a significant amount of money.

For example, Kim (f,14) explicitly admitted that “*she was obsessed with them*” and Mila (f,14) remembered when she spent five pounds during 10 minutes of play. A few pupils specifically referred to the stress of trying to get a particular toy, and the feeling of disappointment of not getting one that generated some violent behaviour amongst them. For example, Jim (f,17), when describing her experience, stated that she felt like “*it’s gonna come out and I am shaking it; right; brag; I got a ring and I wanted a necklace, and I am just trying; you know what I mean, and keep it and I am just trying until I am out of money...*” completed by Mike (f,17) showing angry face and questioning “*and where is my toy gone?*”. Gucci (f,17) also concurred by saying “*exactly, you feel cheated and you hit it*” with Jim (above) directly admitting that it was what she did when she tried to get a particular sweet from a sweet machine that did not give her what she expected. Chad (f,14) also described immediate negative feelings she experienced. She stated: “*I played, literary once I went through with twenty pounds and was like ‘oh my God; I lost twenty pounds’*”.

These negative feelings themselves did not discourage them from playing on the machines, and the pupils’ views were polarised with regards to the question as to whether this form of leisure constitutes gambling. While many recognised the gambling characteristics of penny pushers and toy grabbers, some concerning issues have also emerged. For example, an interesting insight came from John (m, 14) who relied on age restrictions to decide whether an activity is considered to be gambling or not. He argued that as penny pushers and toy grabbers are permitted (and in fact designed) to be played by minors, they cannot constitute gambling and must therefore be risk-free. This is concerning because such an attitude may prevent minors from being cautious about this form of gambling, may be transferred onto other risky but not prohibited behaviour and, as a result, may make pupils with similar views more vulnerable to gambling-related harm.

1.3.4. Concluding remarks in respect of gambling machines

The Gambling Act specifies that children should be protected from “*being harmed or exploited*” by gambling. The Act did not confine itself to protecting children from developing a problem gambling habit and neither should the Secretary of State or the Gambling Commission confine its priorities to problem gambling only. Blaszczynski et al³⁰⁴ pointed out recently that determination of what gambling should, or should not, be permitted to minors should include considerations of the level of cognitive competency and understanding of the risks that can be expected to have developed by any particular age. Accordingly, it cannot be argued that, for example, a seven year old would have such competence and these machines should only be permitted if they are considered not to pose risk of any harm. Such lack of harm has not been proved and, accordingly, it is submitted that the potential harm that some children may experience while playing Category D gaming machines has been, and continues to be, ignored. The Act represented an excellent but missed opportunity to introduce a gradual³⁰⁵ phasing out of such machines³⁰⁶ and to bring UK legislation in line with other jurisdictions.

The UK government’s refusal to review its policy on gaming machines, and the recent increases in stakes/prizes limits, is a clear indication of preference being given to the economic wellbeing of seaside resorts and other gambling venues over potential health concerns of minors and other vulnerable persons. This is a misguided policy, especially as there are many fun and entertaining activities with sufficient amusement properties to remove the need for those that are structurally gambling. It is recommended that the Secretary of State exercises its powers under s.59 of the Gambling Act 2005 and introduces age restrictions on such machines.

1.4. Betting

The bookmaking business has been formally assimilated under the overall regulatory framework by the Gambling Act and, as this brings more consistency and supervision, this should be seen as a positive aspect of the legislation³⁰⁷. The definition of betting is

³⁰⁴ Alex Blaszczynski ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014), http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf accessed December 2014

³⁰⁵ To enable the arcades to adjust

³⁰⁶ As they typically attract minors

³⁰⁷ Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70(4) MLR 626

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all-inclusive in its scope and its legal classification as a form of ‘*hard core*’ type of gambling reflects the available psychological evidence well and must be supported.

Betting is defined by s.9 of the Gambling Act as the process of placing and accepting a bet on anything other than financial services³⁰⁸ that remains uncertain to at least one party of the transaction at the time of the bet³⁰⁹. Most common and popular forms are betting on the outcome of sporting events/competitions including horse races³¹⁰, but it is possible to bet on a limitless variety of events. Examples may include betting on the gender of the royal baby³¹¹, the outcome of the Scottish referendum³¹², and even whether a particular relationship between two people will last for a specific period of time³¹³. A bet remains valid even if either of the parties to the transaction already knows the outcome of the betted event. No specific mention is made regarding consideration or prizes³¹⁴, but commercial betting is unlikely to take place in the absence of either and can be presumed from the joint reading of this part of the Act.

S.11 specifies that an arrangement whereby participants pay to enter a game to predict the outcome of something uncertain in order to win a prize if their guess is more accurate than others, will also amount to betting³¹⁵ as players effectively bet that their prediction will be better than those made by others. In this context, prize means money, article or services, irrespective of the name used for description purposes³¹⁶ or who provides it³¹⁷.

Betting competitions attract separate definition with regards to what constitutes payment to enter and are treated in a similar way to the payment to enter a lottery. It is defined as incurring expenditure³¹⁸ over and above standard delivery and communication charges³¹⁹

³⁰⁸ GA2005, s 10(1)

³⁰⁹ GA2005, ss 9(2)a and 9(3)b

³¹⁰ Carla Seasbury and Heather Wardle, ‘Gambling Behaviour in England and Scotland: Headline Findings From the Health Survey for England and Scottish Health Survey 2012’

<<http://www.gamblingcommission.gov.uk/pdf/headline%20report%20to%20gc%20v2.0.pdf>> accessed January 2015

³¹¹ Such bets were accepted in 2013

³¹² September 2014

³¹³ £100 bet accepted in October 2010 by William Hill on whether Christopher Brooker and Hannah Grayson will remain in relationship after Christopher Brooker’s graduation,

<<http://www.dailymail.co.uk/news/articles-2166566/Student-21-win0bet-girlfriend-graduates.html>> accessed November 2013

³¹⁴ The “betting” section of the Gambling Act does not mention anything about financial outlay or any prize

³¹⁵ GA2005, ss 11(1) and 11(2)

³¹⁶ GA2005, s 11(4)a

³¹⁷ GA2005, s 11(4)b

³¹⁸ GA2005, sch 1, s 2

³¹⁹ GA2005, sch 1, s 5

that one would normally expect when posting a first or second class letter, or making a telephone call at the standard rate. It is irrelevant whether such payment is required to enter the competition or to find out the results. It includes arrangements if payment is necessary to claim the prize or for the prize to be released to the winner³²⁰.

It is equally immaterial if the entry to the competition also entitles the participants to receive additional goods³²¹, as long as the payment reflects the value of the entry tickets and does not represent only the value of the purchased product³²². If a purchaser only buys the product at a normal retail price that also gives entry to a prize competition, and the price is not inflated as a result of the competition, this will not be classified as paying to enter and will fall outside s.11³²³. Finally, there is no requirement that the participants are aware that they are entering the competition³²⁴.

Pool betting is a sub-type of betting activity and is defined by s.12. It occurs when people bet against others within a group of identified or identifiable individuals on the outcome of an event with their stakes (financial or non-financial) being paid into a common pot. The full amount is then distributed amongst those who predicted the outcome correctly or otherwise in accordance with their specific agreement.

Nearly all forms of betting are prohibited to those who are under the age of 18 years old³²⁵. The exceptions are pool betting that is permitted to those who are over the age of 16, and non-commercial or domestic betting that is permitted to all. Bets will be considered domestic if they are made between parties who reside at the same address³²⁶ or made between people who are employed by the same employer³²⁷. Betting between persons, neither of whom are, nor profess to be, a business person³²⁸, is exempt as non-commercial betting³²⁹. The permissibility of domestic and commercial betting follows the same reasoning and has similar consequences as the lack of prohibition of private gaming and has already been discussed in paragraph 1.2.8.

³²⁰ GA2005, sch 1, ss 6 and 7

³²¹ GA2005, sch 1, s 2(c)

³²² GA2005, sch 1, s 2(c)

³²³ GA2005, sch 1, s 2(c)

³²⁴ GA2005, sch 1, s 4

³²⁵ GA2005, s 46

³²⁶ GA2005, sch 15, s 7

³²⁷ GA2005, sch 15, s 8

³²⁸ GA2005, s 302

³²⁹ GA2005, s 306

1.5. Lotteries

1.5.1. Introduction

The final form of gambling (other than mixed types) relates to lotteries. The UK National Lottery was established by the National Lottery etc. Act 1993 and had its first draw on the 14th November 1994³³⁰. It was intended to operate as a commercial monopoly under an umbrella of one private operator supervised by the governmentally controlled National Lottery Commission³³¹. The National Lottery offers a variety of number draws such as *Lotto*, *EuroMillions*, *Thunderball* or *Lotto HotPicks*³³² as well as other products such as instant Scratchcards.

The Gambling Act preserved the single commercial monopoly of the National Lottery provider, Camelot, and other lotteries can only be offered on a non-commercial basis. They must possess an operating licence that is granted exclusively to a “*non-commercial society*”³³³, or “*a local authority*”³³⁴, or “*a person proposing to act as external lottery manager on behalf of a non-commercial society or a local authority*”³³⁵ or if it falls under the definition of an exempt lottery³³⁶.

However, the litigation that ensued between Camelot and the creators of the Health Lottery³³⁷, as well as the evidence given to the Parliamentary Select Committee³³⁸ by the lottery representatives on behalf of the Postcode Lottery and the Health Lottery, demonstrates that the practical boundaries between commercial and non-commercial lotteries are not straightforward. Players may not necessarily distinguish other offerings from the National Lottery and they can be equally attractive to them, thus further contributing to the general proliferation of the offer.

Lotteries tend to be perceived as a relatively safe form of gambling due to their low event frequency and a time delay between the purchase of the lottery ticket and finding out the

³³⁰ David Miers, ‘Latest Development in the United Kingdom’s National Lottery’ (2006) 10(6) Gaming Law Review 542

³³¹ See <www.natlotcomm.gov.uk/> accessed September 2014

³³² See <<https://www.national-lottery.co.uk/>> accessed September 2014

³³³ GA2005, s 98(1)a

³³⁴ GA2005, s 98(1)b

³³⁵ GA2005, s 98(1)c

³³⁶ GA2005, s 259(1)b

³³⁷ R (on the application of Camelot UK Lotteries Ltd) v Gambling Commission [2012] EWHC 2391, [2013] PTSR 729

³³⁸ Culture, Media and Sport Committee, *Society Lotteries* (HC 2014-15, HC 615) para 32

results³³⁹. The legal status of the lottery endorses this view. Accordingly, it is classified as a “*medium*” form of gambling. Anyone over the age of 16 years old is permitted to purchase lottery products. The widespread permitted use of lotteries and raffles as a means of raising funds at schools and other events perpetrate the attitude towards lotteries as a relatively harm-free fundraising method.

However, in this section I will demonstrate that lotteries are not devoid of risks, especially in respect of young people, and the addictive properties of some lottery products such as *Instant Scratchcards* can be as substantial as is the case for gaming and betting³⁴⁰. Furthermore, and akin to the arguments made in respect of gaming machines, lotteries may constitute an introduction to gambling that, coupled with their popularity amongst the general population³⁴¹, contributes to the overall normalisation of gambling and lowering of risk-averse attitudes.

1.5.2. What is a lottery?

The definition of a lottery is contained in s.14 and it is an arrangement, regardless of how it may be called, that satisfies conditions stated in s.14(2) or s.14(3). The Gambling Act makes a distinction between simple and complex lotteries with the common characteristics being the need to pay in order to enter³⁴², the existence of one or more prizes³⁴³ and the presence of randomness in the determination of the prize allocation³⁴⁴.

The method of selecting the winners classifies whether the lottery is a simple or a complex one. If the prizes are distributed in line with one single process that relies wholly on chance it will be a simple lottery³⁴⁵. However, if the allocation is determined by a number of processes it will be a complex lottery if at least the first process relies wholly on chance³⁴⁶.

³³⁹ Mark D Griffiths & Richard Wood, ‘The psychology of lottery gambling’ (2001) 1(1) *International Gambling Studies* 27

³⁴⁰ Griffiths (n 339)

³⁴¹ Health Survey 2012 indicated that 68% of people play lottery at least some time; lotteries are played by the highest number of people in comparison to any other gambling product

³⁴² GA2005, s 14(2)a

³⁴³ GA2005, s 14(4)

³⁴⁴ GA2005, ss 14(2)c and 14(3)d

³⁴⁵ GA2005, s 14(2)c

³⁴⁶ GA2005, s 14(3)c

1.5.3. What types of lotteries can be offered?

In addition to the National Lottery that is commercially offered by *Camelot*, the Gambling Act allows for several other lotteries to be organised by, amongst others, institutions where children are present on a regular basis such as schools or youth clubs. Incidental non-commercial lotteries³⁴⁷, private lotteries³⁴⁸, customer lotteries³⁴⁹ and small society lotteries³⁵⁰ can be arranged without a licence as long as they meet the statutory conditions. These relate to the conduct of the lotteries, whether profit is permitted and, if so, what the profit may be used for, rules governing roll-overs, value of permitted prizes and cost of each ticket. Engagement in incidental non-commercial lotteries or private lotteries is permitted under s.56(1)a and s.56(1)b respectively regardless of age, but participation in all other lotteries is only permitted to those who are over the age of 16.

1.5.4. Why should the risks associated with lotteries not be ignored?

Despite the popular perception of lotteries as harmless entertainment, empirical evidence suggests that this form of gambling may lead to addiction, not only if combined with other forms of gambling but also as a stand-alone activity. Grusser et al³⁵¹ reported that 15.2% of 171 lottery players that participated in the study satisfied DSM-IV criteria for pathological gambling. Their sample excluded those players who also engaged in slot machines or casino gambling. Of the 171 participants, 100 players were also engaged in sports betting but 71 of them only played the lottery.

Ariyabuddhiphongs³⁵² referred to the substantially increased endorsement of DSM-IV criteria for addiction that occurred within six months from the introduction of the UK National Lottery. Farrell et al³⁵³ also conceded that “*there is an element of addictive behaviour*” that can be identified in lottery purchases. Even more concerning are the results of the study carried out by Felcher et al³⁵⁴ with 1,072 young people aged between 10 and 18 years old in Ontario, Canada that identified lottery as the “*preferred form of*

³⁴⁷ GA2005, sch 11, Part 1

³⁴⁸ GA2005, sch 11, Part 2

³⁴⁹ GA2005, sch 11, Part 3

³⁵⁰ GA2005, sch 11, Part 4

³⁵¹ Sabine M Grusser ‘and others’, ‘The Addictive Potential of Lottery Gambling’ (2007) 19 *Journal of Gambling Issues* 19

³⁵² V Ariyabuddhiphongs, ‘Lottery Gambling: A Review’ (2011) 27(1) *J Gambl Stud* 15

³⁵³ Lisa Farrell, Edgar Morgenroth and Ian Walker, ‘A Time Series Analysis of U.K. Lottery Sales: Long and Short Run Price Elasticities’ (1999) 61(4) *Oxford Bulletin of Economics and Statistics* 513

³⁵⁴ Jennifer Felsher, Jeffrey Derevensky and Rina Gupta, ‘Lottery Participation by Youth with Gambling Problems: Are Lottery Tickets a Gateway to Other Gambling Venues?’ (2004) 4(2) *International Gambling Studies* 109

gambling” amongst those young people who had already developed gambling problems. Studies carried out by Griffiths³⁵⁵ demonstrated problematic lottery play in teenagers. Moreover, affected youngsters display similar pathological behaviour, such as chasing losses, which would typically be expected from other forms of gambling. Indeed “*chasing losses*” was found to occur more frequently amongst this age group than for any other forms of gambling³⁵⁶.

Some of the lottery features and advertising techniques feed into the addictive propensities of some players. The relatively low stakes of lottery tickets, coupled with the allure of winning life-changing jackpots, is the predominant cause of the popularity of lotteries³⁵⁷. However, this may also lead to the feeling of entrapment where “*a player feels obliged to continue betting (investing) both time and money through some internal sense that they have gone too far to give up now despite mounting losses*”³⁵⁸. Frequent lottery players are often cited to be affected by this phenomenon, especially if they choose identical numbers each week and feel anxious not to play in any given week in case “*their*” numbers are selected³⁵⁹.

One National Lottery marketing exercise that was recalled by pupils during the focus groups drew specifically on this psychological phenomenon in their advertisement³⁶⁰, whereby they portrayed the negative feelings of a player who forgot to play on their usual numbers that were then selected. The concept of “*near miss*” is also present in lottery games, especially if the player gets two correct numbers in any one row, or 6 correct numbers across a number of rows, that give an impression that winning is much more likely than the actual odds or probabilities indicate.

It is also submitted that the relaxed attitude towards lotteries, and their widespread usage in fund raising activities at institutions that are well placed to teach children about the risks associated with gambling, fosters the favourable attitudes that extend well beyond

³⁵⁵ Mark D Griffiths, Richard T.A. Wood, ‘Lottery Gambling and Addiction: An Overview of European Research’ (2002) [https://www.e-stave.com/documents/odgovorno-igranje/Lottery-gambling-and-addiction-\(EU%20research\)-Mark-Griffits.pdf](https://www.e-stave.com/documents/odgovorno-igranje/Lottery-gambling-and-addiction-(EU%20research)-Mark-Griffits.pdf), accessed October 2014

³⁵⁶ Jennifer Felsher, Jeffrey Derevensky and Rina Gupta, ‘Lottery Participation by Youth with Gambling Problems: Are Lottery Tickets a Gateway to Other Gambling Venues?’ (2004) 4(2) *International Gambling Studies* 109

³⁵⁷ Mark D Griffiths & Richard Wood, ‘The psychology of lottery gambling’ (2001) 1(1) *International Gambling Studies* 27

³⁵⁸ Paul Rogers, ‘The Cognitive Psychology of Lottery gambling: A Theoretical Review’ (1998) 14(2) *Journal of Gambling Studies* 111

³⁵⁹ Michael B Walker, *The Psychology of Gambling* (Routledge 1995)

³⁶⁰ Shown on terrestrial TV in April/May 2013

lotteries and raffles themselves. The rationale behind the permissibility of such wide use of lotteries centres on the fundraising benefits that add important revenues to the relevant societies, schools or other charitable purposes. While it may be argued that it is important to encourage charitable giving amongst young people, this can be done without reference to gambling, especially as it is well recognised that the motivations of the majority of lottery players is not to give to charity but the hope of winning the main prize³⁶¹.

Furthermore, while National Lottery draws tend to be well recognised by young people as a form of gambling, lotteries organised by schools may not be treated by them in the same way. For example, participants of one focus group carried out during this thesis realised, only in the course of the discussions, that the raffle tickets they were purchasing at school in order to win a hairdressing trip was equivalent to a lottery, and most would never consider any potential risk of an activity frequently organised in an educational establishment.

Note the following extract from one focus group:

- “Gucci – *I just realised, the raffle tickets, raffling, are a gamble;*
- others – *yeah, yeah;*
- Gucci – *oh my gosh (with sudden realisation) on school we gamble so much;*
- Micky – *yeah, our school does gamble; we gamble!...;*
- Herbert – *so we must be doing it illegally as well because (unfinished);*
- all laughing;
- Jim – (repeating) *school is doing it illegally*
- Gucci – *come on; we are not doing it illegally at school, can’t be!”*

Although this is an isolated example, other pupils may also not expect schools, which are otherwise well suited to teaching children about the risks associated with gambling, to promote a potentially hazardous activity.

Such use of lotteries for school fundraising efforts also fosters further favourable attitudes towards this form of gambling. It is accordingly recommended that, despite lottery

³⁶¹ Mark D Griffiths & Richard Wood, ‘The psychology of lottery gambling’ (2001) 1(1) International Gambling Studies 27

products being less likely to lead to gambling-related problems, they nevertheless should be treated as all other forms of gambling and only permitted to those who are over the age of 18 years old.

1.6. How do young people understand gambling?

1.6.1. Introduction

Minors' understanding of gambling has significant implications for any harm prevention strategy that incorporates reliance on minors' knowledge, or which relies on the protective factors such as parental, social or religious influences³⁶². All existing educational and awareness-raising notices such as “*be gamble aware*” or “*no underage gambling*” use the term gambling generically, but it is submitted that their effectiveness depends on the receiver accurately associating the message with the intended activities.

This may not necessarily be the case with minors, who are unlikely to adopt risk-averse behaviour towards activities that they do not recognise or treat as gambling. In such circumstances any socially taught protective factors may be diminished, or lost altogether. Such result may arise regardless of whether minors do not view an activity as gambling due to not recognising the presence of the chance element; due to lack of monetary involvement; due to reliance on lack of age-restrictions, or because it is organised by the educational institution that is not envisaged as being capable of promoting something that may lead to harmful consequences, in a similar way to pupils not expecting school to condone cigarettes, alcohol or drugs.

There is a significant body of literature that analyses what children do in relation to gambling³⁶³ but there is still relatively little research that focuses specifically on what they understand gambling to be, and what they actually think themselves about the activity. There are some important exceptions. Buczkiewicz et al³⁶⁴, in a study of 2,576 UK adolescents, reported good overall understanding. Collectively, participants were able to recall most of the popular games, with poker and other card games being cited most frequently.

³⁶² Carmen Messerlian, Jeffrey Derevensky and Rina Gupta, ‘Youth Gambling Problems: A Public Health Perspective’ (2005) 20(1) Health Promotion International 69

³⁶³ Those include prevalence studies undertaken on behalf of the Gambling Commission

³⁶⁴ Martin Buczkiewicz, Mark D Griffiths and Jane Rigby, ‘Adolescent Attitudes Towards Gambling: Some Preliminary Findings’ (2007) 25(1) Education and Health 6

However, a study that focused more on general understanding of what gambling is, as opposed to assessing knowledge of gambling type activities, produced different results. Hume and Mort³⁶⁵ qualitatively considered the views of 175 Australian young people aged between 13 and 30 years old and reported that the majority of participants had a problem understanding what gambling truly is, or what the potential risks are, with many seeing gambling simply as a “*sport*” or another “*game*”.

The qualitative nature of the study offered a more in-depth insight that is often not possible with quantitative surveys. However, it must be noted that the samples were located in different jurisdictions, and the age groups differed, so no direct comparison would be methodologically sound. Nevertheless, it is worth highlighting that many participants “*suggested that gambling was a game of skill, where they could develop better skill the more they participated*”³⁶⁶ with only a small number, who were also characterised by having negative views about gambling, recognised that it is truly predominantly a game of chance where skill plays a less significant part.

During the focus groups an emphasis was placed on finding out how children actually perceive gambling, as opposed to looking at what gambling means in popular terms. This topic generated most controversies and opinions amongst the pupils. No prevailing view could be discerned, but there was sufficient evidence that at least some of the pupils may be vulnerable due to lack of proper appreciations of the mechanics of gambling. The Gambling Commission should, therefore, ensure that there are attractive educational campaigns carried out in order to correct such misunderstandings.

1.6.2. Knowledge of gambling games

Collectively, participants from all focus groups were able to name nearly all types of traditional gambling activities undertaken in the UK. Pupils listed casino games, poker (several varieties), blackjack, roulette, slot machines, betting on sport, lotteries (National Lottery, Postcode Lottery, Health Lottery), scratch-cards, bingo, and betting on several other activities such as the outcomes of school tests, and whether a particular teacher will leave the school by the end of the term. Pupils also mentioned games such as penny-up, noughts and crosses, or heads or tails played for money.

³⁶⁵ Margee Hume and Gillian Sullivan Mort, ‘Fun, Friend or Foe: Youth Perception and Definition of Online Gambling’ (2011) 17(1) Social Marketing Quarterly 109

³⁶⁶ Hume (n 365)

Only one type of gambling activity – football pools – was not mentioned by any of the pupils and, upon probing, several of the focus groups were entirely unaware of what football pools were. With regards to lotteries, one pupil was of the view that lottery is not gambling but a competition because he was under the impression that there is always someone guaranteed to win. His misunderstanding was swiftly corrected by his peers who pointed out that the existence of rollovers proved that no such certainty of winning at each draw exists.

Three pupils included the game of *Monopoly* as a gambling activity. Two of them did not justify as to why they classified *Monopoly* as gambling but Terry (14,m), explained that when someone plays for money “*you borrow from bankers*” so, to him, it was gambling because real money could be lost. The *FIFA* video game was also named as a straight gambling game by Munch (14,m) who explained that “*many people spend enough of real money³⁶⁷ to gamble to try to get a good player and most of the time they don’t so it is a waste of money*”.

Although pupils tended to be over-inclusive in their listing of gambling games it is worth noting that some pupils did not view penny pushers and toy grabbers as gambling, and penny auctions were not mentioned by anyone. Furthermore, as already stated in paragraph 1.5.4, some pupils did not recognise that the activities carried out in schools were in fact gambling, despite otherwise having a good knowledge of gambling games and good understanding of lotteries.

1.6.3. Generic understanding

When pupils were asked to discuss the characteristics of gambling, as opposed to merely naming gambling activities, their descriptions were heavily biased towards the requirements of risking money or materials possession on a chance or uncertain event. Relatively little attention was given to the difference between skill and chance as well as to the actual structural mechanics of gambling. Understandably, descriptions offered by the 17 to 18-year-old pupils tended to be more sophisticated, but substantive differences were negligible.

Some pupils adopted a very wide-ranging approach and they viewed anything that involved an element of risk to be gambling. For example, Bing (17, m) argued that

³⁶⁷ As they wish to progress quicker than it would otherwise be the case if they only purchased players with virtual points earned in the game

“gambling is simply risk-taking; it’s like everything is gambling; what you call gamble is the opportunity cost; I see gambling like doing everyday life in everyday form”.

These pupils appreciated that their wide definition substantially differed from the popular meaning, but even these wide-ranging approaches focused on risk taking, not on chance taking. So, if someone did not risk anything valuable or worthwhile but merely had a chance to win something, this would not amount to a gamble in these pupils’ minds. This does not correspond to the legal definition of gaming that does not require any financial risk to be taken by the player, and may cause gambling-related risks that are not financial to be underestimated.

The majority of pupils offered narrower definitions but all of them were also preoccupied with financial risk. These included *“risking money to get more money”* (Steve,14,m), *“addiction to money”* (Coconut,14,m), *“putting money on, I say, sport with the object of winning money back”* (Jack, 17,m).

The initial preoccupation with the need to risk something of value meant that further probing was required to enable more extensive deliberation amongst the pupils. The in-depth discussions revealed pupils’ ability to identify that gambling must contain an element of chance, but it also demonstrated some potential vulnerabilities.

Two distinctions articulated by pupils are worth emphasising. A number of participants thought that gambling must involve either a substantial amount of money (relative to individual means) or the activity in question does not amount to real gambling at all. For example, Gary (14,m) said that playing with one penny *“is nothing major because you are really like only using a little bit of money”*. When challenged by John (14,m) who argued that it is still gambling, Gary seemingly conceded by saying *“yeah, I am not saying it is not gambling but it is not like major; it’s not like anything, you are just using a little bit of money, just fun”*. This indicated that, although he appreciated John’s view, he would not himself treat it as gambling. These individuals may be vulnerable to gambling related-harm, especially as lotteries, scratch-cards or Class D gaming machines are not only widely available, but also involve a very small expenditure, at least in the early stages.

Amongst those who did not make a differentiation between small and larger stakes, some approached all types of gambling with the same level of caution while others were of the view that small stakes equal small risks, and therefore represented a *“soft”* or *“softer”* type of gambling. This corresponds to the approach taken by the legislation that also

focuses on financial risks, but it comes at the expense of recognition of emotional and social issues that may arise out of gambling. It also further supports the analysis of this chapter that argues that the policy of allowing minors to gamble on a product with lower stakes and prizes is misconceived as such “softer” forms may ultimately lead them to “harder” ones.

1.6.4. Attitudes

1.6.4.1. Attitudes to gambling

Minors’ attitudes towards gambling are not currently being measured in any systematic³⁶⁸ way. Adults’ attitudes are no longer measured after the British Gambling Prevalence Studies³⁶⁹ was incorporated into the larger Health Survey for England and Wales, and Health Survey for Scotland³⁷⁰. This omission is undesirable. Gambling engagement assesses current levels of problem gambling and accordingly, if this is found too high, any response will automatically be reactive and delayed. Changes in attitudes, however, may give pre-warning signs that allow for preventative measures to be implemented, if necessary, increasing the probability of their effectiveness.

In the introductory part of this chapter it was alleged that minors’ attitude towards gambling tends to be more negative than positive. This functions as a restraining factor that to some extent prevents some young people from being too engaged in gambling regardless of the legal provisions. Although no systematic data for British adolescents has been found, the findings from the focus groups carried out in this thesis suggests that the above proposition held largely true for the participating pupils.

Two interrelated but separate dimensions of disposition were observed – general attitude towards monetary gambling and attitude towards the gambling industry itself. Gambling attitudes in the first sense were very diverse but still with a clear bias towards more negative feelings, influenced by familial³⁷¹ and religious values³⁷², that were only partially counterbalanced by positive views. Even the pupils who admitted that they find

³⁶⁸ The Young People Omnibus does not measure gambling attitudes and the Health Surveys no longer contain questions on attitudes

³⁶⁹ British Gambling Prevalence Survey 2010

³⁷⁰ Health Survey for England and Scottish Health Survey

³⁷¹ Some pupils expressly stated that their parents do not approve of gambling. E.g., Timmy (14, m) in response to the question whether he gambled said “*no, my mum would beat me up*”.

³⁷² Several pupils from a variety of denominations (including Islam and Christianity) stated that gambling is against their religion

gambling exciting and those who gambled themselves, saw many negative sides of this form of entertainment.

Only four pupils in total had a predominantly strong positive mind-set about gambling and they also tended to either not recognise that gambling may potentially lead to some negative consequences, or felt immune that these risks do not apply to them.

In most focus groups, there was at least one pupil who was able to recall someone they knew who suffered negative consequences from gambling and at least five pupils described situations that affected someone who was close to the family home. For example, one pupil said “*my mum keeps crying but my dad will not look for help, he says he doesn't need it*”. The negative consequences listed by pupils ranged from the very severe, such as losing a home and being declared bankrupt, to the more intangible aspects such as neglecting family and causing upset.

The risks that are associated with gambling were well recognised and, although pupils were able to recall nearly all possible negative consequences, indicating a very good awareness, a theme of bias towards financial difficulties was discerned. Pupils pointed out that gambling was, or could lead to addiction³⁷³, “*causes debt*”, “*you can lose all the money*” and it can lead someone to “*financial ruin and bankruptcy*”³⁷⁴. They also thought that it could lead to physical and mental stress and depression³⁷⁵, to violence and other criminal activities³⁷⁶, to lack of respect for themselves and others³⁷⁷, and could lead to family problems or even suicide.

Several pupils highlighted that gambling is *haram*³⁷⁸ because it is money that has not been earned but gained at the expense of other people. However, one pupil (Osama, 14, f) expressly stated that only ‘*true*’ gambling activities are haram and, accordingly, she did not consider gambling activities that did not involve any financial risk to fall into this category. By analogy it can be speculated that other activities not recognised as gambling due to any other reasons would equally not be categorised as haram.

³⁷³ Mentioned by several pupils

³⁷⁴ Mentioned by several pupils

³⁷⁵ E.g., Bob (17,m) “*apart from the physical you get a mental stress if you get to people's heads; too much gambling could lead to that, like mental stress; if you win the money it can also get to their heads*”

³⁷⁶ E.g., Kate (14,f) “*people spend like money, some they steal it from others like some homeless people*”

³⁷⁷ E.g., Bing (17, m) “*I think gambling identifies that you are more than willing to risk something of value; in the sense that some people may put things on the line and the fact that you are willing to sacrifice the house for more shows that you don't really have any values*”.

³⁷⁸ “*Haram*” describes activities prohibited in Islam

Other individual comments included:

“Some people must experience some kind of loss of rational thinking because people who are gambling all the time; it is just, well, ultimately, individuals will be unlikely to win” (Twinker,18,f)

Several pupils referred to the inability of players (known either from personal experience or from news reports) to simply play for a short period and, if they win, to enjoy the winnings, pointing out that most winnings are gambled away in any case. For instance:

“This one win I got like 15 quid back, instead of taking the money and be happy, no, as I won I may win again and you get that thrill and you play again” (P3,18,m, confirming that on the described occasion he lost all the money he had with him at the relevant time).

“I think it can be quite addictive because people when they are there and they are like so close to winning something and they want to go back and win it and when they keep losing they will keep going back and losing so it’s like,..., like setting money on fire” (Misha,14,f)³⁷⁹.

Negative attitudes toward real money gambling were also observed indirectly by the difficulties that most focus groups had when attempting to identify some positive aspects of gambling. Positive comments tended to be made only after further probing and related to three main themes.

High emphasis was placed by many pupils on the possibility of winning money, with many pupils indicating that this is the only good element of gambling.

A smaller, but still a significant number of pupils, highlighted the thrill and fun aspects when taking part in gambling, and the additional enjoyment gamblers get when watching sports events. For instance:

“I think, if you watch a game of football, it’s so much better to watch something ... it’s so much more better to watch it if you bet on someone” (Sachin,17,m).

Those who focused on the thrill and social aspects of gambling tended to be pupils that were engaged in real money gambling, or who had family members who gambled without suffering any negative consequences known to them.

³⁷⁹ Other comments include: Paly (14, m) *“say if you like won it once before you want to do it again”*

A small number of pupils also indicated that gambling can be a social event that may facilitate bonding between family members. For example:

“I do scratchcards with my grandma; sometimes she wins, sometimes we don’t but she really likes her scratchcards so even if she loses she still buys lots” (Jenny, 17, f).

But those whose family members had gambling problems tended to view the thrill and excitement as a negative feature.

Other favourable comments were made by individual pupils without attracting further discussion. This made it impossible to determine whether their views attracted support, indifference or dissent. These included comments about gambling being courageous³⁸⁰, encouraging competitiveness³⁸¹, teaching risk assessment³⁸², and offering players the opportunity to lead exciting lifestyles³⁸³.

Poker deserves separate, albeit brief, treatment because playing poker generally attracted significantly more positive responses, and constituted an important exception to the overall prevalence of negative attitudes towards gambling. Pupils’ views were strongly biased towards the skill element involved in playing poker, with many of them viewing the social and fun aspects of the game, and the learning of mathematical skills, as outweighing any potential risks from the game itself. However, it is important to highlight that the majority of pupils in the sample played poker for money or items of financial value only with their friends or family, with online poker being played predominantly on free social gaming sites rather than on any for-money sites.

1.6.4.2. Attitudes to the gambling industry

However, attitudes to the gambling industry, and especially to the online gambling industry, were very antagonistic. Many pupils expressed their perception that gambling activities, including gambling that is lawful to minors, cannot be trusted. Others pointed out that gambling machines are “*dodgy*”, “*rigged*”, that casinos want you to lose all your money and that they generally do not care about children or those who have a gambling problem.

³⁸⁰ Bing (17, m) “*gambling is being courageous, it’s like if you put something and you are willing to put it on the line except that you may be getting something bigger*”

³⁸¹ Misty (17, f) “*like being competitive is a good thing*”

³⁸² Carly (17, f) “*risk assessing, you need [it’s good] to know that sometimes but ...*”

³⁸³ Joe (14, m) “*if you go to casino you feel like a real top geezer*”

For example:

“People who play, they think they gonna get the money back but they rig it so only certain customers get the money; there is a whole system in it; my uncle used to own a pub and what he did was when he got the machine he rigged it so when people paid they never got their money back” (Cookie, 14, m).

Pupils were also familiar with the risk of hacking and online scams that made them additionally wary when accessing any online activities that required disclosure of too much personal information. For instance:

“It is too risky to put your bank details on because of all the hacking scams” (Rohan, 14, m).

“There are some scams out there, basically we were watching this film and the pop-up comes and this women with all her cleavage coming out and you are so onto it (sic) and you fill in the details and they take all your money like that” (Quentin, 14, m).

1.7. Conclusion

The meaning of gambling, and of regulated gambling, is of paramount importance when assessing the overall regulatory framework’s effectiveness in protecting minors from gambling-related harm. This is because this determines which activities are caught by the statutory regime and which should be avoided by minors. The law underpins the gambling industry’s conduct and it dictates to what extent minors are excluded from participation. It also has some influence as to what minors perceive to constitute gambling which, in turn, impacts on their decision as to whether to engage or not.

Minors that participated in the study had a very good understanding of what traditional gambling is. It was equally reassuring that they seem to have rather negative attitudes towards gambling *per se* because this stops many of them from being engaged in this activity. However, due to the industry efforts to portray themselves as legitimate entertainment, minors’ overall perception of gambling may change over time. The study also indicated that the negative attitudes seem to be displayed only towards activities that are considered as prohibited gambling, and did not necessarily extend to gambling that is permitted to them. These include Category D gaming machines or lotteries/raffles organised by schools, or engaged in during fun days out, despite the clear recognition that participation in gaming machines led to some negative consequences amongst some of

them. Despite the overall reduction of availability of Category D gaming machines, they continue to be widespread and easily accessible. Furthermore, the potential risks of participating in “*soft*” or “*medium*” forms of gambling were trivialised by the pupils, clearly reflecting the attitude adopted by the Gambling Act itself.

It has never been the Gambling Act’s intention to fully insulate minors from gambling participation³⁸⁴ but, as has been demonstrated in this Chapter, these “*soft*” or “*medium*” forms of gambling are not devoid of risks. The statutory boundaries lead to perceptions about gambling amongst minors that in some deters use, but is too narrow, thereby exposing minors to activities that are potentially harmful. Gaming machines may introduce children to the excitement of gambling that may transfer onto “*harder*” forms either during their youth or during their adulthood. Some other gambling permitted to young people such as Instant Scratchcards can, in fact, be as addictive and harmful as other forms of casino gambling or betting.

The ability for schools and other institutions that are otherwise well suited to teaching children and young people of gambling-associated risk, further reinforces the incorrect view that some forms of gambling are entirely risk-free. This undermines minors’ protection. It has already been pointed out by Moody and Hastings³⁸⁵ that “*it is difficult to tell children that gambling is potentially addictive and harmful behaviour, whilst allowing them to legally do so*”. To this end, it can be added that it is difficult to warn minors of the associated risks if, at the same time, gambling is organised and promoted by those that should otherwise discourage engagement in potentially hazardous behaviour. Schools and other institutions should of course be permitted to run lotteries as part of their fundraising events, but minors should be excluded from participation or facilitation of such gambling.

The Gambling Act also failed to give full consideration to more novel phenomenon such as penny auctions or games where collectable virtual property can be won or lost in virtual games of chance. Penny auctions received only one paragraph statement from the Commission that did not even explain reasons behind the decision, and the legal determination of the value of virtual collectable good remains uncertain. The Gambling

³⁸⁴ S Smith (ed), *Smith and Monckom: The Law of Gambling* (3rd edn, Tottel Publishing 2009)

³⁸⁵ C Moodie, G Hastings, ‘Gambling With The Future of Young People’ (2008) 16 *Addiction Research and Theory* 107

Commission should be more proactive in dealing with these emerging issues in order to act in a more preventative rather than reactive way.

While the Gambling Act introduced many positive changes to the gambling landscape, the analysis of the black letter law shows that the inclusion and exclusion, of specific activities has been driven by the political economy theory³⁸⁶ of what needs to be licensed and controlled in order to maximise taxation revenues. This is without giving full consideration of some novel activities that may present similar dangers to current young people and future adults. It also missed the opportunity to rationalise some long-standing anomalies that permit minors to engage in some highly addictive forms of gambling and make the legislation to correspond to the risk of harm threshold, as identified by the current psychological evidence.

It is accordingly recommended that this is reviewed and all commercially offered or publicly organised gambling should only be permitted to those who are over the age of 18 years old. Only private and domestic gambling should be left to enable minors to experiment with this form of activity, and learn in the process how to approach it safely. It is also recommended that further research should identify the actual engagement levels of minors in penny auctions and, if such participation is more than negligible, this form of “*shopping*” should be brought under gambling legislation unless all auctions remove the chance element or the financial risks from their business models. Further research is also needed to establish whether alienable virtual goods can be sufficiently distinguished from mere in-game credits or points in order to determine whether such goods could represent “*money or money’s worth*”. The current study did not include sufficient pupils playing such games to draw a meaningful conclusion but sufficient evidence was established that there is indeed a question to be answered.

³⁸⁶ Raymond D Sauer, ‘The Political Economy of Gambling Regulations’ (2001) 22(1-3) *Managerial and Decision Economics* 5

2. Chapter 2 – Are minors prevented from accessing prohibited gambling? Statutory measures and practical implementations of age verification procedures.

2.1. Introduction

“Age verification has come a long way since the Internet Technical Taskforce Report of 2008: age verification is no longer just about child protection; it is about good business practice”³⁸⁷.

Chapter 1 demonstrated that the prohibition of minor’s access to gambling is not absolute. As children and young people are prevented from accessing only certain forms of gambling, adherence to these restrictions is particularly important. The industry is required, under the threat of criminal sanctions, to prevent underage access by ensuring that effective age verification policies are put in place and implemented in day-to-day business activities.

Adequate levels of industry compliance are likely to be achieved only if the statutory and regulatory provisions are sufficiently powerful, clear, and appropriately enforced and/or if the aims that underpin the rules command sufficient support from the industry and the society as a whole. In this chapter it will be argued, through the review of the available empirical evidence collected in academic studies, and by the UK Gambling Commission as well as from the data collected during this study that, contrary to the expectation, prevention of underage access is more effective online than it is the case in land-based venues.

However, it will be argued that this position does not primarily stem from the strength of the statutory provisions, or from the fear of criminal sanctions, but more from the gambling industry’s business need to operate within the regulatory framework and from their desire to establish a better reputation within the society. The particular successes of the online gambling providers have been made easier by the technological advances that enabled potential customers to be age verified with reference to a variety of digital databases, as well as due to the Internet being an inherently cash-free environment. These features are not present in offline venues, resulting in significant variations between

³⁸⁷ Victoria Nash ‘and others’, ‘Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry’ (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

remote and land-based gambling providers in their levels of successes in underage gambling prevention.

It will also be argued that insufficient emphasis is placed on encouraging wider responsibility amongst the general public in order to ensure that parents and guardians do not directly, or indirectly, facilitate underage gambling. The existence of the risk whereby an adult purchases a gambling product on behalf of a minor has been highlighted by Blaszczyński et al³⁸⁸. Such instances have the potential to substantially undermine any legislative protections and the efforts of the gambling industry to minimise underage gambling. However, the statutory provisions that aim to prohibit such conduct are not sufficiently transparent or known by the general public. This is detrimental to the minors' protection and should be revisited.

This chapter commences by analysing the nature of the statutory offences that underpin the need for the industry to prevent underage access to gambling. It highlights when appropriate, the discrepancies between the black letter law and its practical implementation. It then describes various age verification methods, followed by evaluation of the effectiveness of the choices made by the gambling industry both in land-based venues and by online providers. The views of the industry representatives are incorporated into the discussion to further reinforce the arguments made.

2.2. Statutory offences

The law that underpins the regulation of age-restricted gambling products does not distinguish between the supply of real money gambling services from an offline venue or online. The primary legislative provisions are, therefore, the same for both delivery channels and the different contexts of face-to-face versus remote interaction is only recognised in supplementary regulations and the Gambling Commission's Licence Conditions and Codes of Practice (later referred to as the LCCP). This is not concerning. The primary laws are typically generic and prescribe the desired end result but leave the choice of implementation methods to the industry itself. This facilitates functional

³⁸⁸ Alex Blaszczyński 'and others', 'Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions' (RGT 2014), http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf accessed December 2014

equivalence in law between both environments³⁸⁹ and allows for inherent variations caused by the different factual contexts to be acceptable.

Within the gambling framework there are two independent regimes that govern respectively the sale of gambling services, excluding the National Lottery and the sale of National Lottery products. The separate regulatory bodies have now been amalgamated into one Gambling Commission. The authority for the National Lottery has been delegated to the National Lottery Committee of the Gambling Commission³⁹⁰ and the black letter laws contain material differences that have not, as yet, been amended. It is speculated that following the mergers the practices applicable to the National Lottery and other gambling products are likely to converge but, as the statutory provisions remain in their pre-merger forms, they are examined separately.

The requirements imposed on the gambling industry to develop, adopt and monitor age verification measures in order to prevent underage access are underpinned by offences contained in Part IV of the Gambling Act 2005. They can broadly be classified as ‘*invitation*’, ‘*employment*’ and ‘*participation*’ offences.

2.2.1. Part IV offences – *actus reus*

2.2.1.1. Invitation offences

At first sight the ‘*invitation*’ offences that were created by ss.46, 47, 56 and 57 of the Gambling Act appear to be sufficiently rigorous to effectively protect minors from being engaged in gambling. However, it will be demonstrated below that a closer examination of the statutory sections reveals weaknesses that undermine the strength of the regulatory provisions and weakens minors’ protection.

“*To invite, cause or permit a child or young person*” to engage in a gambling activity is made unlawful by s. 46(1) and to “*invite, cause or permit a child*” to participate in lotteries or football pools is criminalised by sections 56 and 57. As already considered in Chapter 1, an offence will only be committed if the gambling in question is disallowed to minors, thus focusing the prohibition only on the ‘*medium*’ and ‘*hard*’ forms of gambling³⁹¹ that are offered mainly commercially. S. 46(2) lists the exceptions that permit certain activities

³⁸⁹ Chris Reed, *Making Laws For Cyberspace* (OUP 2012)

³⁹⁰ See <<http://www.gamblingcommission.gov.uk/About-us/Corporate-governance/national-lottery-committee.aspx>> accessed January 2015

³⁹¹ S Smith (ed), *Smith and Monckton: The Law of Gambling* (3rd edn, Tottel Publishing 2009)

to be offered to minors despite them otherwise falling within s.3 definition of gambling. These exceptions correspond to the gambling activities that children and young people can legitimately engage with and their significance was already analysed in Chapter 1.

2.2.1.1.1. The case for the introduction of a clear “proxy” offence

Sections 46, 56 and 57 aim to penalise those who invite, cause or permit gambling activities to be carried out by an underage person but the statutory words are not fully explained. Dictionary definitions of the word ‘invite’ include “*making a polite, formal or friendly request (to someone) to go somewhere or to do something*” or “*to elicit or tempt someone to do something*”³⁹².

Intentional advertising that is directed at minors is deemed by s.46 to amount to an invitation³⁹³. ‘Causing’ is defined as “*making (something, especially bad) happen or to bring about*” a particular consequence³⁹⁴ while ‘permitting’ is explained as “*allowing*”, “*authorising*” or “*affording opportunity for*”³⁹⁵.

The careful choice of three potential *actus rea* indicate that each was meant to incorporate different conducts and should be read disjunctively. The natural and ordinary reading of the words “*inviting*” and “*permitting*” implies that the relevant *actus rea* could only be committed by the employees of the gambling operators. Only they would have the authority to invite someone to gamble or enter their premises, and only they are under an obligation to ensure that those who are underage are unable to do so. The addition of the word “*causing*” potentially broadens the scope of the section to extend it to the general public, such as parents or older friends who may be helping minors in accessing gambling services. However, this cannot be guaranteed as it would ultimately depend on the judicial interpretation of whether this section was indeed intended to be extended to the general public.

Such assistance is also partially criminalised by s.44 of the Serious Crime Act 2007 that outlaws the conduct of intentionally assisting another person in the commission of any offence or of encouraging another to commit such an offence. As will be shown below, a young person who purchases a prohibited gambling product commits an offence under s.48 of the Gambling Act. Accordingly, if a parent purchases a betting slip on behalf of a

³⁹² A Delahunty, *Oxford School Dictionary* (5th Edn, OUP 2007)

³⁹³ GA2005, ss 46(3), 46(4), 46(5) and 46(6)

³⁹⁴ Delahunty (n 392)

³⁹⁵ Delahunty (n 392)

young person they could be liable for assisting or encouraging them to commit such an offence. However, s.44 of the Serious Crime Act 2007 would not apply if such purchase was made on behalf of a child, as children are not capable of committing any offence under s.48 of the Gambling Act.

The existence of such liability is very important. Practical limitations would make it impossible to play e.g., blackjack or slots on behalf of a minor but lottery tickets, Scratchcards, or betting slips can easily be purchased with the intention of giving them to a child³⁹⁶ and have been known to be given as Christmas or birthday gifts³⁹⁷. Such risk is also present within the online environment if an adult ‘lends’ the minors their credit card details or allows them access to their online account for the purpose of gambling.

Of particular concern is emerging evidence that some parents prefer online gambling in order that the whole family can be involved. One participant in a qualitative study carried out by Cotte and Latour³⁹⁸ admitted: *“And here [at home] if I win something big, I can experience it with my [four year old] daughter. ‘Mommy won!’, ‘Mommy just won!’ At a casino she wouldn’t be able to sit there, have that kind of enjoyment with me. ... She gets to clap. ... I don’t think she understands what I am doing, but she gets excited when she hears the noise on the computer. ... So she’ll start jumping up and down”*³⁹⁹. This example only demonstrates that the child was watching but it can easily extend to parents allowing their children to access their online gambling accounts and place bets. Indeed, as already noted in the Introduction, the latest Young People Omnibus 2014⁴⁰⁰ reported that 24% of underage lottery players have made their purchases with the assistance of an adult and 2% accessed the online gambling account of an older person with their permission. The majority of the pupils who participated in the focus groups also indicated that they gambled with the assistance of an adult, with only three pupils having gambled by themselves on prohibited products.

The apparent lack of awareness that purchasing a gambling product on behalf of an underage person is criminalised is a concern. The interviewed industry representatives appeared unaware that criminal liability could attach to parental facilitation of gambling

³⁹⁶ Malgorzata Carran, ‘Minors and Gambling Regulation’ 4 EJRR 509

³⁹⁷ Jeffrey L Derevensky, Rina Gupta and Maggie Magoon, ‘Adolescent Problem Gambling: Legislative and Policy Decisions’ (2004) 8(2) Gaming Law Review 107

³⁹⁸ June Cotte and Kathryn A Latour, ‘Blackjack in the Kitchen: Understanding Online v Casino Gambling’ (2009) 35(5) *Journal of Consumer Research* 742

³⁹⁹ Cotte (n 398)

⁴⁰⁰ Young People Omnibus 2014

by minors and they all would welcome such liability⁴⁰¹. They felt that not enough emphasis is placed on parental duties and each of them stated that they would wish parents to become more responsible for ensuring that their children do not access gambling websites. In particular, they emphasised that gambling parents should ensure that their children do not gain access to their gambling accounts, or to their personal details which could be used to fraudulently open online accounts in their name, and that they do not gamble together.

If the industry representatives responsible for compliance did not seem aware that criminal liability could be imposed for such conduct, such awareness is even less likely amongst the general public. Due to the “*no underage gambling*” signage that is required to be displayed on gambling premises and on the websites, most people are likely to know that gambling by minors is prohibited and that facilitating underage gambling is undesirable. However, this cannot be taken to imply that they are equally aware that purchasing a gambling product on their behalf also constitutes a criminal offence.

Conflating the liability of the wider public with the liability of the industry is not conducive towards raising the appropriate levels of awareness. In other comparable industries, such offences are clearly phrased, are specific and singled out as ‘*proxy offences*’. They exist for the purchase of alcohol under s.149(3) of the Licensing Act 2003 and in Scotland also for the purchase of cigarettes under the Sale of Tobacco (Register of Tobacco Retailers) Regulation 2010. In respect of alcohol, Great Britain and Singapore are the only two countries in the world⁴⁰² that, to some extent, regulate alcohol consumption at home, and although in the UK the limits are absurdly low⁴⁰³, these prohibitions are specifically singled out in the relevant Statutes and are not blended with the liability placed on the industry and the sellers. Such specific ‘*proxy offences*’ would send the right legislative message that undermining statutory restrictions in such a manner is potentially very harmful to children and would be more conducive towards raising awareness amongst the general public.

⁴⁰¹ As detailed in paragraph 2.4.6.

⁴⁰² ‘Drinking Age Limits’ (ICAP Reports 4, March 1998 updated March 2002)

<http://www.icap.org/portals/0/download/all_pdf/icap_reports_english/report4.pdf> accessed March 2015

⁴⁰³ Children and Young Persons Act, s.5 creates a criminal offence to supply a child under five years old with an intoxicant

To some extent, it is reassuring that the Gambling Commission already requires gambling providers to refuse services if a parent is accompanied by a minor⁴⁰⁴. It also requires that operators should “*draw attention to parental responsibility*”⁴⁰⁵ to ensure that parents do not take children onto gambling premises, do not leave them unattended outside the venues, and to raise parental awareness that remote gambling may be accessed via mobiles or interactive televisions and that children’s use of such devices should be monitored accordingly. These requirements do not specifically direct the operators to warn adults that they are committing a criminal act if they are purchasing the gambling product for someone who is underage. Moreover, these provisions are contained in the ordinary part of the LCCP and do not form part of the mandatory obligations. If s.46 liability was indeed intended to extend to the general public this is surprising, especially when compared with the mandatory condition imposed on the online providers to warn customers that underage gambling is an offence⁴⁰⁶.

It is accordingly recommended that the liability of parents, guardians or older friends should be made more transparent by introducing a specific and clearly formulated ‘proxy offence’. Such introduction would clarify whether the intention behind s.46 was to confine the liability to the gambling industry, or whether it was indeed aimed at everyone and would be more conducive towards raising the necessary awareness.

2.2.1.1.2. Entry onto the prohibited premises

In contrast to section 46, s.47 only outlaws “*inviting or permitting*” to enter prohibited premises. This makes it clear that s.47 creates an offence for operators of allowing a minor to enter their premises irrespective of whether a minor attempts to gamble or not. Accordingly, if a parent sends a child to e.g., place a bet on the parent’s behalf this would not expose the parent to any liability under s.47 but such bet should be refused by the operator.

Under s.47, premises that are restricted to minors exhaustively include (i) a casino⁴⁰⁷, (ii) premises with a betting licence where betting actually takes place⁴⁰⁸, (iii) areas that are used in pursuance of adult gaming centre licence⁴⁰⁹, (iv) areas where betting facilities are

⁴⁰⁴ LCCP 2015, Part II, Provisions 3.2.1(7), 3.2.3(5), 3.2.7(5)

⁴⁰⁵ LCCP 2015, Part II, Provisions 3.2.6(3), 3.2.12

⁴⁰⁶ LCCP 2015, Part II, Provision 3.2.11(2)a

⁴⁰⁷ GA2005, s 47(1)

⁴⁰⁸ GA2005, s 47(4)

⁴⁰⁹ GA2005, s 47(5)

located on a horse or dog track, unless a horse or dog race is either taking place or is due to take place on the same day⁴¹⁰, and (v) premises with a family entertainment centre licence where Category C gaming machines are used or are capable of being used⁴¹¹.

Premises are defined as “including any place, and in particular (a) a vessel, and (b) a vehicle”⁴¹² but it seems that the definition only refers to places that have actual physical location and does not extend to any “virtual” venues. Such interpretation is still *de facto* adopted by most online gambling operators that do not typically restrict a mere viewing of a gambling website with links to pages where betting or other real gambling can take place⁴¹³. During the mystery shopping exercise, this candidate came across only one provider, trading under the name of Endemol Game Ltd that required registration before entering the actual site. It is submitted that this omission was not accidental. Land-based venues are able to attract new customers by their mere presence on the High Street or by advertisements displayed on their windows, whereas remote providers’ ability to attract new players is confined to their marketing strategy and attractiveness of their platforms. The need for registration before the site can be accessed or viewed would be likely to substantially hinder the competitive capacity of online providers.

However, while no conclusive evidence can confirm that mere exposure as opposed to actual engagement correlates with increased risk⁴¹⁴, this has been assumed with regards to land-based establishments where not only gambling but mere entry is considered undesirable. Casino and betting home websites are much more than a ‘window’ display of land-based venues. They have exciting graphics of a variety of games and are often accompanied by audio effects. Many of them contain a wealth of information about the games’ rules, details of sporting events including results and odds (live and past), top stories relating to betting and gaming, details of other players’ past successes as well as tips and advice, some of which may reinforce cognitive biases such as lists of ‘*lucky charms*’ that are believed by some gamblers to help them win⁴¹⁵.

⁴¹⁰ GA2005, ss 47(6) and 182

⁴¹¹ GA2005, s 47(7)

⁴¹² GA2005, s 353(1)

⁴¹³ Distinction is made between the home pages of gambling websites and the actual page where bets can be placed or money games can be played that usually can only be accessed after registering with the website and providing log-in details.

⁴¹⁴ Simon Planzer and Heather Wardle, ‘The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling’ (RGF 2011)

<<http://ssrn.com/abstract=2045052>> accessed November 2013

⁴¹⁵ See e.g., CoolCat Casino <<http://www.coolcat-casino.com/entertainment/top-7-popular-lucky-charms-for-gamers.php>> accessed September 2014

For all intents and purposes these websites are the virtual equivalents of land-based shops and are frequently more attractive to, and easier to be accessed by, minors without being subjected to any potential supervision by the ‘*floor staff*’ as in High Street venues. Despite this, there is nothing in the Act that would require age verification to be completed before such virtual entry. As entry into the land-based gambling venue is considered sufficiently undesirable, a similar restriction should apply online.

2.2.1.2 Employment offences

Employment offences are designed to protect children from being exposed to gambling environments for prolonged periods of time and are as extensive as comparable provisions relating to the sale of alcohol⁴¹⁶. They are more appropriate than restrictions applicable to the sale of cigarettes in England and Wales that permits those under the age of 18 years to sell tobacco products⁴¹⁷.

Employment offences are committed if a child is employed to provide facilities for gambling including lottery or football pools⁴¹⁸ but excluding private or non-commercial gaming or betting, or prize gaming at a travelling fair⁴¹⁹. It is unlawful to employ a child to perform any function on premises where bingo is being played⁴²⁰; on premises that are used in pursuance of a club gaming or a club machine permit⁴²¹, or in premises that operate under casino premises licence, betting premises licence or adult gaming centre premises licence, unless the child is employed in an area where they cannot be engaged in any gambling functions⁴²².

A child must also not be allowed to work where Category A, B, C or D gaming machines are situated and the child may have to perform any duties with regards to the operation of those machines⁴²³. The inclusion of prohibition of employment around Category D gaming machines, despite them being permitted to be played by minors, is to be commended as being in such an environment could entice them into participation which

⁴¹⁶ Licensing Act 2003, s 153

⁴¹⁷ In Scotland children are not permitted to sell cigarettes

⁴¹⁸ GA2005, s 52

⁴¹⁹ GA2005, s 292

⁴²⁰ GA2005, s 53(a)

⁴²¹ GA2005, s 53(b)

⁴²² GA2005, ss 55(1) and 55(2)

⁴²³ GA2005, ss 54(1)a and 54(1)b

would be undesirable for the reasons that have been specified in Chapter 1, paragraph 1.3.3.

2.2.1.3. Participation offences

Participation offences are addressed towards young persons. A child is not capable of committing any offence under the Act but young persons may be liable if they engage in gambling⁴²⁴, provide facility for such activity⁴²⁵, or enter premises where a young person's presence could expose the proprietor to the liability⁴²⁶.

2.2.2. Part IV offences - *Mens rea*

2.2.2.1. General principles

Under the common law there are three broad categories of *mens rea*: intention, recklessness and negligence. The sub-category of gross negligence is inapplicable in the gambling context as it only applies to manslaughter⁴²⁷ and no academic agreement has been reached as to whether strict liability offences represent a type of statutory *mens rea* or whether they are exception to the generic rule⁴²⁸. The Gambling Act 2005 does not stipulate the offences to be of strict liability but it does not provide a clear description of the mental element required either.

Only s.46(3) specifies that sending marketing communication to children or young persons will incur criminal liability if such distribution was intentional. Both direct and oblique intention typically suffices⁴²⁹ and is determined subjectively⁴³⁰. Nevertheless, s.46(3) appears to target only generic advertisements due to the exceptions carved out by s.46(4) and s.46(5) as it will only apply to advertisements that contain no names or contact details of the person authorising or sending it. In such a situation, identification of a prospective defendant is likely to be burdensome and, even if this is overcome, proving an intention is typically difficult. The prosecution would have to show that the defendant deliberately sent the advertisement to a child or young person as mere negligence in ascertaining whether the recipient is a minor is unlikely to suffice.

⁴²⁴ GA2005, s 48

⁴²⁵ GA2005, s 50

⁴²⁶ GA2005, s 49

⁴²⁷ Janet Loveless, *Complete Criminal Law: Text, Cases and Materials* (2nd Ed, OUP 2010) 140

⁴²⁸ Andrew Simester, *Appraising Strict Liability* (OUP 2012)

⁴²⁹ Loveless (n 427) 100

⁴³⁰ Criminal Justice Act 1967, s 8

However, if a commercial material was sent with the name or contact details of a relevant person⁴³¹, s.46(4) and s.46(5) creates a presumption that such conduct was carried out intentionally unless the defendant proves that he did not consent or give authority for the prohibited communication, or that the minor's exposure to such communication was merely incidental and that there was no intention for gambling to be encouraged⁴³². Under such reverse burden of proof the prosecution is not required to prove the requisite intention. The defendant must satisfy the court that all elements of the defence have been met and such burden of proof is unlikely to be discharged lightly.

2.2.2.2. S.63 defence

For other offences no intention is required. However, whether mere negligence would suffice or whether actual recklessness is needed⁴³³ depends on the interpretation of the 'due diligence' defence that is, under s.63, available to anyone accused under Part IV offences.

The significance of the section justifies its full exposition. Section 63(1) provides "*where a person is charged with an offence under this Part [Part IV] of doing anything in relation to an individual who is a child it is a defence for the person charged to prove that – (a) he took all reasonable steps to determine the individual's age and (b) he reasonably believed that the individual is not a child*". Section 63(2) is identical except that it relates to a young person instead of a child. Both elements must be satisfied and reasonable belief, without taking due care to ascertain the age of the customer, will not suffice.

Unsurprisingly, in light of the generic evidential difficulties with proving subjective beliefs, the emphasis is directed towards the objective element. There is not as yet a direct precedent on s.63 of the Gambling Act but a limited guidance can be drawn from judicial interpretation of similar defences under different statutes. For example, s.141 of the Criminal Justice Act 1988⁴³⁴ makes it unlawful to sell a knife to a person under the age of 18 years old and the statutory defence of due diligence is similar.

In *Croydon London Borough Council v Pinch A Pound (UK) Ltd*⁴³⁵ it was held that the statutory language used to describe the defence was readily understood and should be

⁴³¹ GA2005, s 46(5) "*person to whom payment may be made or from whom information may be obtained*"

⁴³² GA2005, ss.46(3), 46(4), 46(5) and 46(6)

⁴³³ On the legal culpability scale recklessness is placed higher than negligence

⁴³⁴ As amended

⁴³⁵ [2010] EWHC 3283 (Admin), [2011] 1 WLR 1189

interpreted accordingly. It was held that the Criminal Justice Act did not require the prosecution to prove any reprehensible state of mind or actual negligence⁴³⁶ but, for the defence to be accepted, the defendant must prove not only lack of negligence but that positive and effective measures were taken to ensure that minors are not sold knives. If the chosen measure was found to have shortcomings the defence would be invalidated. In other words, it was held that it is not enough to prove a mere lack of carelessness but positive and active steps must be evidenced in order to avoid liability.

2.2.2.2.1. Age verification provisions in the Licence Conditions and Codes of Practice (later called LCCP)⁴³⁷

The analogy to the aforementioned case needs to be treated with caution, as the statutory provisions are not identical and the context is different⁴³⁸. Nevertheless, it provides a good indication as to what ingredients may be considered necessary for s.63 defence to succeed. In an equivalent manner to s.46(4) and s.46(5), s.63 defence retains the reverse burden of proof. This means that it is for the defendant to prove that “*he took reasonable steps to determine the individual’s age*”⁴³⁹ and that he “*reasonably believed that the individual is not a child or a young person*”⁴⁴⁰ and not for the prosecution to prove otherwise.

In the absence of gambling specific judicial determination as to what constitutes “*reasonable steps*”, the industry is supported by the provisions and guidance contained in Part II of the LCCP issued by the Gambling Commission. Since the original publication of the LCCP in November 2006 several revisions have been made. The latest edition was published in February 2015 (and updated again in April 2015) following extensive consultation on, amongst others, how age verification measures in land-based venues can be improved. The additional provisions were introduced as a direct response to the age verification failures that have been identified in land-based venues as will be further discussed in paragraph 2.4.3. In recognition of the practical variations between face-to-

⁴³⁶ Croydon London Borough Council v Pinch A Pound (UK) Ltd [2010] EWHC 3283 (Admin), [2011] 1 WLR 1189

⁴³⁷ Gambling Commission, ‘Licence Conditions and Codes of Practice’ (February 2015, updated April 2015); all reference to the LCCP below refers to the February 2015 edition as updated in April 2015 unless otherwise indicated

⁴³⁸ Knives are typically sold alongside other non-restricted products whereas gambling services (with the exception of the National Lottery products) are typically offered from designated premises or websites

⁴³⁹ GA2005, ss 63(1)a and 63(2)a

⁴⁴⁰ GA2005, ss 63(1)b and 63(2)b

face and online interactions the provisions differentiate between these two delivery channels.

The Code gains its regulatory authority from s.24 of the Gambling Act. The importance of the section justifies its full exposition.

“24. Codes of Practice

(1) The Commission shall issue one or more codes of practice about the manner in which facilities for gambling are provided (whether by the holder of a licence under this Act or by another person).

(2) In particular, a code shall describe arrangements that should be made by a person providing facilities for gambling for the purposes of –

(a) ensuring that gambling is conducted in a fair and open way,

(b) protecting children and other vulnerable persons from being harmed or exploited by gambling, and

(c) making assistance available to persons who are or may be affected by problems related to gambling.

(3) A code may include provisions about how facilities for gambling are advertised or described.

(4) A code may be revised or revoked by the Commission.

(5) A code, and any revision, must state when it comes into force.

(6) The Commission shall publish a code and any revision in a manner which the Commission thinks likely to bring it to the attention of those whose activities it concerns.

(7) The Commission may make different provision under this section for different cases or circumstances (whether or not by way of separate codes of practice)

(8) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but this subsection is subject to any provision of or by virtue of this Act making an exception to an offence dependent on compliance with a code.

(9) But a code –

(a) shall be admissible in evidence in criminal or civil proceedings,

(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant, and

(c) shall be taken into account by the Commission in the exercise of a function under this Act.

(10) Before insuring or revising a code under this section the Commission shall consult –

(a) the Secretary of State,

(b) Her Majesty’s Commission of Customs and Excise,

(c) one or more persons who appear to the Commission to represent the interest of persons who –

(i) carry on gambling businesses, and

(ii) are likely to be affected by the code or revision,

(d) one or more persons who appear to the Commission to have knowledge about social problems relating to gambling, and

(e) in the case of a code including provisions by virtue of subsection (3), one or more persons who appear to the Commission to have a relevant responsibility for regulating the advertising industry.

(11) Before issuing or revising a code under this section the Commission shall also consult, if and to the extent that the Commission thinks appropriate having regards to the nature of the code or revision –

(a) one or more persons who appear to the Commission to represent local authorities (including, in Scotland, licensing boards),

(b) one or more persons who appear to the Commission to represent chief constables of police forces,

(c) one or more persons who appear to the Commission to represent the interest of persons carrying on gambling business (apart from those consulted under subsection (10)(c)), and

(d) in such manner as the Commission thinks appropriate, members of the public.”

Social responsibility provisions that are contained in the LCCP constitute part of the licence terms and conditions and by that they gain statutory force. Ordinary provisions also can attract regulatory response but they do not constitute licence conditions.

Land-based venues

The standard set in the LCCP requires the operators to “*have and put into effect policies and procedures designed to prevent underage gambling*”⁴⁴¹ or in the context of lottery “*to minimise the risk of lottery tickets being sold to children*”⁴⁴². With regards to what an effective age verification policy should entail, it specifically provides that the age of suspected underage customers should be checked⁴⁴³ and policies should be in place to ensure that actions are taken against those who attempt to purchase gambling products unlawfully⁴⁴⁴.

⁴⁴¹ LCCP, Part II, Provisions 3.2.1(1), 3.2.3(1), 3.2.5(1), 3.2.7(1), 3.2.13(1)

⁴⁴² LCCP, Part II, Provisions 3.2.9(1)

⁴⁴³ LCCP, Part II, Provisions 3.2.1(5)a, 3.2.3(2)a, 3.2.5(2)a, 3.2.7(2)a, 3.2.9(1)a

⁴⁴⁴ LCCP, Part II, Provisions 3.2.1(5)c, 3.2.3(2)c, 3.2.5(2)c, 3.2.7(2)e, 3.2.9(1)b

Sellers of ‘*over-18*’ gambling products should only accept identification if it contains a photographic image of the holder and their date of birth, the ID has not expired and does not appear to have been tampered with in any way⁴⁴⁵. In the ordinary provisions the Commission provides examples of acceptable forms of identity documents. These include: ID cards with a PASS logo such as *Citizenscard* or *Validate*, full or provisional driving licence, military card⁴⁴⁶, or a passport⁴⁴⁷.

The Commission further recommends that providers should check the identity of all customers who appear to be under the age of 21 years. This mirrors the ‘*Think 21*’ policy introduced in 2005 by the British Beer and Pub Association that also required all customers that wish to purchase alcohol, but who look under the age of 21 years, to be identified. However, the ‘*Think 21*’/‘*Challenge 21*’ campaign, now run by the Retail of Alcohol Standard Group, has been amended to ‘*Think 25*’/‘*Challenge 25*’ campaign as early as in 2009, in order to even further lower the rates of underage sales⁴⁴⁸. The ‘*Challenge 25*’ now formally applies in Scotland after the Licensing (Scotland) Act 2005 was amended, and many supermarkets in England are also adopting this threshold. During the most recent consultation process the Commission considered whether a recommendation to increase to ‘*Challenge 25*’ within the gambling context would be beneficial but concluded that, on its own, this would not increase underage refusal rates and decided against it⁴⁴⁹. In this candidate’s view this is unfortunate. Although it is acceded that a mere raising of the threshold is unlikely to facilitate better compliance, a more consistent approach with other prohibited products would be beneficial, especially as identifying the age of prospective customers is equally difficult in gambling venues as it is in supermarkets.

The guidance to non-remote lottery sellers and providers of pool betting is surprisingly brief. It only states that the age of “*apparently underage purchasers of lottery tickets*” or “*entrants to the pool*” should be checked⁴⁵⁰ and action should be taken if a child attempts

⁴⁴⁵ LCCP, Part II, Provisions 3.2.1(5)(b), 3.2.3.(7), 3.2.5(6), 3.2.7(7)

⁴⁴⁶ Added in the February 2015 edition of the LCCP

⁴⁴⁷ LCCP, Part II, Provisions: 3.2.2(3), 3.2.4(1), 3.2.6(1), 3.2.8(1)

⁴⁴⁸ ‘Raising the Challenge: Report Into The Application and Impact of Challenge 25’

<<http://www.wsta.co.uk/publications-useful-documents/65-rising-to-the-challenge-a-report-into-the-application-and-impact-of-challenge-25/file>> accessed September 2014

⁴⁴⁹ Gambling Commission, ‘Strengthening Social Responsibility: Amendments to The Social Responsibility Provisions in the Licence Conditions and Codes of Practice (LCCP) for All Operators’ (February 2015) <<http://www.gamblingcommission.gov.uk/pdf/Strengthening-social-responsibility-LCCP-responses.pdf>> accessed May 2015, 26

⁴⁵⁰ LCCP, Part II, Provision 3.2.9(1)a

to make a purchase⁴⁵¹. Potential customers who appear to be under the age of 16 years should be asked to produce “*proof of identity and age*”⁴⁵². In contrast with the ordinary provisions applicable to the ‘*over-18*’ gambling products, the Commission failed to provide specific examples of what forms of identification are acceptable. Many 16 or 17-year-olds hold a passport but they are likely to be kept by their parents and a further clarification on whether, for instance, a college card or 16+ Oyster photo card would represent a sufficient proof of age would be beneficial.

The Gambling Commission recognised that any challenge policy is unlikely to be effective without addressing the structural and systemic weaknesses that some operators suffer from⁴⁵³. To address this aspect, in addition to the conditions that were retained from the previous LCCP, new ones have been introduced. The retained conditions mandate that entry to a casino must be supervised by one or more responsible supervisors⁴⁵⁴ and all venues must be proactive at ensuring that minors do not enter prohibited areas. The ordinary provisions clarify that exclusive reliance on CCTV cameras for supervision is unsatisfactory⁴⁵⁵ and that there must be a human supervisor present. All operators must ensure that members of staff receive appropriate training and are fully aware and understand their social responsibilities⁴⁵⁶.

All premises, with the exception of bingo halls and Family Entertainment Centres, must not be deliberately designed to appeal to children and young people⁴⁵⁷. In order to further strengthen the culture of compliance, all operators are now also required to ensure that the venues are “*designed and equipped in a way that facilitate compliance with the age verification requirements*”⁴⁵⁸ in recognition that the layout of premises may facilitate or hinder the staff’s ability to effectively perform their supervisory function. For example, it has been recognised that a customer’s age is more likely to be correctly assessed upon entry or when the supervisors have unobstructed lines of vision of their customers during

⁴⁵¹ LCCP, Part II, Provision 3.2.9(1)b

⁴⁵² LCCP, Part II, Provision 3.2.10

⁴⁵³ Gambling Commission, ‘Strengthening Social Responsibility: Amendments to The Social Responsibility Provisions in the Licence Conditions and Codes of Practice (LCCP) for All Operators’ (February 2015) <<http://www.gamblingcommission.gov.uk/pdf/Strengthening-social-responsibility-LCCP-responses.pdf>> accessed May 2015 26-27

⁴⁵⁴ LCCP, Part II, Provision 3.2.1(3)

⁴⁵⁵ LCCP, Part II, Provision 3.2.2(1)

⁴⁵⁶ LCCP, Part II, Provisions 3.2.1(8), 3.2.3(6), 3.2.5(5), 3.2.7(6), 3.2.9(2)

⁴⁵⁷ LCCP, Part II, Provisions 3.2.1(6), 3.2.3(4), 3.2.7(4)

⁴⁵⁸ LCCP, Part II, Provisions 3.2.3(3), 3.2.5(3), 3.2.7(3)

their play⁴⁵⁹. It may also be added that customers are more likely to be challenged by supervisors if they are on the shop floor without having the pressures of dealing with other waiting customers. Finally, the LCCP introduced a further mandatory condition that all Category C licence fee operators carry out or participate in the mystery shopping programmes in order to ensure that their underage prevention policies are effectively implemented in practice⁴⁶⁰. In addition, those in Category A and B premises should determine how to monitor the compliance to the satisfaction of the Gambling Commission⁴⁶¹.

This strengthening of the LCCP is a direct response to the age verification failures that were identified in land-based gambling venues which will be further discussed in paragraph 2.4.3. They are likely to be instrumental in improving age verification procedures but arguably are not, as yet, extensive enough. They do not represent a radical overhaul of the underlying principle that gives the industry relatively high levels of freedom as to how best to prevent underage access and does not address potential instances of deliberate non-compliance. The imposition of compulsory test purchases only on larger gambling providers was justified by the disproportionately higher costs that such requirement would impose on smaller operators⁴⁶² but it also demonstrates how financial considerations compete with the need for minors' protection.

Online gaming and betting

In addition to the overriding requirement that “*licensees must have and put into effect policies and procedures designed to prevent underage gambling*”⁴⁶³, policies of online gambling providers must contain special measures. These include a mandatory warning to all prospective customers that underage gambling is an offence⁴⁶⁴, a condition that all players must affirm that they are of legal age⁴⁶⁵, a reminder that all members of staff

⁴⁵⁹ Gambling Commission, ‘Proposed Amendments to the Social Responsibility Provisions in the Licence Conditions and Codes of Practice for All Operators (the CCP): Consultation Document’ (August 2014) <<http://www.gamblingcommission.gov.uk/pdf/Proposed-amendments-to-social-responsibility-provisions-in-LCCP-consultation-August-2014.pdf>> accessed May 2015, para 3.9

⁴⁶⁰ LCCP, Part II, Provisions 3.2.1(9), 3.2.3(8), 3.2.5(7), 3.2.7(9)

⁴⁶¹ LCCP, Part II, Provisions 3.2.4(5), 3.2.6(6)

⁴⁶² Gambling Commission, ‘Strengthening Social Responsibility: Amendments to The Social Responsibility Provisions in the Licence Conditions and Codes of Practice (LCCP) for All Operators’ (February 2015) <<http://www.gamblingcommission.gov.uk/pdf/Strengthening-social-responsibility-LCCP-responses.pdf>> accessed May 2015 17-20

⁴⁶³ LCCP, Part II, Provision 3.2.11(1)

⁴⁶⁴ LCCP, Part II, Provision 3.2.11(2)a

⁴⁶⁵ LCCP, Part II, Provision 3.2.11(2)b

should receive appropriate training⁴⁶⁶, a condition that gambling companies must enable “*filtering software*” to be installed by third parties in order to prevent access to their website⁴⁶⁷, and a policy of regular reviews of existing procedures to take into account technological advances⁴⁶⁸.

More specifically, the LCCP’s provisions indicate that direct reliance on credit cards as a method of identification is permitted⁴⁶⁹ but additionally the operators must perform random checks⁴⁷⁰. Using third parties (such as Skrill or NetIDMe) is permitted⁴⁷¹ as well as direct reference to online databases carried out by the gambling provider itself⁴⁷² as long as secondary methods of verification are also completed when necessary⁴⁷³.

The operators have 72 hours to carry out the age verification⁴⁷⁴. If identification is not successful within the stipulated timeframe the account must be frozen and no withdrawals can be made. In the interim period the unverified customer is permitted to gamble or place bets with real money.

The LCCP’s provisions applicable to remote gambling remained substantially the same as under the previous editions. Due to the high success rate of age verification procedures adopted online this is unsurprising. Nevertheless, some of the provisions of the LCCP would benefit from judicial interpretation as they, in their current form, diverge from the black letter law.

The statutory defence should only be made out if “**all reasonable steps are taken**” by the person (providing the facility) **himself**⁴⁷⁵ whereas the LCCP effectively permits the delegation of this task to a third party. Although such third party must be selected with due care⁴⁷⁶, this does not address all legal questions and may lead to a situation where no individual is liable for allowing a minor to gamble with real money, even if that was done intentionally.

⁴⁶⁶ LCCP, Part II, Provision 3.2.11(2)d

⁴⁶⁷ LCCP, Part II, Provision 3.2.11(2)e

⁴⁶⁸ LCCP, Part II, Provision 3.2.11(2)c

⁴⁶⁹ LCCP, Part II, Provision 3.2.11(2)f

⁴⁷⁰ LCCP, Part II, Provision 3.2.11(2)h

⁴⁷¹ LCCP, Part II, Provision 3.2.11(2)f

⁴⁷² LCCP, Part II, Provision 3.2.11(2)f

⁴⁷³ LCCP, Part II, Provision 3.2.11(2)f

⁴⁷⁴ LCCP, Part II, Provision 3.2.11(2)f

⁴⁷⁵ Emphasis added

⁴⁷⁶ LCCP, Part II, Provision 3.2.11(2)f

Such position may arise if a real money gambling company chooses the third party verifier with satisfactory due care but which later, and unknown to the gambling provider, negligently (or deliberately) fails to carry out the age verification adequately and incorrectly certifies to the provider that a prospective customer is an adult. Although it is not possible to outsource criminal liability, in such a scenario, and assuming that the permission to delegate this function to the third party is legally valid, the gambling provider will be excused from liability on the basis of s.63 defence as it carried out “*all reasonable steps*” to choose a reliable third party and it “*reasonably believed*” that the third party satisfactorily carried out the age verification. The third party, even if they carried out the process negligently, is most likely to successfully argue that it should not be liable as it has not committed the relevant *actus reus* of the offence. It was not the age verifier but the gambling provider who permitted, invited or caused the minor to gamble and no criminal liability can attach if *mens rea* does not coincide with *actus reus*.

In the view of the representative of NetIDMe, such liability could not be imposed on the age verification provider. The industry opinion does not, of course, prejudge the determination of a legal question but it demonstrates that, in fact, there is a question to be answered and clarification should be provided. The existing gambling offences have never been intended to be subject to strict liability principles, but equally it should not be possible to escape liability if the conduct that ultimately led to a minor being allowed to gamble with real money was deliberate or negligent.

The second area where judicial clarification would be welcomed relates to the provision in the LCCP that gives the online industry the period of 72 hours within which the age verification procedures must be completed, during which time the customer is permitted to use the service (i.e., gamble with real money). This corresponds to the principles recommended in Art.22 of the EU Commission Recommendation 2014/478/EU⁴⁷⁷. However, it is submitted that this represents a direct breach of the Gambling Act 2005 despite the fact that the LCCP specifies that the company must not pay-out any potential

⁴⁷⁷ Commission, Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (2014/478/EU) Official Journal of the European Union L214/38, Art 22 recommends that “*players have access to temporary account until the identity verification is successfully completed*”.

winnings until the verification process takes place⁴⁷⁸ and, if it appears that the service was accessed by minors, any deposit must be returned and any winning forfeited⁴⁷⁹.

There is no provision in the Gambling Act that would discharge the providers from liability in the interim period between an attempt to gamble with real money and the providers recognising that such attempt was made by a minor. Indeed such a time-delay should directly nullify any claim that the operator reasonably believed and checked that the customer is an adult. This means that the permitted 72 – hour time lag has no statutory basis and must not be supported.

Remote operators should, of course, be entitled to adopt any adequate age verification procedures that fit their business models and for that they must be afforded a suitable time frame. However, this does not mean that in the interim period an unverified individual should be permitted to gamble with real money. Despite the claims made by some industry representatives that such time lag is vital for their business⁴⁸⁰, it is submitted that stopping UK customers from real money gambling for a short period of time cannot be argued to be a disproportionate response to the potential risks involved, even though it may lead to some loss of custom.

Modern capabilities of online age verification providers in UK, and the high level of digital footprint that British people create⁴⁸¹, mean that most players can be verified almost instantly in real life by reference to electronic databases⁴⁸². It is estimated that, in the UK, approximately 85% of the adult population can be verified by reference to credit agencies alone and 70% by reference to the Electoral Register⁴⁸³. Accordingly, there is a high probability that in the UK those who cannot be verified in that manner are indeed underage. It also demonstrates that the loss of customers as a result of the need to stop them playing until they are verified is likely to be much smaller than some commercial gambling providers fear.

⁴⁷⁸ LCCP, Part II, Provision 3.2.11(2)f

⁴⁷⁹ GA2005, s 58

⁴⁸⁰ Florian Saucer, 'Panel 2: Stakeholders' Perspective' (Regulating Online Gambling in the EU- Recommendation 2014/478/EU on Player Protection – Where Do We Go From Here?, Paris, 25 November 2014)

⁴⁸¹ Victoria Nash 'and others', 'Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry' (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

⁴⁸² Further discussed in paragraph 2.4.3.6.

⁴⁸³ Nash (n 481)

The study carried out by Codagnone et al (2014)⁴⁸⁴ on behalf of the EU Commission reported a significant negative effect of standard and extended gambling registration form on reducing customers' intention to register with the site. The findings speculated that having such a requirement “*may push especially new and occasional customers of online gambling services towards operators' website not requiring registration, possibly including non-regulated and illegal ones*”⁴⁸⁵. Such effect would be undesirable but this suggestion is speculative, does not flow from the study itself, cannot be supported empirically and, accordingly, should not be used to justify the time-lag between age verification and permission to gamble.

The risks that minors may try to gamble online are real and should not be underestimated. The EU Commission reported that in Europe between 7% and 68% (out of 700 sample, Italy) of minors gambled online for money. Sally, the representative of a major gambling company, indicated that they get “*about 100 or so*” attempts per month from minors trying to register on Sally's website - and this represents only one gambling company.

The gambling industry may argue that there is no actual harm resulting from minors being potentially allowed to play for such a short period of time, as any risk is sufficiently counterbalanced by the inability to withdraw winnings until successful verification. This argument is supported by the ‘*risk barometers*’ theory⁴⁸⁶. This theory argues that individuals are only likely to adjust their behaviour in respect of potentially ‘*hazardous*’ activities if they are sufficiently persuaded that the activity is either too risky and harmful, or by removing any potential rewards that could otherwise flow from it⁴⁸⁷.

The refusal to pay-out any winnings relies on the second justification but is incomplete. This is because, in the same way as gambling harm is not constricted to financial losses, rewards from gambling are not confined to winning money but extend to “*thrill and excitement*”⁴⁸⁸, “*relief of boredom*”⁴⁸⁹ and others.

⁴⁸⁴ C Codagnone ‘and others’, ‘Study on Online Gambling and Adequate Measures For the Protection of Consumers of Gambling Services’ (Final report for European Commission, March 2014), <http://ec.europa.eu/internal_market/gambling/docs/initiatives/140714-study-on-online-gambling-final-report_en.pdf> accessed October 2014

⁴⁸⁵ Codagnone (n 484)

⁴⁸⁶ J Adams, ‘What is risk?’ (Risk: Perceptions, Measurement & Policy, London, December 2013)

⁴⁸⁷ Adams (n 486)

⁴⁸⁸ David Giacomassi, B. Grant Stitt and Mark Nichols, ‘Motives and Methods of Under-Age Casino Gamblers’ (2006) 22 J Gambl Stud 413

⁴⁸⁹ Mark Griffiths and Richard TA Wood, ‘Risk Factors in Adolescents: The Case of Gambling, Video Game Playing and The Internet’ (2000) 16(2/3) J Gambl Stud 199

Minors may try out several different providers. This may be enough to introduce them to this form of entertainment and ignite the interest in gambling. It could also lead to further two negative consequences that, as yet, have not been explored in the literature. Firstly, the permission to gamble, albeit for a limited period of time, may blur the boundaries between licensed and unregulated offerings. Consistent refusal to allow a minor to register for an online gambling account can operate as an additional warning that legitimate providers do not permit underage customers to open an account under any circumstances. This message is lost if the account can be opened, albeit only for 72 hours, and if minors try out several sites, they may not recognise if they eventually access an illegal one. Allowing minors to gamble on prohibited forms, even for short periods, also sends an incorrect legislative message that underage gambling is not treated seriously enough and should not be condoned.

Finally, this permitted time-lag means that, at least some online providers, focus more on ensuring that no customer is able to withdraw their deposits, or any winnings, without being fully identified and not on ensuring that those who should not gamble are not permitted to do so. This has been expressly admitted, prior to the implementation of the Gambling (Licensing and Advertising) Act 2014, by a representative of one of the major online gambling companies licensed in Gibraltar where the permitted time limit was longer than the 72 hours. When asked by this candidate about their age verification procedures during an informal discussion the answer was “*at the point of registration we trust you but we will never allow you to withdraw any winnings unless we verify you*”⁴⁹⁰. This does not fit easily with the need for preventing minors from getting excitement from gambling which may lead to addiction, as opposed to only protecting their funds.

Allowing such customers to gamble online while waiting for the identity documents to arrive equates to a land-based betting shop accepting bets from young-looking bettors or allowing them into a casino for 72 hours on a bare promise that they will bring their identity documents three days later, or only when they try to claim the winnings. Clearly, such a scenario could not be deemed acceptable offline so it is rather surprising that it is deemed acceptable online. Furthermore, it potentially offers gambling providers a financial windfall for their own unlawful conduct. If such delay enables a minor to win, the fact that the gambling provider is not required to pay out the prize (that they would

⁴⁹⁰ Informal discussion between the candidate and the representative of one online gambling provider during the Gambling Summit held in London on 21/22 November 2012

otherwise be legally obliged to pay) effectively permits the operators to benefit from their own wrongdoing.

It is therefore submitted that allowing a customer to play before the age verification is successfully completed constitutes a direct and unequivocal breach of the Gambling Act. In such situations s.63 defence should not be available and the Code should be amended to reflect this.

Online lottery sellers

The conditions that apply to remote lottery sellers are contained in provision 3.2.13 and the majority of them are broadly equivalent to those applicable to other remote gambling operators.

The first distinction results from the lower age restriction applicable to lottery products which can be purchased by anyone over the age of 16. The LCCP accordingly provides that electronic database that contains “*names and addresses of individuals over the age of 16*”⁴⁹¹ can be referred to. However, in a similar manner to guidance applicable to offline lottery sellers, this provision does not provide examples of acceptable ‘over-16’ IDs. The Commission failed to give examples of any digital database that could reliably distinguish between those who are over or under the age of 16 years old. Many electronic databases⁴⁹² can identify with high levels of accuracy those who attained the age of legal majority but this is not replicated when the age limit is lowered to 16. Accordingly, further guidance is needed to clarify if, for example, reliance on 16+ travel cards’ registers would be deemed sufficiently robust.

Attention needs also to be drawn to the potential inconsistency between social responsibility provision and the recommendation contained in the ordinary section of the LCCP. The mandatory measures rightfully appear to place the onus on ensuring that customers are age verified on the remote lottery providers. However, ordinary provision 3.2.14(1) specifies that “*where operators consider the lottery will more likely to attract underage play – e.g., where the prize is of particular appeal to children (those under the age of 16) such as concert tickets, games consoles, large prizes – operators should ensure*

⁴⁹¹ LCCP, Part II, Provision 3.2.13(2)f(ii)

⁴⁹² Further discussed in paragraph 2.4.3.6

that age verification measures are appropriate to the risk of attempted underage play. In these circumstances it is unlikely that self-verification alone will be sufficient”.

The last sentence of this provision implies that, in other circumstances, such as when the lottery prize is small, the self-verification may be considered adequate. Reliance on self-certification should not be deemed sufficient in any circumstances for the reasons considered in paragraph 2.4.3.1 below. It is likely that such effect was unintended and was merely accidental in a similar manner to the provisions 3.2.3(2)b and 3.2.7(2)b contained in the May 2014 LPPC (now amended) that implied that minors should only be removed from age restricted premises if they attempted to gamble⁴⁹³. The statutory force of social responsibility measures cannot be overridden by ordinary code provisions but, for the avoidance of any potential misinterpretation, the last sentence of provision 3.2.14(1) should be removed from the LPPC.

2.2.3. The National Lottery

The law that relates to the National Lottery pre-dates the move toward the liberalisation of gambling. The primary duties are set out negatively in Reg. 3 of the National Lottery Regulation of 1994. It imposed an absolute prohibition on the sale of lottery tickets “*to or by a person who had not attained the age of 16*”⁴⁹⁴. It further outlaws the sale of lottery tickets from a vending machine that is unsupervised by a competent person able to stop an underage customer from purchasing a ticket⁴⁹⁵. The Regulation’s statutory authority stems from s.12(1) and s.12(2)⁴⁹⁶ of the National Lottery etc. Act 1993 that delegates the power to establish age-related restrictions on the sale of lottery products to the Secretary of State.

The Regulation itself provides no further guidance. It does not stipulate whose responsibility it is to ensure the adherence to the prohibition; it does not refer to any criminal offence nor does it impose any sanctions for non-compliance. These can be found in s.13 of the National Lottery etc. Act that provides that an offence will be

⁴⁹³ Gambling Commission, ‘Strengthening Social Responsibility: Amendments to The Social Responsibility Provisions in the Licence Conditions and Codes of Practice (LCCP) for All Operators’ (February 2015) <<http://www.gamblingcommission.gov.uk/pdf/Strengthening-social-responsibility-LCCP-responses.pdf>> accessed May 2015, 13-14

⁴⁹⁴ National Lottery Regulations 1994, SI 1994/189 reg 3

⁴⁹⁵ National Lottery Regulations 1994, SI 1994/189 reg 6

⁴⁹⁶ Full text of the section is included in Appendix I

committed whenever there is a contravention of any “*requirement or restriction imposed by regulation*”⁴⁹⁷.

2.2.3.1. Section 13 of the National Lottery etc Act 1993

Section 13 is a complicated section. Three different groups of people can be found guilty of the offence. These are (1) promoter of the lottery; (2) a director, manager, secretary, other similar officer of a promoter or a person purporting to have such a position and (3) any other person.

The promoter is *prima facie* liable for any contravention committed by any third party. This wide proposition is substantially limited by a statutory defence which provides that the promoter will be excused from liability if he shows that he did not consent to the contravention either expressly, or by acquiescence, and that he exercised due diligence to prevent the occurrence of such contravention⁴⁹⁸. A person falling within the second category will be liable if he committed the breach himself⁴⁹⁹, if he consented either expressly, or by necessary implications, or if his neglect contributed to the commission of the offence⁵⁰⁰.

The language used to set out the offence in s.13(1)a differs from s.13(1)b⁵⁰¹ and it has been argued⁵⁰² that the drafter must have therefore intended different levels of culpability. The legal reading of the section indicates that the offence in s.13(1)(a) is an absolute one, subject only to the right of the promoter to avail himself of the statutory defence, whereas the offence in s.13(1)b is not committed unless the relevant person has either agreed to the contravention, or was negligent in his duty to prevent it. The theoretical difference lies in the onus of proof and in the underlying message regarding culpability and moral wrongdoing.

A promoter will be liable unless he can satisfy, on the balance of probability, both elements of the defence (lack of knowledge and compliance with diligence) but liability may still attach even if the promoter had an entirely blameless state of mind⁵⁰³. A director

⁴⁹⁷ National Lottery etc. Act 1993, s 13(1); the relevant restriction is contained in National Lottery Regulations 1994, SI 1994/189 reg 3

⁴⁹⁸ National Lottery Act etc. 1993, s 13(1)c

⁴⁹⁹ This must be the necessary implication based on the wording of the provision

⁵⁰⁰ National Lottery etc. Act 1993, s 13(1)c

⁵⁰¹ Full text of s13(1)a and 13(1)b is included in Appendix I

⁵⁰² Tom Rees, ‘Mens Rea: Selling Lottery Ticket To Person Under 16’ (2000) Aug Crim LR 692

⁵⁰³ Rees (n 502)

or a similar person will only be liable if the prosecutor proves beyond reasonable doubt that he either consented to, or was negligent about, the breach. This implies that no liability can attach if the person's state of mind was entirely blameless⁵⁰⁴. As there are no reported cases of anyone having been convicted, or even prosecuted under this section, it is not possible to determine whether this theoretical distinction has any practical significance. It is submitted that it does not.

It is the third category that is the most expansive and that genuinely aims to ensure that children are not sold lottery tickets. Section 13(1)c stipulates that "*any person who was party to the contravention shall be guilty of an offence*". The Act does not provide any guidance as to the conduct required before someone is deemed to be "*a party to the sale*" but certain activities will definitely suffice. These include physically handing over lottery tickets to a minor, accepting payments from a minor, or processing number selection of the lottery terminal in the shop. Within the online environment this will include allowing a child to register for an account and play, and accepting payments.

Unlike s.13(1)a and s.13(1)(b), s.13(1)c makes no provisions for either any statutory defence or for the requirement of *mens rea*⁵⁰⁵. This does not mean that the court can automatically assume that no mental element is required. Due to the common law presumption that presupposes the need to prove both *actus reus* and *mens rea*⁵⁰⁶, such conclusion can only be reached if it is found, on the true construction of the statute, that Parliament truly intended to impose strict liability. This presumption is firmly grounded in the principles of natural justice⁵⁰⁷ and should not be displaced lightly. Mere lack of express reference to the mental element in the statute is not of itself sufficient⁵⁰⁸ and further doctrinal justification is necessary.

Several tests, all based on the content and the context of the applicable statutory provisions⁵⁰⁹, have been developed in the case law. Three appear to be most prevalent: (1) does such intention appear on the basis of "*words used, the nature of the duty, the person on whom it is imposed, the person by whom it would be performed, the person on*

⁵⁰⁴ Andrew Simester, *Appraising Strict Liability* (OUP 2012)

⁵⁰⁵ Such as in s 13(1)b

⁵⁰⁶ As held in *Sweet v Parley* [1970] AC 132, "*mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary, and the court ought not to hold that an offence is an absolute offence unless it appears that that must have been the intention of Parliament*"

⁵⁰⁷ *Fowler v Padget* (1798) 7 Term Rep 509, 101 ER 1103 (Lord Kenyon)

⁵⁰⁸ *Reg v Tolson* (1889) 23 QBD 168, 187

⁵⁰⁹ A Reed, 'Strict Liability and The Reasonable Excuse Defence: *R v Unah* [2011] EWCA Crim 1837' (2012) 76(4) J Crim L 293

*whom the penalty is imposed*⁵¹⁰; (2) is such intention necessary as otherwise the purpose of the Act could not be fulfilled⁵¹¹ or (3) does the offence deal with an issue of social concern where strict liability is necessary in order to ensure diligent compliance⁵¹².

It was the application of the third test that led the court in *London Borough Council v Shah*⁵¹³ to declare that s.13(1)c created an offence of strict liability. “*The offence of selling lottery ticket to an underage person ... related to an issue of social concern, namely gambling by minors, where strict liability would encourage greater vigilance against the commission of the offences*”⁵¹⁴. This reasoning was further supported by the declaration that selling lottery tickets to a child is “*not of truly criminal nature*” and as *mala prohibita* as opposed to *mala per se* it does not attract sufficient moral opprobrium as to expect diligent compliance in the absence of strict liability. The strict liability extends not only to the person who had directly committed the contravention but also to the employers of the offender by virtue of the principle of vicarious liability⁵¹⁵. This applies irrespective of whether or not the employer had any direct involvement in the actual breach outside being only a party to the contract of employment and providing the facility.

2.3. Penalties

2.3.1. Gambling (excluding National Lottery)

All offences under Part IV of the Gambling Act 2005 attract a maximum penalty of up to 51 weeks imprisonment or a fine not exceeding Level 5 on the standard scale. The current level of the maximum fine is set at £5,000 for adults under s.17 of the Criminal Justice Act 1991⁵¹⁶. The limits are currently being increased under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offenders) Order 2014 but this change does not affect the nature of the offences. The maximum fine for a young person equals £1,000⁵¹⁷ but no imprisonment⁵¹⁸.

⁵¹⁰ *Mousell Bros Ltd v London and North Western Railway Co* [1917] 2 K.B. 836

⁵¹¹ *Mousell* (n 510)

⁵¹² *Harrow London Borough Council v Shah* [2000] 1 W.L.R.83

⁵¹³ *Harrow* (n 512)

⁵¹⁴ *Harrow* (n 512) 89

⁵¹⁵ *Harrow* (n 512) 90

⁵¹⁶ As this constitutes the maximum fine Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 86 does not apply

⁵¹⁷ Criminal Justice Act 1991, s 17(b), amended

⁵¹⁸ GA2005, s 62(2)a

Penalties for Part IV offences have decreased from the penalties applicable to offences under the National Lottery legislation and their low levels further contribute to the perception that the third licensing objective under the Gambling Act is not given due priority, especially when one considers that in practice it is very rare for maximum penalties to be imposed⁵¹⁹. Following the coming into force of the Gambling (Licensing and Advertising) Act 2014 on the 1st of November 2014, all providers that wish to offer their services to British consumers must possess the relevant UK gambling licence and must comply with UK law. However, many online providers are based outside UK jurisdiction and the penalties further undermine the possibilities of successful cross-border enforcement.

This is because the low levels make extradition of the suspected offender impossible⁵²⁰ unless the person has already been convicted and sentenced in a Member State of the European Union or Gibraltar to at least four months imprisonment⁵²¹. The European Arrest Warrant cannot be invoked either as such warrant can only be issued for offences which carry a maximum penalty of at least 12 months imprisonment, or if an offender has already been convicted and punished to at least four months in prison⁵²². Even in the unlikely event that a conviction was secured for allowing a minor to gamble, the European Arrest Warrant is arguably not an appropriate tool to utilise. The recent call issued by the European Parliament to the European Commission in January 2014 anticipated a review of the EAW principles and the introduction of better safeguards of individual persons⁵²³ in order to ensure that the warrant is only used for offences of a serious nature as originally anticipated. The UK statutory framework undisputedly classifies gambling offences as not serious, thus making the use of the European Arrest Warrant inappropriate.

Even investigating potential offences is not devoid of difficulties. If the suspected breach of the Gambling Act was committed by a company based abroad, it is likely that all the relevant data and evidence will also be located there⁵²⁴. The European Investigation

⁵¹⁹ See examples for other offences in Kevin M Rogers, *The Internet and the Law* (Palgrave Macmillan 2011) 254-259

⁵²⁰ Extradition Act 2003, ss 148(1) and 148(2); see also Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010) 97-99

⁵²¹ Extradition Act, s 148(3), amended; extradition to and from territories other than European Union have even stricter conditions

⁵²² Extradition Act, ss 148(4)b and 148(5)c, amended

⁵²³ See <<http://www.fairtrails.org.justice-in-europe/the-european-arrest-warrant/>> accessed May 2014

⁵²⁴ Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010)

Order⁵²⁵ which is replacing the European Evidence Warrant⁵²⁶ will substantially facilitate investigation of offences but it only extends to the Member States of the European Union. No dual criminality is required but Art 11(1)g provides that the European Investigation Order does not have to be recognised if the offence in question does not constitute an offence under the law of the executing State, unless it is listed in Annex D and the penalty imposed is at least three years⁵²⁷.

Computer-related offences are listed in Annex D but gambling offences under Part IV do not carry the penalty of three years imprisonment. This means that if providing service to a minor does not constitute a criminal offence in the country where the gambling provider is located the use of the European Investigation Order will not be possible. The European Evidence Warrant currently cannot be used either as it is also only available if an offence carries a maximum term of imprisonment of at least three years⁵²⁸.

Outside the European Union, the Council of Europe Convention on Cybercrime 2001 has been ratified by 44 States⁵²⁹ including UK⁵³⁰, USA⁵³¹ and Panama⁵³² and was designed to facilitate the mutual co-operation between the States with regards to the preservation, collection, production, searching and seizing of evidence, as well as the collection of real time data that may be needed in connection with a variety of criminal offences. While the Convention has not specifically imposed the requirement of dual criminality, such restriction can be entered upon ratification⁵³³.

Moreover, Art. 32 of the Convention only allows direct trans-border collection of evidence if such evidence is publicly available⁵³⁴ or if the party in possession of the evidence granted consent for such access⁵³⁵. In other circumstances the Convention allows for the request to be directed to the other State to gather and seize the relevant

⁵²⁵ Directive 2014/41/EU of 3rd of April 2014 regarding the European Investigation Order in Criminal Matters

⁵²⁶ With the exception of Denmark and Ireland that have not “opted in”

⁵²⁷ Directive 2014/41/EU, Art 11(1)g

⁵²⁸ Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010) 108

⁵²⁹ As of last check on 17th January 2015 on <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG> 44 States ratified the Convention, 9 signed but did not ratify it

⁵³⁰ Signed 23/11/2001, ratified 25/05/2011

⁵³¹ Signed 23/11/2001, ratified 29/09/2006

⁵³² Accessed 5/3/2014

⁵³³ Amalie Weber, ‘The Council of Europe’s Convention on Cybercrime’ (2003) 18(1) Berkeley Tech L J 425

⁵³⁴ Convention on Cybercrime 2001, Art 32(a)

⁵³⁵ Convention on Cybercrime 2001, Art 32(b)

information but such process is likely to be cumbersome, expensive and time-consuming, making it less likely to be utilised in connection with gambling offences.

In addition, it is worth highlighting that several jurisdictions where many remote gambling providers are known to originate from such as Costa Rica, Antigua, Belize, Lichtenstein, or Monaco⁵³⁶, have not signed up or ratified the Convention with the consequences that the Convention's effects are still not universal.

2.3.2. The National Lottery

Penalties under the National Lottery etc Act 1993 are higher. The statutory maximum fine remains at £5,000 on summary conviction⁵³⁷ but the maximum term of imprisonment is 2 years⁵³⁸ as long as the prosecution is brought on indictment. While in theory these levels of potential penalties avoid some of the jurisdictional difficulties⁵³⁹, it is unlikely that any difference in practical application would ever be observed as enforcement is currently very limited, as will be further discussed in paragraphs 5.3.3 to 5.4.2.2.

2.3.3. Interim conclusion

The level of penalties means that in practical terms the likelihood of prosecution for Part IV offences is remote in respect of both land-based venues and online providers. This is further discussed in Chapter 5 but such position must have been anticipated by the legislator, especially with regards to remote providers as most online operators are based overseas. Even though under the Gambling (Licensing and Advertising) Act 2014 they are now required to apply for a UK gambling licence, they will continue to be based outside UK jurisdictions making it significantly more difficult to initiate and successfully prosecute operators, even if they are found to deliberately ignore the UK social responsibility provisions.

While it is recognised that regulatory offences should not be subjected to very harsh and severe penalties, such low limits hamper the regulator's abilities, not only to minimise unlawful gambling, but also to enforce the law amongst those providers in possession of a valid licence where only some aspects of their procedures may have shortcomings. Accordingly, and in light of the nature of possible offences, the penalties should be

⁵³⁶ Lichtenstein and Monaco signed the Convention on 17/11/2008 and 2/5/2013 respectively but did not ratify it

⁵³⁷ National Lottery etc. Act 1993, s 13(2)a

⁵³⁸ National Lottery etc. Act 1993, s 13(2)b

⁵³⁹ The Extradition Act 2003 applies but not the European Arrest Warrant

increased to reinforce the deterrent effect and to make the possibility of cross-border enforcement real.

2.4. Age verification methods

2.4.1. Offline age verification

The land-based age verification processes still primarily rely on the members of staff challenging young-looking customers to produce an ID supported by either “*Think 21*” or “*Think 25*” Challenge and refusing sale if the individuals are unable to provide valid identification, or if they prove to be underage. Despite extensive training that is typically offered to employees, this method still relies on subjective assessment of whether someone looks underage. The face-to-face nature of the transaction may also cause potential confrontation between a customer and a staff member which may lead to some members of staff being reluctant to challenge individuals unless absolutely sure. Even then the employee may feel intimidated by e.g., groups of youths⁵⁴⁰.

Customers may also be verified on entry by ‘*automatic face recognition*’ robots, some of which claim to be over 99% accurate⁵⁴¹. Although some of these mechanisms are already employed in some large casinos⁵⁴², the cost implications make it significantly less feasible for them to be introduced in smaller betting shops or adult entertainment centres prevalent on UK High Streets.

2.4.2. Effectiveness of the offline age verification procedures

The Gambling Commission’s own early test purchases carried out in 2009 in land-based betting shops demonstrated a 98% rate of non-compliance⁵⁴³. Further tests carried out in betting shops in December 2009⁵⁴⁴ and in adult gaming centres in June 2010⁵⁴⁵ showed

⁵⁴⁰ Renee A St-Pierre ‘and others’, ‘Preventing Lottery Ticket Sales to Minors: Factors Influencing Retailers’ Compliance Behaviour’ (2011) 11(2) *International Gambling Studies* 173

⁵⁴¹ See, e.g., AS Mian, M Bennamoun, R Owens, ‘An Efficient Multimodal 2D-3D Hybrid Approach to Automatic Face Recognition’ (2007) 29(11) *Pattern Analysis and Machine Intelligence, IEEE Transactions on* 1927

⁵⁴² S Langford, ‘Reliable facial recognition technology for VSE detection in ‘real world’ gaming environments’ (5th International Gambling Conference, Auckland, February 2014)

⁵⁴³ Gambling Commission Press Release, ‘Mystery Shopping Tests Continue’ (31/07/2009) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingcontinues.aspx>> accessed January 2015

⁵⁴⁴ Gambling Commission Press Release, ‘Underage Gambling in Betting Shops – Operators Face Further Tests’ (3/12/2009) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingpart2.aspx>> accessed January 2015

⁵⁴⁵ Gambling Commission Press Release, ‘Monitoring Underage Gambling in Adult Gaming Centres’ (15/06/2010) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2010/monitoringunderagegambling.aspx>> accessed January 2015

substantial improvements, but still approximately one out of three attempts by testers have been successful.

The improvements proved short-term as more recent tests which were published on the 5th of December 2013 showed that “*in around half of the 23 adult gaming centres (AGCs) tested, the young person was challenged at the threshold of the premises being able to access a gambling product. However, in nine out of the AGC tests the young person was able to enter the premises, play a gaming machine for several minutes and exit without any challenge being made; ... in [smaller betting shops] 20 of the 31 premises tested the young person was not challenged at any stage of the test. In some of the betting and AGC premises ... the young person was even welcomed and encouraged to gamble*”⁵⁴⁶. The Young People Omnibus 2014 also reported a noticeable, although not statistically significant, rising trend in the number of children being able to successfully buy lottery tickets by themselves without any assistance from adults.

By the gambling industry’s own admission, the rates of unverified customers being allowed to gamble in offline venues remain too high. In 2011/2012 and 2012/2013 there were still respectively 34,606 and 27,391 instances of customers being allowed to bet in commercial betting shops and 1,636 and 1,590 occasions when a customer was allowed to play in an AGC, despite lack of identification or proof of age⁵⁴⁷. Some of these reported instances may in fact refer to an adult who was just unable to produce identification at the relevant time. However, many of these are likely to reflect attempts by those who are under the legal age for gambling and, furthermore, the data does not include occasions where minors have successfully gambled but have never been challenged and this fact was never brought to the attention of the operators.

The justification behind this status quo is not easy to find. St. Pierre et al⁵⁴⁸ demonstrated in their study of refusal rates of lottery tickets to minors that independent stores are less likely to refuse a sale than chains or franchise stores, or supermarkets and that females,

⁵⁴⁶ Gambling Commission Press Release, ‘Results of Test Purchase Exercise on Smaller Independent Licensed Operators – 2013’ (5/12/2013) <http://www.gamblingcommission.gov.uk/gh-press/news_archive/2013/underage_gambling_controls_mus/test_purchase_exercise_2013.aspx> accessed January 2014

⁵⁴⁷ Gambling Commission, ‘Industry Statistics – November 2013’, the relevant figures for other sectors in 2011/2012 and in 2012/2013 are 104/65 for bingo; 32/26 for casino; 351/188 for Family Entertainment Centres; no data is provided for gaming machines; < <http://www.gamblingcommission.gov.uk/Gambling-data-analysis/statistics/Industry-statistics.aspx>> accessed May 2015

⁵⁴⁸ Renee A St-Pierre ‘and others’, ‘Preventing Lottery Ticket Sales to Minors: Factors Influencing Retailers’ Compliance Behaviour’ (2011) 11(2) International Gambling Studies 173

regardless of appearance, were more likely to succeed in their purchase than males. It was speculated that owners of independent stores have less financial resources to ensure adequate training for staff and have more of a vested interest in maximising sales than, for example, a salaried manager of supermarkets. Van Hoof et al⁵⁴⁹, when considering compliance levels in respect of alcohol sales, identified that difficulties with ascertaining someone's age, fear of intimidation and being too preoccupied with other workloads were the main reasons to blame.

The amendments to the social responsibility measures introduced by the latest revision of the LCCP which were discussed in paragraph 2.2.2.2.1 are a welcome addition. However, it is submitted that they, by themselves, are unlikely to facilitate radical overhaul of the land-based age verification practices. The additional measures do not address the inherent difficulties with subjectively attempting to assess someone's age, neither do they solve the issue of non-compliance arising from deliberate misconduct.

The lack of effective enforcement may also have a salient effect on the offline non-compliance rates. Repeated breaches of the mandatory provisions of the Act, whereby the licensee not only allows underage customers to gamble, but even encourages or welcomes them onto the prohibited premises⁵⁵⁰, which remain unpunished, despite the regulator having exact intelligence to identify where such offences were committed, is a fundamental breach of the Act's objectives and a breach of the regulatory responsibility.

The Gambling Commission issued warnings but, despite having a wider range of more effective regulatory sanctions at their disposal, as well as the possibility of initiating a criminal prosecution under Part IV of the Act, not many have been initiated. This continues to be the case despite clear (albeit indirect) criticism made by the Culture, Media and Sport Committee when evaluating the effectiveness of underage gambling prevention⁵⁵¹.

Criminal prosecution may not necessarily be the best option but the Gambling Commission has a wide range of civil measures which can be imposed for non-

⁵⁴⁹ JJ Van Hoof 'and others', 'Improving Shop Floor Compliance with Age Restrictions for Alcohol Sales: Effectiveness of Feedback Letter Intervention' (2012) 22(5) Eur J Public Health 737

⁵⁵⁰ Gambling Commission Press Release, 'Results of Test Purchase Exercise on Smaller Independent Licensed Operators – 2013' (5/12/2013) <http://www.gamblingcommission.gov.uk/gh-press/news_archive/2013/underage_gambling_controls_mus/test_purchase_exercise_2013.aspx> accessed January 2014

⁵⁵¹ Culture, Media and Sport Committee, *The Gambling Act 2005: A Bet Worth Taking?* (HC 2012-13/HC421-I) para 33-39

compliance which may be equally powerful and effective. Such sanctions include fines as well as the right to suspend licence or remove it altogether. These arguably may represent an even stronger deterrent due to their effect on commercial profitability and reputation of the provider. Tougher punishments should now be utilised in order to increase the deterrent effect of Part IV offence and to demonstrate that s.1(c) is given the attention it deserves.

A solution exists which would be more effective at ensuring that minors are not permitted to engage in age restricted gambling. In a similar manner to online providers, offline venues should be mandated to identify each and every single customer, either on entry or when the individual attempts to gamble or place a bet. If such requirement is imposed, it would remove the need for gambling staff to subjectively assess an individual's age and, after an initial period of aggravation that this solution could admittedly cause, gamblers would adapt to the need to carry ID with them if they wished to gamble. However, such a proposition is likely to attract significant opposition from the gambling providers. It may lead to loss of those customers who wish to gamble anonymously, is likely to slow down the process of placing and accepting bets, may necessitate the employment of an extra employee in betting shops, and may negatively impact spontaneous gambling⁵⁵². Despite these drawbacks, this proposed solution merits further consideration in light of the existing evidence that age verification in land-based venues remains wholly inadequate.

2.4.3. Online age verification

Online gambling companies have several choices which can be adopted in order to comply with their statutory requirement of due diligence. Although they did not originate with the gambling industry in mind, they have been well adapted for this purpose. None of the methods described below are considered to be 100% fault proof⁵⁵³ and those that may be so do not fit the commercial business models of gambling providers. However, the existing methods still tend to produce highly reliable results.

⁵⁵² Albeit, a large number of driving adults carry their driving licence with them all the time

⁵⁵³ Victoria Nash 'and others', 'Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry' (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

A comprehensive list of available measures was produced by the European Commission with findings reported on the Safer Internet Forum⁵⁵⁴ and can be broadly classified into seven separate categories: (1) self-certification; (2) electronic identity cards; (3) semantic analysis; (4) traditional off-line identification for online purposes; (5) biometrics; (6) reliance on credit and debit cards; and (7) digital age verification solutions.

2.4.3.1. Self-certification

Self-certification, otherwise called self-affirmation, can safely be disregarded as it is widely acknowledged that this method, without more, is entirely unsatisfactory and it is not conceivable that it could ever satisfy s.63 defence. This measure asks the customers to declare that they are over the age of 16/18 years old by either ticking a specific box on the website or by informing customers that, by progressing further with registration, or by accepting the terms and conditions of the supplier, they confirm that they are of specific age.

This method is seen as being inadequate as it places the entire onus on the honesty of the customer. It is known that minors may resort to misrepresenting their age in order to gain access to the site/service or product they desire, especially if they intend to participate in an activity that they know is prohibited to them. However, self-affirmation has a warning value as it informs players that gambling is permitted only to those who are over the appropriate age in a more active way than just a display of a ‘*no under 18*’ notice as recommended by Art.III(4)(b) of the EU Commission Recommendation 2014/478/EU. The relevant sign may not necessarily be observed, whereas being required to tick the relevant box is more likely to engage the minor’s conscious mind. This may explain why the Gambling Commission rightfully insists that all gambling websites must require customers to affirm their age before proceeding to registration and should be included in the EU Recommendation.

2.4.3.2. Semantic analysis and biometrics

Due to the existence of other, more cost-effective and industry friendly measures, neither of the two methods discussed in this paragraph appear to be used by the UK gambling industry. Semantic analysis relies on analysing the level of sophistication with the usage of language when, for example, creating a social networking profile as it is assumed that

⁵⁵⁴ Commission, ‘Background Report on Cross Media Rating and Classification, and Age Verification Solutions’ (Sept.25-26, 2008) <http://cnpl.lu/en/2008/11/12/1390/> accessed September 2014

different levels of literacy skills and methods of expressing oneself can be attributed to different age groups. As gambling websites do not require players to set up a profile (other than provide elementary details) this method has no direct use for gambling purposes.

Nevertheless, information derived from social networking sites may be beneficial in the overall fight against underage access. For example, Sally⁵⁵⁵ referred to a situation where a minor sent to her company fake identity documents as a proof of his age. One of their verifiers came across the same person “bragging” on *Facebook* that he was able to “dupe” the company into accepting these fake IDs. He also included the scanned copy of how the documents were altered in order to advise others how it can succeed. This verifier’s discovery had led to immediate suspension of this minor’s gambling account but it does exemplify how vigilant the gambling companies may have to be.

Online biometrics solutions⁵⁵⁶ range from analysing fingerprints, iris or retina scans, facial recognition, and voice patterns to hand geometry and analysis of bone density. They are becoming increasingly less expensive but the advance set up is extensive. This is because customers would have to first sign up with the provider, collect or wait for the equipment to arrive and synchronise it with their internet enabled devices. These methods are highly intrusive and, although they exist, they are rather extreme and disproportionate to the intended aim.

A use of a webcam⁵⁵⁷ may *prima facie* appear attractive but this would be equivalent to offline face-to-face recognition, made more difficult by the potential distortion that may occur during transmission of the image. As this form of verification may not be possible by using technology, this method would also necessitate the gambling company to have verifiers constantly available; a requirement that is unlikely to be cost effective or convenient.

2.4.3.3. Electronic identity cards

Electronic identity cards are used in some countries abroad⁵⁵⁸. They are issued by the respective public authorities, and include details of the person’s identity including his or her date of birth. In the UK proposals for the introduction of government-issued

⁵⁵⁵ Compliance officer of a major gambling company

⁵⁵⁶ Virginia Franke Kleist, ‘Building Technologically Based Online Trust: Can the Biometrics Industry Deliver the Online Trust Silver Bullet?’ (2007) 24(4) *Information of Systems Management* 319

⁵⁵⁷ Most current devices come with integrated webcam as standard

⁵⁵⁸ Such as Germany or Belgium, see <<http://en.myeurop.info/2012/04/06/complicated-rise-electronic-identity-card-europe-5145>> accessed January 2015

compulsory IDs have previously received a rather hostile reaction from the electorate making it unlikely for such paper-based or electronic identity cards to be introduced in the near future⁵⁵⁹. The government is currently developing an electronic identity ecosystem for services provided by the government⁵⁶⁰ but they are not designed to be used for other purposes.

Alternatives to the government e-IDs include commercial e-cards or e-tokens which are offered on a voluntary basis for a payment. For example, *Microsoft* developed a platform called *Identity Metasystem*⁵⁶¹ which allows customers to create ‘digital information’ cards that contain and disclose selected personal details. These may, but do not have to, include date of birth. Other providers that offer a similar service include *NetIdMe* as well as the *CitizenCard* and *Validate* which are specifically endorsed by the Gambling Commission. The registered details can be static⁵⁶² or dynamic⁵⁶³ and, after they are verified, the customers are issued with an identifier (either a physical card or e-token) which can be used in those online transactions that accept these forms of identification.

2.4.3.4. Traditional offline identification for online purposes

There are two alternative variations of offline identification. The first alternative requires a customer to either send or email copies of their passport, driving licence, or other national ID which typically contain the name, date of birth, and address of residence. The second alternative asks a customer to be verified in person in a land-based branch of the company where a staff member can visually inspect the documents of the person attempting to register online (e.g., local post office or other retailer). This method is only available to those companies that offer their services both online and offline, or those that

⁵⁵⁹ The government’s attempts to introduce compulsory ID cards for UK customers have been largely unsuccessful. The Identity Cards Act 2006 which provided for the National Identity Cards and European Travel Documents linked with the National Identity Register was repealed by the Identity Documents Act 2010 (c.40) which mandated the destruction of all issued cards and all information that has been contained on the database. It is very unlikely, in light of this experience, that UK would have much appetite for government issued e-cards but that does not stop commercial providers to issue e-cards on a voluntary basis that many online business accept, e.g., *CitizenCard* issued by non-profit organisation (see <<http://www.citizencard.com/>>

⁵⁶⁰ Victoria Nash ‘and others’, ‘Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry’ (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014, 4

⁵⁶¹ Microsoft Operation Whitepaper, ‘The Identity Metasystem: Towards the Privacy-Compliant Solution to the Challenges of Digital Identity’ (2006) <https://danskprivacynet.files.wordpress.com/2008/06/identity_metasystem_eu_privacy.pdf> accessed January 2015

⁵⁶² Those details don’t change e.g. date of birth or that an individual is already 18

⁵⁶³ Those details can change such as address or marital status

have entered into a contractual relationship with offline providers. According to the interviewed gambling companies' representatives, the first option is utilised by the gambling providers but only as a secondary measure if the customer cannot be verified by other methods. Notwithstanding the example from paragraph 2.4.3.2, forgeries of passports or driving licences are not easily carried out⁵⁶⁴ making this method one of the most reliable ones. However, the inherent delay and inconvenience in making copies or scans of the documents, and then emailing or posting them to the gambling companies, or having to go to a shop/office to be verified may disincline some customers from continuing with the registration. This could amount to a loss of business thus making this method less desirable to the companies than the ones discussed immediately below.

2.4.3.5. Reliance on credit and debit cards

The European Commission in the *Background Report on Cross Media Rating and Classification, and Age Verification Solutions* originally presented at the *Safer Internet Forum (2008)*⁵⁶⁵ discussed credit, debit and pre-paid cards jointly. However, grouping together the different cards for online gambling purposes is incorrect due to significant differences in the underlying legislation that underpins each of them.

Debit cards can be legally offered by some banks and building societies in conjunction with an under-18 account which can be opened for a child from the age of 11 years old. The decision whether to issue a cash-card, a debit card, or none at all, depends on the banks' individual policies as the law does not restrict the availability of such accounts. They can be run by the child alone, or by the child's parent or legal guardians, but as they can be held by minors, they cannot be used to determine the age of the customers.

Credit cards are regulated in the UK by the Consumer Credit Act 1974 as amended by the Enterprise Act 2003 and Consumer Credit Act 2006. Under s.8 of the Consumer Credit Act 1974⁵⁶⁶ the contract between the issuer and cardholder constitutes a consumer credit agreement whereby the customer is allocated an amount of money which can be borrowed on a rolling basis subject only to a minimum monthly repayment, or any review rights reserved by the card issuer. No such agreement can be entered into with a minor under

⁵⁶⁴ At least not within the financial means of a minor

⁵⁶⁵ Commission, 'Background Report on Cross Media Rating and Classification, and Age Verification Solutions' (Sept.25-26, 2008) <http://cnpl.lu/en/2008/11/12/1390/> accessed September 2014

⁵⁶⁶ Consumer Credit Act 1974, s 8, amended

the age of 18 and, in the UK, no minor is permitted to hold a credit card or use it for online purchases⁵⁶⁷.

Credit cards have never been developed with the intention of being used for age verification purposes. However, the strict nature of the lending legislation, driven primarily by the current Anti-Money Laundering Regulation 2007, and the rigorous conditions imposed on credit card issuers by the *Mastercard* and *Visa* Associations in respect of age and identity verification procedures, ensures that only customers over the age of 18 years can, in practice, successfully apply for a credit card. The accuracy of the credit card application process meant that other industries which supply age restricted goods quickly felt justified in accepting that any genuine credit cardholder must be of legal age and further verification is not needed.

However, credit card issuers do not authorise their cards to be used for such purpose and Anti-Money Laundering Regulation, together with the associated legislation, is designed more to prevent fraud and serious criminal activities and not to age verify customers. Nevertheless, the Gambling Commission LCCP permits direct reliance on credit cards as a method of identity checks. In practice, this method is likely to be very effective, but only if the providers ensure that they distinguish between genuine credit cards from pre-paid cards which also bear the *Mastercard* and *Visa* logos.

These cards can be purchased in a variety of places without any form of identification being required, and without the need for an underlying bank account. Several can be used by anyone, regardless of age, up to the amount that has been pre-loaded onto the card and paid for in advance. Some may be reloaded but many are used only once. They are equivalent to shopping vouchers and, as they can be used by anyone, they are not suitable for age verification processes. The gambling operators are capable of distinguishing such cards from genuine credit cards⁵⁶⁸ and, therefore, they should either ensure that pre-paid cards are never used for age verification purposes, or they should not accept them as a valid form of payment.

⁵⁶⁷ Joint application of Consumer Credit Act 1974, Minors Contract Act 1987 and Consumer Protection (Distance Selling) Regulation 2000; in other countries the position may be different. For example, in Germany children are allowed a credit card

⁵⁶⁸ Confirmed by data retrieved from <<https://www.bindb.com/identify-prepaid-cards.html>> as well as the representative of one financial payment intermediary

2.4.3.6. Digital age verification solutions

Several commercial businesses market cost-effective age verification solutions capable of verifying customers almost instantly by reference to a cross-section of digitally available databases⁵⁶⁹. This software is promoted as being highly reliable at determining whether someone is over or under the 18 years threshold, and their use is endorsed by the Gambling Commission itself. Some are specifically targeting online gambling providers, but most have been developed for generic identification of remote customers for other usages such as social networking sites or adult materials.

The business model and pricing structure vary between different companies but their core offering relies on similar technologies. The customer is verified by reference to a variety of databases, which are either freely available to the public or which can be contractually obtained for a fee. Of these, the most referred to are those held by credit search agencies as these hold details of all credit transactions carried out by the members of the adult public to determine their creditworthiness. It is estimated that 85% of the adult population can be verified by recourse to credit agencies alone⁵⁷⁰. Minors' inability to legally receive credit prevents them from being included in these records. If someone is found on this database, it is assumed that they are over the relevant threshold.

Secondly, reference can be made to the Electoral Roll which holds details of all people who are registered to vote in UK political elections. It is estimated that it covers approximately 70% of the UK adult population and the registration is actively promoted by the Electoral Commission. Individuals can register online or by post. There are two types of electoral roll register: closed and open.

The closed register is available only to credit search agencies and to prevent election-related frauds but the open version can be sold to anyone for a fee. Citizens opt into either of these versions. Although the provisions of false details carries a penalty of six months, imprisonment, or a £5,000 fine, the registrations were accepted in good faith and no identification documents were traditionally required for the registration itself.

⁵⁶⁹ Victoria Nash 'and others', 'Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry' (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

⁵⁷⁰ Nash (n 569)

This changed in 2014 with the introduction of the “*individual electoral registration*” (IER)⁵⁷¹. This was in recognition of the weaknesses of the previous system which allowed e.g., a voting card to be sent to an 8 month old baby in November 2012⁵⁷² and to a dog in May 2012⁵⁷³. These two examples were merely anecdotal and the actual level of mistaken registrations were in fact unknown⁵⁷⁴. The Electoral Registration and Administration Act 2013 was introduced to rectify this. Now, anyone wishing to register has to supply identifying information which will be verified by public authorities before the process is complete. However, this applies only to new registrations. Despite the weaknesses that continue to exist, the Electoral Register still features highly on the list of reliable digital sources.

Other databases which are being used include public records held by the Land Registry and birth records. Telephone directories and mail order companies’ lists can also be used but they are less reliable. The telephone directory is an over-18 list but it only includes the surname, an initial and address. It is not uncommon for parents to give their children a name that starts with the same initial as the parent, and mail order companies are not always as strict as perhaps they should be when verifying their customers.

Checks against the listed database are classified as ‘*entry level*’ service with most providers also offering adds-on according to clients’ needs. Typical add-on refers to the offline identification method discussed in paragraph 2.4.3.4. The most sophisticated added method involves customers being asked unique questions such as “*Who is your mortgage provider?*” or “*What car did you own in xxx year?*” with the answers being matched against public information. Such adds-on can be very effective at preventing a minor registering with the name of a real adult. Although they may know the name and address of parents, and may get access to their credit card details, they are less likely to know the answer to such specific questions. However, they are not considered necessary in the gambling industry, although they are increasingly used by financial services.

⁵⁷¹ See <<http://www.electoralcommission.org.uk/find-information-by-subject/electoral-registration/our-role-in-individual-electoral-registration>> accessed September 2014

⁵⁷² ‘It’s Playground Politics! Twins, Aged Just 18-Months, Receive Polling Card to VOTE’ (14 November 2012) <<http://swns.com/news/twins-aged-18-months-receive-polling-cards-vote-27647/>> accessed May 2015

⁵⁷³ Benjamin Russell, ‘Barking mad! Dog Receives Invitation to VOTE in European Parliament Elections’ *Sunday Express* <<http://www.express.co.uk/news/weird/470369/Barking-mad-Dog-receives-invitation-to-VOTE-in-European-Parliament-elections>> accessed May 2015

⁵⁷⁴ See <<https://www.gov.uk/government/publications/about-individual-electoral-registration-ier>>, accessed September 2014

Age verification can be carried out in real time or can be performed ‘*in batches*’. If the process is carried out in real time the result is supplied to the gambling company before the customer is able to complete registration. The batch method allows customers to register and play without immediate age verification, with the list of all customers being sent to the age verifier at the end of the working day who then completes the process overnight.

Remote gambling providers can choose either/both methods – real time during normal day-to-day transactions and ‘*in batches*’ during particularly busy periods such as during FA Cup Finals or during the Grand National horse racing. The ‘*batch method*’ ensures that there is no slow-down on the gambling website during heavy traffic and allows companies to maximise their profits during busy sporting events.

The financial cost of using a third party varies between the providers as well as within an individual provider, depending on the size of the gambling client, the number of verifications required in any given period, the length of the contract and the level of service. The average prices range between £0.11 and £5, with the majority of gambling companies paying anything between £0.11 and £0.90 per enquiry⁵⁷⁵.

Thanks to the extensive ‘*digital footprint*’ that British adults typically leave⁵⁷⁶, reference to publicly available databases is the most reliable, easy to use, and a consistent method. Its adoption by the gambling industry is an appropriate response to the need to prevent minors from gambling related harm. However, it must be remembered that none of the databases described above, are entirely free of errors and there is always a risk that a minor could accidentally appear on any of them.

Although such risk is likely to be small, it can be further minimised by ensuring that the age verification check is carried out against at least two or three of these databases, and should not be confined to only one of them. Currently, at least two major gambling companies⁵⁷⁷ consult the records consecutively until a positive match is found. If, for example, such match is found through reference to the first database which is in fact

⁵⁷⁵ Information provided by NetIDMe

⁵⁷⁶ Victoria Nash ‘and others’, ‘Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry’ (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

⁵⁷⁷ Those interviewed by the candidate

erroneous, there will be no further checks that would identify such error and it may potentially allow a minor to bypass the legal restrictions.

The need for such concurrent checks is further reinforced by the online context. Unlike in land-based venues, where minors need to overcome age checks each time they try to gamble, once the online gambling account is created there are typically no further checks carried out. This means that a one-off successful registration can then be used for multiple gambling activities, making it even more important to ensure that this first verification is accurate. Accordingly, it is submitted that gambling companies should be required to refer to at least two independent databases before the customer can be deemed to have been verified.

2.4.5. The effectiveness of online age verifications

Online age verification solutions adopted by the gambling industry are considered to be very effective⁵⁷⁸, were reported as having been praised as exemplary by child protection charities⁵⁷⁹ and some scholars recommend them to be used as models for other industries that sell age-restricted products⁵⁸⁰.

The effectiveness of these measures appears to be confirmed by empirical evidence. For example, Chambers and Willox⁵⁸¹ examined the approaches to age verification of 15 large gambling providers listed on the Stock Exchange and reported that all operators required “*actual proof of age*” before the customer was allowed to use the site. They further reported that 26 of the analysed websites offered parental controls to enable parents to prevent minors accidentally being exposed to such sites.

The results of an online mystery shopping programme carried out by the Gambling Commission⁵⁸² also demonstrated that only 4.7% of gambling websites were identified as having weaknesses that could potentially allow a minor to access the gambling

⁵⁷⁸ Mark D Griffiths, ‘Internet Gambling, Player Protection and Social Responsibility’ in Robert J. Williams, Robert T Wood, Jonathan Parke (Eds.), *Routledge Handbook of Internet Gambling* (Routledge 2012) 227-249

⁵⁷⁹ Victoria Nash ‘and others’, ‘Effective Age Verification Techniques: Lessons to Be Learnt From the Gambling Industry’ (University of Oxford 2014) <<http://www.oii.ox.ac.uk/research/projects/?id=102>> accessed September 2014

⁵⁸⁰ Nash (n 579)

⁵⁸¹ Clare Chambers and Craig Willox, ‘Gambling on Compliance with the New 2005 Act: Do Organisations Fulfil New Regulations?’ (2009) 23(3) *International Review of Law, Computers and Technology* 203

⁵⁸² Gambling Commission, ‘Online Mystery Shopping Programme’ (July 2009) <<http://www.gamblingcommission.gov.uk/pdf/Online%20mystery%20shopping%20programme%20July%202009.pdf>> accessed May 2014

services⁵⁸³. The gambling industry annual report stated that only 188 and 432 attempts to register for a gambling account in 2011/2012 and 2012/2013 were successful without verification, which compares favourably to the figures quoted previously for land-based betting shops.

This candidate's mystery shopping exercise also produced similar findings. However, it was not possible to conclude from the tests whether the result was the effect of age verification procedures or lack of acceptance of payments by pre-paid cards. Of the 102 websites tested in Stage One of the exercise, 12 sites permitted the account to be created despite entering minor's date of birth, but none of them accepted a pre-paid card as a payment method. One site offered a bonus play without the requirement of a deposit. This bonus money was used to play and lost, but an attempt to deposit further funds with a pre-paid card was unsuccessful.

At Stage Two, 30 sites were tested and, although all of them permitted the account to be opened, all attempts to deposit funds were declined. However, it must be noted that the transactions were declined by the card issuers at the stage of authorising the payment and not at the stage of registration. Additionally, all websites suggested that another form of payment should be used. The end result remained the same, i.e., inability to gamble with real funds, but it raised the question as to who has in fact effectively prevented the potential minor from playing. A similar experience was also reported by the only pupil from the focus groups who attempted to register online with his own details (albeit fake adult date of birth). His payment attempt using his under-18 debit card was declined with the note saying that he should use another method of payment.

The above results are pleasing, and suggest that the industry as a whole⁵⁸⁴ has worked very hard to prevent minors from accessing remote gambling services. However, the gambling industry should not be allowed to become complacent, especially as the results only indicate the success of age verification measures after the grace period of 72 hours criticised in paragraph 2.2.2.2.1.

Moreover, there are still significantly fewer people gambling online than in land-based venues. The 2012 English Health Survey reported that 46% of men and 40% of women gambled on a gambling product, excluding the National Lottery, compared to 10% of

⁵⁸³ 2.2% were identified as having weaknesses and 2.5% was deemed inconclusive; the report does not specify what the aforementioned weaknesses were

⁵⁸⁴ That includes the gambling industry, the age-verification providers and the financial services

men and 4% of women gambling online (also excluding the National Lottery)⁵⁸⁵. Although age verification procedures should not be affected by rapid increase in numbers, this cannot be guaranteed.

The discussions during the focus groups also indicated that minors may still be wary of putting their financial details online, but this may change. It must also be noted that these results indicate that minors are unable to deposit funds into the online gambling accounts, but do not necessarily indicate that they are prevented from registering on the site. A mere registration is not likely to pose risks to minors if gambling is not possible, but may come to the fore if bonuses that do not require a ‘matching’ deposit become more widespread. In such a situation the registered minor may be allowed to play without any deposit being required.

As it has already been identified in paragraph 2.2.1.1.1, what also remains critical in respect of online gambling is the possibility of minors gambling using an older person’s online account with, or without their permission. Such instances are unlikely to be recognised within the statistical data considered above. Although these gambling accounts can only be accessed with valid log-in details and passwords, minors accessing such accounts are likely to be in possession of these, either because the relevant adult provided it to them, or because they obtained it by other means. Minors resorting to fraudulently using e.g., parents details and their credit card, may also not be recognised until the credit card statement arrives.

2.4.6. The view from the industry

All of the gambling providers’ representatives interviewed by this candidate stated that the age verification requirements featured highly on the list of important priorities for their business. A successful approach was seen as an important part of maintaining a good relationship and reputation with the regulators and the general public. For example, Peter highlighted that the development and implementation of age verification processes “*are a big issue for us and just yesterday we had GamCare with us ... and we passed with flying colours*”. Richard also stressed their duty to protect minors as “*it’s important that minors don’t develop a gambling habit at a young age as it is very dangerous*” and Sally

⁵⁸⁵ Carla Seasbury and Heather Wardle, ‘Gambling Behaviour in England and Scotland: Headline Findings From the Health Survey for England and Scottish Health Survey 2012’ <<http://www.gamblingcommission.gov.uk/pdf/headline%20report%20to%20gc%20v2.0.pdf>> accessed January 2015

confirmed by saying that they “*wanted a strict jurisdiction ... a very well respected jurisdiction because we have the brand of xxx, the reputation of xxx to maintain*”. All companies emphasised the existence of the appropriate training that relevant staff receive, thus further highlighting their commitment to children’s protection.

With respect to minors’ gambling while using an adult’s gambling account, the interviewed gambling providers’ representatives conceded that it is almost impossible to be certain that the person who actually gambles in front of the internet enabled device, as opposed to the person to whom the gambling account is registered, is not a minor. For example, Richard stated that: “*I think if minors really want to gamble they will find a way to cheat the system*” with Jason concurring “*it is probably not possible [as yet] to ensure that minors never play*”. Sally and Peter agreed. Sally said: “*I guess; it is very, very difficult because you don’t see the customer. You can’t see who is on the other side of phone or the computer playing or internet playing*” and Peter stated that: “*it is certainly not possible [to be 100% certain]. It is like the jurisdictional policy, if you put all measures in place but e.g., if you steal your mother’s or father’s credit card and you log into their account and you know that the parent never picks it up; how do we know that it is a genuine customers [who] plays?*”.

Some internal controls have been introduced by Richard’s, Peter’s and Sally’s companies to counteract this, but those are not as efficient as the processes adopted during the registration stage. For example, Sally’s company locks the customers’ accounts if they are inactive for more than two hours. If parents accidentally forget to log themselves out this may prevent a minor from opportunistically using such account, but this mechanism is very weak. Their companies also employ dedicated fraud teams to monitor the accounts and, if suspicious behaviour is identified the account is blocked and re-verification is required. This also offers rather weak prevention from minors using the gambling accounts of parents as their fraud teams are more alert towards big transactions, where they may be a suspicion of money laundering, rather than opportunistic play by minors. They are more designed to protect the gambling companies from potential losses resulting from unauthorised transactions.

The industry representatives were clearly of the view that the law does not do enough on a statutory or practical level to help the businesses with their task. The first issue raised by the interviewers was their perception of a complete lack of any attempt to prosecute adolescents for committing identity fraud, or for lying about their age in order to gain

access to a prohibited activity, despite such act constituting a criminal offence under s.48 of the Act.

Secondly, the representatives insisted that the law should place more emphasis on the responsibilities of the adult account holders in order to protect businesses that do all that is required of them, but who are unable to prevent parents lending their children their credit card details or allowing them to use their online account. They also raised the issue of lack of education of parents and lack of comprehensive programmes in schools to raise awareness of the law, as well as of the potential risks of gambling by youths. Sally was of the view that the law does not tackle this aspect with sufficient strength and rigour and would welcome placing more duties on a family: *“It’s a tricky one but I mean there has to be a line when it comes to the responsibility of the family rather than the company. That comes back to parents knowing and doing enough. If my child is playing on my site; how did you let them; why did you let them?”*

2.5. Gambling prevalence amongst minors

The level of gambling participation amongst young people is very difficult to establish. The previous British Gambling Prevalence Survey, and the current Health Surveys, place 16 and 17 years old together with those who are 18 to 24 years old. In light of the overall significant consequences of reaching the legal age of majority, the joint treatment of those who are legally permitted to gamble, and those who are not, is unsatisfactory, especially as the 16 to 24 age group has been identified as being at the highest risk of developing gambling-related problems. As noted in the Introduction, the Young People Omnibus assesses gambling prevalence among those who are 11 to 16 years old, but their focus is on those who are underage for lottery products i.e., below 16 years of age. This leaves those who are 17 years old entirely unaccounted for. The Young People Omnibus 2014⁵⁸⁶ reported that the levels of gambling by minors is declining but there are still *“one in six 11 to 15 years-olds (16%)”* who admitted to gambling in the past seven days preceding the survey, although only 6% bought a National Lottery tickets by themselves.

Amongst the pupils from the focus groups, a small but significant minority of pupils said that they gambled for money in commercial venues at some point prior to the focus group, but only 12 pupils gambled more than three or four times in their entire life on prohibited forms. Of the 200 pupils, 30 gambled on an activity that was unlawful for their age with

⁵⁸⁶ Young People Omnibus 2014

seven of them having gambled online⁵⁸⁷. However, of those 30, only three gambled by themselves. Ray (m, 14) played slot machines while on vacations in Vegas but not in the UK, Joe (m, 14) played slot machines in a betting shop in London and Katy (f, 14) played slot machines in an amusement arcade when out with her brother. Neither of them were asked to leave premises or were stopped from playing by any of the staff members in the respective venues.

All other participants purchased the tickets or betting slips with the assistance of an older⁵⁸⁸ person, or they used another person's online gambling account. All seven that gambled online stated that it was done with the online account holder's permission. Eight participants gambled on lottery or Scratchcards that they were lawfully allowed to play because all of them were over the age of 16 years old at the time of purchasing the ticket.

2.6. Conclusion

This chapter demonstrated that the requirements, imposed by the Gambling Act and monitored by the Gambling Commission, on the gambling industry to develop and implement effective age verification measures in order to prevent underage access has produced mixed results. Contrary to the popular expectation that has been underpinned by the general mistrust towards the Internet, this review concluded that online age verification measures are in fact significantly more robust than their offline counterparts.

The underage prevention on the Internet appears to be very effective at ensuring that underage customers do not have access to online forms of gambling and, to the extent that this outcome can be attributed to the regulatory or industry efforts, it must be commended. The interviewed representatives clearly indicated that the online industry as a whole is taking age verification requirements very seriously but, in a paradoxical way, their remote and cashless environment makes their discharge of responsibilities easier because they cannot rely on face-to-face subjective assessment of the age of an individual, a method that has been proved by land-based gambling venues to be prone to errors.

Nevertheless, some issues applicable to the online industry that potentially undermine minors' protection remain and they should be reconsidered. Firstly, the 72- hour grace period, during which the age verification process must be carried out, does not have any

⁵⁸⁷ The activities included: betting on Grand National and other horse racing, playing lottery or scratch-cards by under 16; slot machines other than Category D; betting on football and other sports, poker, blackjack and roulette

⁵⁸⁸ Other persons mentioned were: parent, friend's mother, mates and one person refused to specify

statutory basis and should not be supported, even though it is included in the EU Commission's recommendation. Such period during which an unidentified customer may gamble undermines minors' protection as it blurs the boundaries between licensed and unlicensed sites; may in fact be long enough to introduce minors to the excitement of gambling, and does not have any legislative support. The Gambling Commission's LCCP should reflect this. Furthermore, when using third parties, or referring to the variety of available electronic databases, the online providers should ensure that at least two electronic sources are referred to, as none of them is 100% fault proof. The legislator should clarify the potential liability of third parties that may be used for identification purposes.

The prevention of underage access levels in land-based venues still remains inadequate. The actual reasons for such non-compliance is difficult to discern. However, it is submitted that, in addition to practical difficulties that ensue from sellers' attempts to guesstimate customers age, the statutory provisions are not fully enforced and, as a result, do not have a sufficient deterrent effect.

Finally, as it has already been also identified and explicitly mentioned in the study by Blaszczyński et al⁵⁸⁹, Part IV of the Gambling Act and other legislation does not address clearly enough, the risk of parents/guardian or other older persons purchasing gambling products on behalf of minors. In light of the evidence that proves that relaxed parental attitudes towards this form of entertainment may significantly undermine any efforts of the gambling industry to stop minors from gambling, and the evidence that such conduct indeed takes place, the lack of clarity in this area is unwelcome. The legislator should either make the applicability of s.46 to such behaviour clear, or more preferably to introduce a clear "*proxy liability*" offence. The gambling industry should then be required to ensure that the existence of such liability is clearly brought to the attention of all adults purchasing their gambling services. While such '*proxy offences*' would most likely remain unenforced, they would at least send the right legislative message and raise awareness amongst the adult population that gambling by minors may be harmful and should not be encouraged by anyone.

⁵⁸⁹ Alex Blaszczyński 'and others', 'Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions' (RGT 2014), http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf accessed December 2014

3. Chapter 3 – Does fun gambling entice minors’ into real money gambling? Minors views and perceptions.

3.1. Introduction

In Chapter 1, paragraph 1.2.2 the structural and psycho-social similarities between penny auctions and gambling were considered. Due to omnipresence, technological convergence, and increased sophistication, the playing of ‘demo’/social gambling games and video games containing gambling-like elements by youth has also been raised as a potential concern in the context of minors’ protection from gambling related harm⁵⁹⁰. They have been argued to present a potential risk to adolescents, either because they may in themselves lead to harm as a result of e.g., excessive play, or because they may entice them into real money gambling⁵⁹¹.

This chapter is concerned with the second assertion only. Such determination is of crucial importance to the UK Gambling Commission responsible for ensuring the achievement of the third licensing objective of the Gambling Act 2005 as well as for other legislators⁵⁹². Adequate regulation of all activities which encourage minors to try out prohibited forms of real money gambling should constitute an inherent part of any strategy that aims to protect minors from gambling-related harm.

As demonstrated in paragraph 1.2.7 ‘demo’/social gambling and gambling-like elements in hybrid video games currently are considered to lack a prize that is ‘*money or money’s worth*’. This removes such games from the regulatory regime created by the Gambling Act 2005 and places them within the remit of regulation of video games and online gaming. The regulation of non-gambling games is very fragmented and, at best, incomplete. Since July 2012, the role of rating video games has been allocated to the Games Rating Authority by the Video Recordings (Labelling) Regulation 2012 authorised by s.41 of the Digital Economy Act 2010. In effect, UK law incorporates the

⁵⁹⁰Jeffrey L Derevensky, Rina Gupta, and Maggie Maggon, ‘Adolescent Problem Gambling: Legislative and Policy Decisions’ (2004) 8(2) Gaming Law Review 107; Daniel King, Paul Delfabbro, Mark Griffiths, ‘The Convergence of Gambling and Digital Media: Implications for Gambling in Young People’ (2010) 26(2) J Gamb Stud 175; Jonathan Parke ‘and others’ ‘Exploring Social Gambling: Scoping, Classification and Evidence Review’ (Gambling Commission, 2012) <<http://www.gamblingcommission.gov.uk/pdf/Exploring%20social%20gambling%20-%20scoping,%20classification%20and%20evidence%20review%20-%20May%202013.pdf>> accessed October 2012; Jas Purewal, ‘Social Gaming: The Converging Worlds of Social Gaming and Gambling’ (2012) 11(6) WOGLR 7

⁵⁹¹ Mark D Griffiths, ‘Gaming Convergence: Further Legal Issues and Psychosocial Impact’ (2011) 15(7/8) Gaming Law Review and Economics 461

⁵⁹² Julian Harris & John Hagan (eds), *Gaming Law: Jurisdictional Comparisons* (Thomson Reuters 2012)

Pan European Game Information (PEGI) system⁵⁹³ and requires all video games that are suitable to be played only by those over the age of 12 years old to be classified.

PEGI explicitly lists simulated gambling as one of the components that must be included in the consideration when classifying video games. However, this has not stopped many games with overt or covert gambling-like elements such as *Super Mario* or *Moshi Monster* to be classified as suitable “for all persons”⁵⁹⁴. Indeed, it has been reported that since the year 2000 about 100 new games were introduced with gambling-like activities, with most of them being rated either as “suitable for all” or one that should be played under “parental guidance”⁵⁹⁵.

Moreover, the PEGI system typically rates games that are sold in physical form. It was only relatively recently that PEGI Online began to offer greater protection to minors on the internet. Their operation and scope is still different from the main PEGI system thus further adding to the complexity and fragmentation of regulatory provisions. Many typical casino games such as roulette and poker are rated on *i-Tunes* as suitable for those over the age of 12 years and are freely accessible to minors. Additionally, even games that are rated as suitable for over 18 only are known to be often played for those below the specified age⁵⁹⁶.

Such a situation could, on the one hand, lead youth to try out gambling for real. In the alternative, it may inhibit youths’ gambling for money because they can play for free. These contrasting possibilities render a precautionary approach less desirable, making the need for a sound empirical evidence base even more important before a decision is made as to how such games should be regulated, if at all. However, existing evidence remains contentious as to whether demonstration games (more popularly known as ‘demo’ games), social fun gambling games, and/or gambling-like activities within hybrid games increase young peoples’ propensity to take up actual real money gambling and there is still a shortage of empirical data that considers young people’s perception and attitudes towards these two forms of entertainment.

⁵⁹³ <<http://www.pegi.info/en/index/>>

⁵⁹⁴ PEGI Rating “3”

⁵⁹⁵ Daniel King ‘and others’, ‘What Risks Do Simulated Gambling Activities Pose to Young People? Preliminary Results from the Samus Project’ <<http://www.kunobook.com/pdf/what-risks-do-simulated-gambling-activities-pose-to-young-1630/>> accessed May 2014

⁵⁹⁶ Peter Nikken and Jeroen Jansz, ‘Playing Restricted Videogames: Relationship With Game Ratings and Parental Mediation’ (2009) 1(3) *Journal of Children and Media* 227

The purpose of this chapter is to analyse how young people experience monetary and simulated forms of gambling, and whether they are sufficiently aware of the differences between them. No UK study, as yet, has directly asked young people what they think about the relationship between gambling-like games and real money gambling games and in this chapter this area is explored in order to fill this gap. This contributes to the development of the wider evidence base that should underpin any legislative decision as to whether to retain status quo, bring fun-gambling games under real money gambling regulations and subject it to age-restrictions applicable to monetary gambling, or whether such proposition would, in fact, prove counterproductive and an interim solution is needed.

This chapter of the thesis is divided into two parts. In the first part I examine the reasons why the cross-over between non-monetary and monetary forms of gambling may ensue, and why it has been raised as an area of concern. This is followed by what we currently know about the impact of ‘demo games’, ‘social fun gambling games’, and hybrid and entertainment games. The second part presents the results of the qualitative focus groups carried out with pupils attending schools in the area of London and Kent.

3.2. Why have non-monetary forms of gambling within video games been considered as potentially inducing minors to take up real gambling?

3.2.1. The concern?

The potential relationship between non-monetary forms of gambling and real money gambling remains uncertain. It has been speculated that the first may lead to the second due to the similar structural and psychosocial characteristics of both activities, as well as due to the technological advances which enable both activities to be offered on the same platforms, using the same technological solutions, and within the same environment, either as separate or integrated games. Both share many structural features, and both satisfy similar psychological and social needs that, over time, may lead minors to believe that these two types represent similar forms of entertainment.

Furthermore, although ‘demo games’ are invariably free, social fun gambling games and video games with gambling-like activities increasingly utilise the ‘*freemium*’ model whereby players can acquire the game for free but with the option of paying in order to e.g., gain access to enhanced game features, to progress more rapidly through the levels, or to send virtual gifts to other players. Minors who spend money on ‘*in-app*’ purchases

in such games may be enticed to try real money gambling as they may consider that it would be more worthwhile to spend the money on games where they can actually win a real prize. The ubiquity of ‘demo’/social games or gambling-like activities makes them more likely to be known and recognised by pupils, and may also lead to “normalisation” of real money gambling or to the development of positive attitudes toward this form of leisure⁵⁹⁷.

In other words, players may experience a smooth transition from one activity to another. Such cross-over is certainly hoped for by some commercial players as demonstrated by the comments of Leigh Nissim, Commercial Director of IGT, made during the Social Gambling Workshop at the Mobile and Tablet Gaming Summit, who stated that “*any gambling company that is able to successfully integrate similar design and achieve a similar level of commitment from the players [that they achieve on social gaming sites] would completely swipe the market*”⁵⁹⁸.

Furthermore, players of ‘demo’ games on real money gambling websites are almost invariably met with several promotional messages during their ‘demo’ play enticing them to transfer onto the real play by e.g., being offered a financial bonus or free additional spins⁵⁹⁹. The risks of such potential transition materialising for minors is undesirable. Therefore, the existence of such risk should be assessed and if present, the risks should be minimised or if possible, eliminated.

3.2.2. Structural and psycho-social characteristics

3.2.2.1. Structural similarities

Such risks may arise due to structural and psychosocial similarities between entertainment and hybrid games, non-monetary forms of gambling and real money gambling.

Structural characteristics have been defined by Griffiths⁶⁰⁰ as “*features of the gambling activity itself that often influence the development and maintenance of gambling behaviour*”. These include features such as: event frequency that determines how often a

⁵⁹⁷ Daniel King, Paul Delfabbro, Mark Griffiths, ‘The Convergence of Gambling and Digital Media: Implications for Gambling in Young People’ (2010) 26(2) J Gambl Stud 175

⁵⁹⁸ Leigh Nissim, ‘Social Gambling Workshop’ (Mobile and Tablet Gambling Summit, 21-22 November 2012 London)

⁵⁹⁹ Candidate’s observation during the mystery shopping exercise

⁶⁰⁰ Mark D Griffiths, *Encyclopaedia of Adolescences* (Vol.3 2011) 11-20

particular event occurs within a game; “*repetitiveness*” where players repeat similar sequences of activities in order to reach their goal; “*entrapment*” where players feel that they have “*gone too far to stop*”; “*near misses*” where the outcome of a play is perceived by players to be nearly winning as opposed to losing⁶⁰¹; and similar. Real money gambling and most forms of video gaming also share similar sounds and graphic effects, control options, use of humour and famous brands or familiar settings (such as television or cartoons)⁶⁰².

3.2.2.2. ‘Demo’ practice and social gambling games

‘Demo’ practice games mirror traditional casino games such as poker, roulette, blackjack and slot machines. They can be accessed on a variety of platforms including social networking sites⁶⁰³, online video gaming sites⁶⁰⁴ and real money gambling websites⁶⁰⁵. Equally they can be purchased in physical forms from shops or downloaded from i-Tunes, Android or other application stores. Some mobile phones even come pre-loaded with certain types of poker games. For a minority of the games there may be a small acquisition cost, but the vast majority are available free of charge and these are pre-programmed with usually high amounts⁶⁰⁶ of virtual points or credits.

Depending on the monetisation strategy, these games are free because the providers gain their revenue from advertisements, in-app purchases, the marketing value of the game, or because they hope that players may become bored with ‘demo games’ and register with them to play for real. As these games follow the format of real gambling games, their structural characteristics are typically identical apart from two critical distinctions.

The first difference lays at the centre of this debate, and has already been highlighted in Chapter 1, paragraph 1.2.7. Those games currently escape being caught by the Gambling Act 2005 because they do not offer any monetary prizes, or the possibility of formally cashing out any winnings.

⁶⁰¹ Mark Griffiths, ‘Psychobiology of the Near-Miss in Fruit Machine Gambling’ (2010) 125(3) J Psychol 347

⁶⁰² Jonathan Parke, Mark D Griffiths, ‘The Role of Structural Characteristics in Gambling’ (2007) 9 Research and Measurement Issues 218

⁶⁰³ e.g., poker on *Facebook*

⁶⁰⁴ e.g., *WildTangent*

⁶⁰⁵ e.g., *Paddy Power* calls them “*fun games*”; <<http://games.paddypower.com/?LANG=en>> accessed September 2014

⁶⁰⁶ Candidate’s own observation of ‘demo’ games

The second distinction is more controversial⁶⁰⁷ and may apply only to some of the practice games available. While gambling software has to comply with strict regulations to ensure fair distribution of prizes⁶⁰⁸, no such regulations apply to ‘demo’/social gambling games. Sevigny et al⁶⁰⁹ tested 117 online real money gambling sites and reported that 39% of them provided inflated pay-out rates of over 100% during the ‘demo’ session that were not maintained during the actual for money games.

Some operators are open about providing different indicators of possible wins in practice games. For example, *Facebook* does not hide⁶¹⁰ that they deploy algorithms to prolong players’ enjoyment as opposed to random chance and mathematical formulas, but this information is unlikely to be known to an average player. Other companies’ pay-out rates may be more covert and entirely undiscoverable. Such misrepresentation of the odds and chance of success may create or reinforce existing erroneous beliefs that gambling for real produces financial rewards quickly and easily.

3.2.2.3. Entertainment and hybrid games

Structural similarities are not confined to fun gambling games. Although entertainment games do not automatically follow the same format as the fun gambling games and have many different aspects, they nevertheless share many similarities with real money gambling, many of which have been identified in the literature already.

For example Karlsen⁶¹¹ analysed the features of the massively multiplayer online role playing game *World of Warcraft* and argued that aspects such as repetitiveness of playing action with variable reinforcement schedule, ‘near misses’ and ‘entrapment’ are also clearly present within video games. These are also often cited as reasons for increased real money gambling as well. Within *World of Warcraft* the element of repetitiveness is embedded in the ‘grinding’ process whereby a “player is repeating the same simple action

⁶⁰⁷ ‘Harvest Strategy Report: A New Industry’s Profile: Digital+Social+Game=Digsogame’ <www.harveststrategy.com.au> accessed November 2014

⁶⁰⁸ Gambling Commission, ‘Remote Gambling and Software Technical Standard’ (July 2015) <<http://www.gamblingcommission.gov.uk/pdf/Remote-gambling-and-software-technical-standards.pdf>> accessed July 2015

⁶⁰⁹ Serge Sevigny ‘and others’, ‘Internet Gambling: Misleading Pay-Out Rates During the Demo Period’ (2005) 25(1) *Computer in Human Behavior* 153

⁶¹⁰ Sally M Gainsbury, Jeffrey L Derevensky, ‘What Do We Currently Know About the Impact of Social Media Gambling Games Upon Current and Future Gambling Among Young People?’ (15th International Conference on Gambling and Risk Regulation, Las Vegas, May 2013)

⁶¹¹ Faltin Karlsen, ‘Entrapment and Near Miss: A Comparative Analysis of the Psycho-Structural Elements in Gambling Games and Massively Multiplayer Online Role-Playing Games’ (2010) 9 *Int J Mental Health Addition* 193

over and over again to gather resources”, with the action itself requiring no real skill. This is compared to playing real money slot machines that are equally repetitive and typically⁶¹² require no real skill at all. However, for many real money slot machine enthusiasts this repetitive action is a source of fun and entertainment, whereas those who grind in World of Warcraft generally acknowledged that the grinding process was simply necessary to enhance their social in-game recognition stemming from progressing to higher levels quicker, but not enjoyable in itself. Moreover, the outcomes on the real money slot machines are unpredictable, whereas grinding within the game is certain to produce the desired rewards.

Unlike repetitiveness, ‘*entrapment*’ is not an inherent part of video games, but in some it is a very powerful method to keep players tied to the game. *Farmville*, a game played on Facebook which involves creating and looking after a virtual farm, adopts a very visible method of entrapment. The structure of the game necessitates players to log-in on a regular and frequent basis as otherwise their crops will die and players need to start from the first stage again. This is designed to replicate possible life events within a virtual environment, and potentially teach children the meaning of duties, but it remains just a game. Persistent playing may, in fact, detract children from real life responsibilities and may underpin the development of unhealthy attraction to repetitive in-game activities. This may subsequently be transferred onto real money gambling.

The ‘*near miss*’ is also influential in encouraging both real money gambling and video gaming because players perceive such outcomes not as losing, but as nearly winning⁶¹³. Within both types of games, this gives players the hope that they are close to a successful outcome and prevents them from getting bored too quickly⁶¹⁴. Progression through the levels, and accomplishments of the final task, must not appear too easy but neither must it give the appearance of being unattainable in order to maintain the willingness to come back and try again⁶¹⁵. This also contributes towards the illusion of control which is discussed further below.

⁶¹² Although exceptionally slot machines where skill plays some part may still be found in some places in Great Britain

⁶¹³ Mark Griffiths, ‘Psychobiology of the Near-Miss in Fruit Machine Gambling’ (2010) 125(3) J Psychol 347

⁶¹⁴ Near miss is a necessary prerequisite in all game that involve progressing through levels and achieving certain goals but not in creative games such as arts and crafts (e.g., Minecraft or Barbie Doll)

⁶¹⁵ Daniel King, Paul Delfabbro, Mark Griffiths, ‘Video Game Structural Characteristics: A New Psychological Taxonomy’ (2010) 8(1) International Journal of Mental Health Addiction 90

It has been speculated that the structural similarities may give potential gamblers the opportunity to familiarise themselves with the applicable rules, and allow them to practice, in order to improve their skills without risking any money. This, in turn, may encourage the same players to confuse real skill with luck and to use these newly learned or seemingly improved ‘skills’ on real sites⁶¹⁶. Following the same arguments, Messerlian et al⁶¹⁷ suggested that these practice sites may work as preparatory stages before one moves onto the real online gambling as they appear attractive to young people due to their “*colourful, fast paced videogame-like qualities*”.

3.2.2.4. Psychosocial similarities

Psychosocial characteristics may play an equally important part. For example, the illusion of control arises when players believe that they are able to exert or influence a positive outcome of a particular event by using their individual skills, actions or having a ‘*lucky charm*’ in situations where, objectively, no such influence is possible, or is substantially smaller than the players’ perception. Langer⁶¹⁸ defined this phenomenon in more technical terms as the “*expectancy of a personal success probability inappropriately higher than the objective probability would warrant*”. Such illusion of control is propagated by both real money gambling games and video games by utilising similar control options and having similar advancement rates in terms of how quickly players are able to progress through the games⁶¹⁹.

However, while the heuristic method of entertainment games typically allows players to improve their performance by persistent training and betterment of their playing skills, no amount of practice can influence the outcome of pure random events in games of pure chance. Only relatively limited improvements can be achieved in games with combined skills and chance, if the chance dominates. Although neither is based on pure skill, this may underpin cognitive misconceptions whereby minors develop an inappropriate perception that they are able to control random events by incorrectly comparing video

⁶¹⁶ Daniel King, Paul Delfabbro, Mark Griffiths, ‘The Convergence of Gambling and Digital Media: Implications for Gambling in Young People’ (2010) 26(2) J Gambl Stud 175

⁶¹⁷ Carmen Messerlian, Andrea M Byrne, Jeffrey L. Derevensky, ‘Gambling, Youth and the Internet: Should We Be Concerned?’ (2004) 13(1) The Canadian Child and Adolescent Psychiatry Review 3

⁶¹⁸ Ellen J Langer, ‘The Illusion of Control’ (1975) 32(2) Journal of Personality and Social Psychology 311

⁶¹⁹ Daniel King, Paul Delfabbro, Mark Griffiths, ‘Video Game Structural Characteristics: A New Psychological Taxonomy’ (2010) 8(1) International Journal of Mental Health Addiction 90

games to real money gambling, either on a conscious or subconscious level⁶²⁰. This may result in them trying out real money gambling due to the belief that if they are particularly successful at playing video games then they will be equally fortunate in real gambling.

Furthermore, actual understanding of odds and probabilities tends to be poor amongst adolescents and even adults. For example, Delfabbro et al⁶²¹ found among a sample of 2,669 South Australian students aged between 13 and 17 years old that their substantive knowledge was relatively poor. Many of them were vulnerable to ‘*gamblers’ fallacy*’ which causes players to forget that each gambling event is independent of each other and unrelated to any previous or subsequent one, and makes them believe that events will “*correct themselves over time*”. A distinction was found to exist between pathological gamblers and others. Those who had a gambling problem were more likely to believe that a higher level of skills was involved, despite having broadly similar knowledge of the principles that apply to odds and probability. Hume and Mort⁶²² similarly reported that many people aged between 13 and 30 years old did not have accurate understanding of the differences between games and real money gambling.

Secondly, the analysis of players’ motivations shows that both video gaming and real money gambling stimulate similar outcomes in terms of emotional needs satisfaction, relief from stress and boredom, socialisation, arousal and competitiveness⁶²³, and/or escapism⁶²⁴. This means that adolescents may seek either of these activities as they tend to fulfil similar, albeit not identical needs.

Some social gambling operators entice their customers by increasing social interaction and by encouraging players not only to invite friends but also to share virtual goods, or to send gifts in their ‘freemium’ entertainment models. These transferable items include virtual cards, flowers, birthday cakes, music tracks or in-game credits which the recipient

⁶²⁰ Jeffrey L Derevensky, Rina Gupta, and Maggie Magoon, ‘Adolescent Problem Gambling: Legislative and Policy Decisions’ (2004) 8(2) Gaming Law Review 107

⁶²¹ Paul Delfabbro ‘and others’, ‘Knowledge and Beliefs About Gambling in Australian Secondary School Students and their Implications for Educational Strategies’ (2009) 25 J Gambl Studies 523

⁶²² Margee Hume and Gillian Sullivan Mort, ‘Fun, Friend or Foe: Youth Perception and Definition of Online Gambling’ (2011) 17(1) Social Marketing Quarterly 109

⁶²³ Mark Griffiths, Richard TA Wood, A. (2000). ‘Risk Factors in Adolescence: the Case of Gambling, Videogame Playing and the Internet (2000) 16(2/3) Journal of Gambling Studies 199

⁶²⁴ Charlotta Hellstrom ‘and others’, ‘Influences of Motives to Play and Time Spent Gaming on The Negative Consequences of Adolescent Online Computer Gaming’ (2012) 28(4) Computers in Human Behavior 1379

can enjoy, or stay in the game for longer without incurring additional expenditure⁶²⁵. These are not currently considered to be equivalent to money in real terms, despite the existence of black markets where they may be traded⁶²⁶, but they may contribute to the ‘substitution effect’ whereby the virtual gift is treated by the donor and the recipient as a replacement of, rather than addition to, a material, non-virtual gift. This may fulfil a similar social function thus making these games even more attractive. That, in turn, may increase the propensity towards real money gambling.

Furthermore, the lack of monetary rewards may not be very noticeable during online play. The internet is a cash-free environment where all transactions are carried out by means of electronic payments. It is generally accepted that virtual representations of money (e.g., e-cash, chips, tokens, etc.) lower their psychological value⁶²⁷. Moreover, there is much empirical evidence showing that the motivations for adolescents’ gambling with real money are not limited to winning money but also focus on “*fun and entertainment factors*”, “*to alleviate feelings of boredom and for social reasons*”⁶²⁸ as well as to experience “*the forbidden fruit*”⁶²⁹ which further reduces the prime role of financial reward from the game.

The effect, whether such games increase or inhibit gambling propensity, may be further influenced by the reasons for playing. The most influential typology of players was developed by Bartle⁶³⁰, who classified them into four main categories: achievers, explorers, socialiser and killers. According to his taxonomy, achievers are mainly interested in high scores and rapid progression through the levels; explorers wish to understand the mechanics of the game; socialisers focus on people’s interactions; and killers derive pleasures from eliminating other players’ ‘personae’⁶³¹.

⁶²⁵ BBC News, ‘Sales of Virtual Goods Boom in US’ (2009) <<http://news.bbc.co.uk/2/hi/8320184.stm>, in December 2013> accessed May 2015

⁶²⁶ See Chapter 1 for full discussion

⁶²⁷ Mark Griffiths, ‘Internet Gambling: Issues, Concerns and Recommendations’ (2003) 6(6) *CyberPsychology & Behavior* 557

⁶²⁸ Mark Griffiths, Richard TA Wood, ‘Risk Factors in Adolescence: the Case of Gambling, Videogame Playing and the Internet (2000) 16(2/3) *Journal of Gambling Studies* 199

⁶²⁹ David Giacomassi, B. Grant Stitt and Mark Nichols, ‘Motives and Methods of Under-Age Casino Gamblers’ (2006) 22 *J. Gambl Stud* 413

⁶³⁰ Richard Bartle, ‘Hearts, Clubs, Diamonds, Spades: Players Who Suit MUDS’ (1996) <<http://www.mud.co.uk/richard/hcds.htm>> accessed January 2014

⁶³¹ Bartle (n 630)

More generically, Lafreniere et al⁶³² described the difference between intrinsic and extrinsic motivations. Those who “*play because they enjoy exploring the game universe and improving their skill levels or because they like the thrill and strong sensation the game provides*” or those who socially gamble predominantly to have fun, are intrinsically motivated and for them the availability of the social gaming may detract them from having a need to gamble for real. Conversely, those who “*play to obtain in-game award, such as virtual currency, experience points, or to gain admiration and recognition from other players*” or who gamble in the hope of winning money, are extrinsically motivated. For them the availability of social gambling may increase the desire to gamble for real.

3.3. What do we currently know about the influence of non-monetary forms of gambling on propensity towards real money gambling?

The above contradicting possibilities makes it imperative that the Gambling Commission actively engages with the collection and analysis of the empirical evidence. As yet, the existing literature has not dealt with hybrid games separately and they are either omitted from analysis or included as part of the consideration of ‘demo’/social gambling or entertainment video games, or both. Frequently, the literature also considers social gambling and ‘demo’ gambling together. However, it is this candidate’s submission that, despite the similarities, they have sufficiently distinctive psycho-social aspects and the differences must be noted. When a child seeks out a ‘demo’/social gambling game on a real money gambling website they would normally do so purposefully, whereas coming across a ‘demo’/social gambling game on social networking sites may be more accidental and as a result of being exposed to advertisements, or to a recommendation from an online friend, or through just browsing. Within hybrid games the gambling-like component may not be obvious and minors may not fully realise or appreciate from the outset, or even after a certain period of time, that they are in fact engaging in a gambling-like activity.

‘Demo’/social gambling games are not new and, even before the proliferation of video technology, many children’s games were comparable to real money gambling. Smith and Abt⁶³³ argued early on that young American boys playing marbles and flipping collectors cards when they risked something of value (their marble or collectors’ cards) to gain a

⁶³² Mark-Andre K Lafreniere, Jeremie Verner-Fillion, Robert J Vallerand, ‘Development and Validation of the Gaming Motivation Scale GAMS’ (2012) 53 Personality and Individual Differences 827

⁶³³ James F Smith and Vicki Abt, ‘Gambling as Play’ (July 1984) 474 Annals of the American Academic of Political and Social Science 122

prize (another player's marble or a desired card) were, in fact, gambling for real. Similarly, if they played these games just for fun or to pass the time without any actual exchange of marbles or cards taking place, they engaged in an activity that was equivalent to modern day 'demo'/social gambling. It may therefore be argued that this phenomenon is old and, as it did not appear to cause any harm to this generation of children, 'demo'/social gaming is unlikely to cause any harm to the current generation either. However, games have become much more sophisticated and accessible⁶³⁴ and their impact on gambling-related problems remains uncertain.

3.3.1. 'Demo' practice games and social gambling

No conclusive evidence proving that fun gambling games cause players to move to real gambling exist, but there is empirical data arguing that the correlation between playing in a free mode and gambling with real money is unequivocal⁶³⁵. The latest Young People Omnibus 2014⁶³⁶ also reported a close association between playing in the free mode and real money gambling. Statistical regression analysis⁶³⁷ carried out on the data previously collected by the British Survey of Children, the National Lottery and Gambling 2008/2009 of 2009⁶³⁸ with a sample of 8,893 pupils aged between 11 and 16 years old, showed that participating in free practice games on **real money gambling** websites [emphasis added] was positively correlated to real money gambling⁶³⁹. It was further found that gambling for fun was "*the single most important predictor of whether the child had gambled for money in the period and one of the most important predictors of problem gambling*"⁶⁴⁰.

⁶³⁴ Sally M Gainsbury, Jeffrey L Derevensky, 'What Do We Currently Know About the Impact of Social Media Gambling Games Upon Current and Future Gambling Among Young People?' (15th International Conference on Gambling and Risk Regulation, Las Vegas, May 2013)

⁶³⁵ Correlation implies association between two different variables while causation implies that one variable influences the other. Correlation may indicate causation but this cannot be implied

⁶³⁶ Young People Omnibus 2014, 10

⁶³⁷ Statistical regression analysis is a generic term that incorporates several statistical processes that aim to determine the relationship between different variables in quantitative studies

⁶³⁸ Ipsos Mori, 'British Survey of Children, the National Lottery and Gambling 2008-09: Report of a Quantitative Survey', (National Lottery Commission 2009) <http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf> accessed May 2015

⁶³⁹ David Forrest, Ian McHale, 'Gambling and Problem Gambling Among Young Adolescents in Great Britain' (2012) 28(4) J Gambl Stud 607

⁶⁴⁰ Ipsos Mori, Appendix 5 'British Survey of Children, the National Lottery and Gambling 2008-09: Report of a Quantitative Survey', (National Lottery Commission 2009) <http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf> accessed May 2015, 133

However, the same study did not produce conclusive correlation between playing fun gambling games on social networking sites and real money gambling. Nevertheless, a more recent study carried out by Kim et al⁶⁴¹ with adult participants, reported that 26% of social gaming players migrated to online real gambling within six months of starting social games⁶⁴². Additionally, Bednarz et al⁶⁴³ established a link between playing practice games and increased risk taking in gambling in comparison to the control group in a study carried out in a laboratory setting with 80 adult participants. They suggested that exposure to winnings in a free mode may alter the players' perceptions of the game and influence a more risky attitude to playing, although the effect was only short-term⁶⁴⁴.

Bednarz et al's study has not, as yet, been confirmed outside laboratory settings. However, if the findings were validated it would be important to see if a similar effect could be observed on a sample of children. Moreover, the study by King et al⁶⁴⁵ with approximately 1287 Australian students aged between 12 and 18 years, identified that the use of gambling apps on *Facebook*, *smartphone apps*, and *gambling video-games* had the strongest association with pathological gambling and the frequency of engagement with simulated gambling had the strongest positive association with real money gambling⁶⁴⁶.

Correlation does not necessarily imply causation and there are studies which suggest that the correlation may be merely coincidental. For example, Floros et al⁶⁴⁷ pointed out that those who seek out the free games on real money gambling websites, as opposed to coming across them on other platforms incidentally, may already have a latent predisposition to be interested in real money gambling. It has also been acknowledged that gambling for money and fun gambling may attract individuals of different personalities⁶⁴⁸. In other words, it may be argued that it is not the practice games that

⁶⁴¹ Hyoun S Kim 'and others', 'Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors' (2014) *J Gambl Stud* DOI 10.1007/s10899-014-9511-0

⁶⁴² Kim et al (n 641) study tested 4 predictors of migration: time spent, skill building, enhancement and micro-transactions. Of those only micro-transactions significantly influenced "the odds of migrations to online gambling (Wald's $X^2(1)=8.23$, $p=.004$, CI [1.94, 34.26], OR = 8.6". When all predictors were kept at fixed value, "the chances of migration were only about 26% (Wald's $X^2(1)=24.37$, $p<.001$, OR = 0.26)

⁶⁴³ Jana Bednarz, Paul Delfabbro, Daniel King, 'Practice Makes Poorer: Practice Gambling Modes and Their Effect on Real-Play in Simulated Roulette' (2013) 11(3) *Int J Ment Health Addiction* 381

⁶⁴⁴ Bednarz (n 643)

⁶⁴⁵ Daniel King 'and others', 'Adolescent Simulated Gambling Via Digital and Social Media' (2014) 31 *Computers in Human Behavior* 305

⁶⁴⁶ King (n 645), "the size of the observed effects was small to moderate"

⁶⁴⁷ Georgios D Floros 'and others', 'Adolescent Online Gambling: The Impact of Parental Practices and Correlates with Online Activities' (2013) 29 *Journal of Gambling Studies* 131

⁶⁴⁸ Sally M Gainsbury, Jeffrey L Derevensky, 'What Do We Currently Know About the Impact of Social Media Gambling Games Upon Current and Future Gambling Among Young People?' (15th International Conference on Gambling and Risk Regulation, Las Vegas, May 2013)

encourage real gambling, but those who are interested in real activities may wish to explore the rules and practice before undertaking any financial risks on real gambling websites. If this holds true, the availability of ‘demo’ games without any age verification certainly does not help those who may already be at risk of developing gambling-related problems but it highlights that those games may not necessarily contribute to it. Furthermore, the availability of social gambling, instead of encouraging real gambling, may in fact inhibit such propensity, as similar needs can be satisfied at substantially reduced financial cost. Indeed, as it has been highlighted by the Harvest Strategy Report⁶⁴⁹, the introduction of ‘demo’/social gambling games coincided with the trends of overall decreasing levels of engagements in real money gambling and problem gambling.

3.3.2. Hybrid and entertainment games

In the field of hybrid and entertainment games, the available empirical data is even more limited and contradictory. Early research by Gupta and Derevensky⁶⁵⁰ surveyed 104 children aged between 9 and 14 years old in 1996. They found that those children who played video games for longer periods of time were also likely to gamble with money more than their peers, who otherwise played less frequently. However, a subsequent project carried out by Delfabbro et al⁶⁵¹ in 2009 with 2,669 adolescents aged between 13 and 17 years old, concluded that the effect of association became less significant once control, and other factors such as gender, had been applied⁶⁵². The difference in the age group of both samples, and the time-lap between the two studies, prevents direct comparison and may indicate that a correlation exists for younger children but not for teenagers, or that cultural changes which occurred in the interim period affected the results.

A more recent result of a questionnaire administered to 65 electronic gambling machine players and 50 regular video game players carried out by King et al⁶⁵³, indicated similar results. They found no significant correlation between video game playing and real money

⁶⁴⁹ ‘Harvest Strategy Report: A New Industry’s Profile: Digital+Social+Game=Digsogame’ <www.harveststrategy.com.au> accessed November 2014

⁶⁵⁰ Rina Gupta, Jeffrey L Derevensky, ‘The Relationship Between Gambling and Video Games Playing Behaviour in Children Adolescents’ (1996) 12(4) Journal of Gambling Studies 375

⁶⁵¹ Paul Delfabbro ‘and others’ ‘Is Video-Game Playing a Risk Factor for Pathological Gambling in Australian Adolescents?’ (2009) 25(3) J Gambl Stud 391

⁶⁵² The effect of association between the frequencies of video game playing and pathological gambling was ‘significant’ but “*the strength of this effect was very small*” (n^2 0.01 for TV games, phone games, hand-held games; n^2 0.02 for arcade games and n^2 <0.01 for PC games); Delfabbro (n 651)

⁶⁵³ Daniel L King, Anastasia Ejova, Paul Delfabbro, ‘Illusory Control, Gambling, and Video Gaming: An Investigation of Regular Gamblers and Video Game Players’ (2012) 28 J Gambl Stud 421

gambling, or video game playing and problem gambling behaviour. Nevertheless, Floros et al⁶⁵⁴ examined a sample of 2,017 students aged between 13 and 19 years old living on the Greek Islands of Kos and, again, found a correlation between engagement in online gaming and online real money gambling, with particularly “*heavy clustering of 37/81 cases of gambling addiction in the most frequent social network user category*”⁶⁵⁵.

3.4. The Present Study

As the study was exploratory in nature, it aimed to capture how pupils categorise, construct and react to gambling-like activities in order to further contribute to the above debate.

3.4.1. Results

3.4.1.1. Video gaming and gambling engagement

Video gaming participation was reported by pupils to be widespread, popular, and easily accessible in both age groups in relation to the number and variety of entertainment/hybrid games played, and the average time spent on the activity. Of the 200 active participants, only nine pupils stated that they were genuinely not engaged in any sort of video gaming, representing 4.5% of the overall sample size. At the initial stage of the discussion, a higher number of participants declared their non-involvement in video gaming but, during the session, it became apparent that they were in fact playing several games, albeit only occasionally. Time spent on the activities varied from playing only during occasional visits to a friend’s house, to playing up to six hours during a school day, and 15 hours at the weekend. Very excessive playing was rare but, for example, Ray (14, m) was described by his friend Joe as “*a crack addict for games*”.

No average time spent playing games was identified, but many pupils played on a regular, as opposed to occasional basis, and many admitted to playing every day after school or at work during their part-time jobs. Many pupils from both age groups reported that they spent more time playing video games when they were younger than they did at the time of the focus group session, indicating that the peak of their video game participation was well below the age of 14 years old. The vast majority of games played were either free of

⁶⁵⁴ Georgios D Floros ‘and others’, ‘Adolescent Online Gambling: The Impact of Parental Practices and Correlates with Online Activities’ (2013) 29 Journal of Gambling Studies 131

⁶⁵⁵ The effect size for “correlates of gambling, online gaming and social networking” were reported to be between small (0.1) and medium range (0.3)

charge or a one-off payment, with only a few participants subscribing to strategic games that required monthly subscription payments. Those who paid for subscriptions, either for the game itself or for the live functions on *Xbox*, were also the ones that tended to play more often and for longer periods of time.

The Most popular games, defined as being mentioned by every single focus group, were *Call of Duty*, *Subway Surfers*, *The Sims*, *FIFA* and *Angry Birds*. The second most popular games (defined as mentioned by at least three different focus groups) were *Grand Theft Auto*, *Assassin's Creed*, *Fruit Ninja*, *Mario (several varieties)*, *Halo*, *Moshi Monsters* and *Minecraft*⁶⁵⁶. Only negligible differences were noticed within the game choices between the two age groups, despite some of them being PEGI classified as suitable only for over 16 years of age, (e.g., *Call of Duty – Classic*, *Call of Duty – Declassified*, *Halo*, *Fable 2*) or 18 years old (e.g., *Call of Duty – Modern Warfare*, *Grand Theft Auto*). Collectively, those aged 17 to 18 years old played less of the games rated PEGI 3 or 7 than those rated 16 or 18, whereas those aged 14 to 15 years played all games frequently, regardless of rating.

From the most popular games that were mentioned by pupils, *Call of Duty*, *FIFA*, *Grand Theft Auto*, *Moshi Monster* and *Super Mario* contain gambling-like elements and were categorised as hybrid games, while other games did not include any gambling-like parts and were categorised as entertainment games.

As already discussed in Chapter 2, paragraph 2.7, a small but significant minority of pupils⁶⁵⁷ said that they gambled for money in commercial venues at some point prior to the focus group. Only 12 pupils gambled more than three or four times in their entire life on prohibited forms. Significantly more pupils admitted to playing 'demo'/social card games on *Facebook* or via their mobile phones, as well as playing with families for money or other non-monetary items such as chocolate, grapes, polos and mints. However, no pupil admitted to playing 'demo' slot machines on any gambling or social networking site.

3.4.1.2. Gaming and gambling motivations

The motivations for playing video games were surprisingly consistent between groups and between participants of the groups. The three main common inter-related themes

⁶⁵⁶ Full list of games mentioned during the focus groups are included in Appendix F

⁶⁵⁷ 30 in total

were: (1) the need for fun, interactive, easy entertainment, and reduction of boredom, (2) peer pressure, social interaction and competitiveness, and (3) ability to experience activities that were impossible and/or undesirable in real life.

Reduction of boredom and seeking entertainment were the most prevalent motivating factor for playing video games. Many pupils reported that they played because (for example):

“I get so bored at home; there is nothing else to do so I play [Call of Duty]” (Zaki,14,m)

These two aspects: (i.e. boredom and entertainment) linked together but there was no complete overlap. Some pupils openly admitted to playing games instead of doing other compulsory activities such as homework or household chores. One pupil expressly admitted:

“I used games for procrastination. I always avoid doing work and instead I just play games because work is just boring and not fun” (Jenny,17,f)

However, only a few were able to verbalise that some of the activities such as participating in real life sport, reading and/or watching television, were replaced by video gaming. Upon further probing, more vocal groups referred to the convenience and ease of playing video games, as well as to their overall attractiveness and interaction which trumped more traditional leisure activities. Participants explained that games:

“it’s less effort to be honest, like I hate reading ...” (Joe, 14, m)

Edgar (14, m) focused on the interactive features of the games which make them more immersive while Kukon (14, m) preferred the games because *“you can control what happens”* thus making it more attractive than e.g., passive activities such as watching television.

The second most popular motivating factor related to peer pressure, social interaction, and competitiveness. All participants acknowledged that, at present, gaming was a normal and highly popular activity. Pupils referred to the teenagers’ semi-cultural expectations of being involved in gaming in order to fit in, *‘be cool’* and generally be *‘in the know’* amongst their peers in line with having a profile on social networking sites. Those who did not play were often left feeling like an outsider amongst groups of friends, or left out from group conversations. However, the impact on specific individuals appeared somewhat small, as the peer pressure did not seem to influence them to do anything that

they did not want to do in the first place. In fact, the socially interactive nature of gaming (i.e., the ability to play games together and compete with each other), was seen as a positive aspect of the gaming environment which further enhanced the appeal of this activity. For example, Ray (14,m) who was earlier described as “*a crack addict of gaming*”, argued that the only reason he played so extensively was because of the social interaction and lots of general chatting with friends and other people he met online beyond the interaction in the game itself. If that aspects were not available, he would not be so involved.

Playing with others increased the actual enjoyment of the activity for pupils by making it more engaging and more interactive. They also gave additional motivations to continue so as not to let friends down if they were not so excited anymore, as well as creating topics of conversation during school breaks and other times, thus making the game more competitive. As one pupil noted:

“[If] you are just playing on the Xbox you feel like ‘oh, ok, I won’ but it’s just a computer but when you play against others is like ‘yeah, I beat Jago!!!, I beat Jago!!!’” (Badonde, 14, m)

Success amongst friends in a gaming environment was seen as very rewarding, and it gave a sense of achievement that gave immediate pleasure and satisfaction. In Clappy’s view (18, m):

“The competitiveness of those games is important; you have a leader board every time you get there and if you are on the top, ... I suppose is always very rewarding” (Clappy, 18, m)

The ability to meet new people and learn new skills through the game was cited predominantly by the older pupils. They recognised that by interacting with others around the world, they learn something about alternative cultures and different ways of thinking which expanded their overall awareness of the social and cultural differences between people from different geographical locations.

The third common theme related to the ability for players to engage in activities that are not possible or that are undesirable in real life. This aspect was indicated by a smaller number of pupils, but for them it was the most influential parameter of the game. For Ahsan and Skittles (15, m and 14, f, playing on *The Sims*) it was the experience of

something unknown and the freedom of experimenting with their creativity that made the games interesting:

“Because you can do anything to them; like dress them up and you can have pets; a job and a family as well”. (Ahsan,m,15)

For Osama (15,f), Laq (14,f), Karm (14,m), Peter (15,m) and Kurt (17,m), it was the freedom of participating in otherwise undesirable activity⁶⁵⁸, to escape from social constraints, and to release their stress and anger without real life consequences, that pulled them into the virtual environment. The need to escape was expressly stated:

“When I play computer games I am trying to escape reality; it is a fantasy and I don’t connect it to any real thing and it counts for everything including violence” (Niss,18,m)

A few pupils were drawn into gaming because of the ability to experience activities that they would find impossible to do in real life, either because it was physically impossible for a human to do, or because it was not easily attainable for them due to lack of financial means. For instance:

“Because this is something that you wouldn’t be able to do in real life, experience something that you wouldn’t experience normally” (Kenzo,14,m)

Finally, other reasons included the addictive properties of the game which make the game irresistible and hard to put down. This was noticeable from many pupils often exceeding the time they allocated themselves, or that had been allocated by their parents as a gaming period, along with the intrinsic desire to beat their own high score. The term *“addiction”* was used frequently, but most pupils used it in a rather loose sense when they simply referred to playing for a prolonged period of time and not really wanting to give up, as opposed to finding themselves truly unable to stop and suffering negative consequences as a result.

On first examination, motivation for real money gambling participation showed many similarities to video gaming. However, a closer investigation demonstrated significant differences in the actual motivating factors and in the strength of displayed emotions.

⁶⁵⁸ Osama *“yes, the good thing is to get the anger out if you are killing people in the game”*; Laq *“you can feel like a bad man but you don’t get arrested for real”*; Peter *“what’s fun about the game is shooting, shooting people [but not for real]”*; Karm *“I play Tekken, it’s a fighting game so I can take my aggression out on people in a game”*; Kurt *“it’s different to what you are doing in real life as well; you don’t really go and crash cars are you (sic)?”*

Perhaps unsurprisingly, the most common reason cited for real money gambling was the desire to win money, but equal weight was given to the influence of family and friends.

For example, Sasha (17,f) bet on the Grand National horse race once a year with her mum who “*won it once and she won a lot so I wanted the same, I thought I will win too*”. Similarly, Christiana (14,f) placed a bet on a horse with the help of her dad “*because everyone was doing it*”. Claire (17, f) bought a Scratchcard because “*all my friends were buying them*”, and Angel (17, f) played with her friend because he asked her to choose the number on *Paddy Power’s* online roulette, and she did just that.

Katy (14, f), who played on a slot machine in a betting shop while out with her brother, explained “*I went with my brother, we were on holidays, he couldn’t have left me outside so they let me in; I wasn’t allowed to play but my brother let me played (sic); there was no one to supervise me outside so they had to let me in*” and Jaffa (17, f) bet on the Grand National race because her parents betted.⁶⁵⁹ Only one pupil (Eric, 17, m) admitted playing online roulette for money, despite disapproval from his father and lack of awareness from his mother.

A small number of pupils played lotto and bought Scratchcards when they became 16 years old (and legally allowed to play) because they wanted to experience something new which had previously been prohibited. However, they usually played only once and had not tried again:

“It was my 16th birthday so I could, so I thought that I just did. It was the first time when I have done it and I have never done it again” (Sarah, 17, f)

“I played on Scratchcards... I just wanted to win... I had a bad day and I thought that because I had such a horrible day I was going to win to make it better” (Carly, 17, f).

Here, Carly’s experience with real money gambling was motivated by escapism, although she may not have recognised this at the time. Only P3 (18, m) openly stated:

“I know why I gamble; I gamble because I have a gambling problem ... slight ... because when I was younger I gambled on slot machines and bit of fruities (sic) [fruit machines]; I took it like that you get really addicted to it at that point”.

⁶⁵⁹ Similar comment was made by Misty (17, f) who expressly identified family influence as a critical aspect in acquiring gambling tendencies; she said “*I think in many ways you copy the behaviour that you see within your family, you imitate what you see so if you are in a gambling environment you may become a gambler yourself; as you can have the same gambling nature*”

Actual enjoyment and entertainment factors *per se* were more noticeable for their absence with only a few pupils listing these as their main reasons for real money gambling during the discussion. For example:

“It makes watching football more interesting if you bet on it” (Ben, 17, m)

3.4.1.3. Recognition of gambling-like activities within video games

Games containing gambling-like elements were recognised by most pupils, and their recollection was very accurate. The games listed were *Grand Theft Auto* (casino), *Sims 2* (casino within a hotel), *Redemption* (card games), *Call of Duty* (casino and betting on a special match⁶⁶⁰), *Moshi Monsters* (pupils explained that this game contains a street where players can buy in-game goods, either with earned points or with real money, and then pay for cards with hidden fixed percentages ‘0%, 50%, 80% and 100%’; if players pick up the card worth 100% they get all their in-game money back, if they pick up any other card they lose their money; *Super Mario* (mini slot machines), and FIFA.

FIFA was an example of a game with a vibrant external market where players can buy or sell virtual points for real money, and where gamers have to use their virtual points in order to get a better footballer. These are drawn at random and this selection is based purely on chance. Those that win are then able to trade their points for real money on markets such as *eBay*. For some pupils, this constituted a form of gambling-like activity but it must be noted that not everyone agreed with this.

Other games named by individual pupils included *Falls* (car race betting); *Team Fortress 2* (gambling-like activity on unknown content of treasure boxes) and *Habbo Hotel* (dice game)⁶⁶¹. Jaffa (17, f) remembered personal adverse experiences of gambling-like activities within *Habbo Hotel* where, at the age of around 13 years old, she inadvertently spent £50 of real money to roll a dice with the hope of winning the other bidder’s virtual furniture and accessories. This resulted in her being prohibited by her parents from

⁶⁶⁰ Eric (17, m) *“yes, there is actually in Call of Duty you can gamble ... there is a thing, you earn more money the more people you kill and then you can do a special type of match and you bet a little bit of this money; and if you win you get like ten times the money back but if you lose the match then you lose all your money”*

⁶⁶¹ Jaffa (17, f) *“I don’t know if that counts but when I was younger I used to play Habbo Hotel; I, like you can buy these credits and I bought lots of them; I was really selfish and stupid; because I had unlimited text so I thought it wouldn’t count towards it; it wouldn’t cost anything and I like ended up having to pay £50 just on the credits; because like I was like in this scenario ... where basically there is a dice rolling a number and I was bidding against this person to like get all his stuff and I already put on so many coins towards it so I got to the point where I really didn’t want to lose it; oh dear ... the other person kept out-bidding me so I had to carry on like, give more coins and stuff”*

playing the game altogether. At the time of playing, Jaffa did not realise that she was in fact engaged in gambling-like activity but realised this when she was older.

3.4.1.4. Does playing ‘demo’ or social gambling games, or gambling-like activities, constitute gambling and does it entice minors into real gambling?

The question about the relationship between non-monetary gambling and real-money gambling generated polarised responses. The main theme focused on the lack of financial risks (as opposed to financial rewards) with ‘demo’/social gambling, or gambling-like activities within video games, as well as the lack of thrill and the excitement that they associated with real-money gambling⁶⁶². Pupils did not consider the initial acquisition price as having importance as they paid for what “*they knew they were getting*”. Pupils who answered this question affirmatively were in a minority, and highlighted the structural similarities of the activities themselves, but they also easily emphasised the distinctions of each form⁶⁶³.

All pupils were unanimous in the view that there are material differences between gambling for real money and gambling for fun. However, the responses were multifarious with regards to whether ‘demo’/social gambling increased the perceived attractiveness, or increased their overall propensity for real-money gambling. The main difference related to anxiety when participating in both activities, with real-money gambling being considered as significantly more stressful. This, in their view, caused players to be more tense, more focused and competitive, and potentially more aggressive. This put some pupils off from being tempted to try. For example:

“With gambling for money you get the fear factor, which isn’t for everyone” (Luffy,17,m)

“I don’t do gambling but I can imagine it being very stressful because you can like lose a lot of money” (Barry,14,m)

For some the financial risks were particularly negative. For instance:

⁶⁶² E.g., Twinker (18, f) “*I know that technically it is gambling but in my mind I just don’t see it as the same thing; like there is not real risk*”

⁶⁶³ E.g., George (14, m) “*I think you still gambling but you are just not gambling money when you play for points or whatever*”; Cookie (14, m) “*but it is still gambling, you can see actual children putting the coins on a mushroom, like they are on a roll and they gonna win; that’s sounds like sad but they want to do it for real*”

“Because playing for money is more competitive and it brings out the worst in people I think (sic), whereas games are more social and gambling you just doing it for yourself rather than having fun” (P6,14,f)

Alternatively, some of the pupils who gambled for real did not see any appeal in ‘demo’/social gambling. For example:

“But I don’t really know; it’s not fun; I don’t think it’s fun at all if you are not playing with real money” (Eric, 17, m)

“Gambling for fun is so lame, if you gamble for fun it’s so boring, it does not make you feel happy with yourself, there is not thrill, no excitement” (P3, 18, m)

With regards to the impact that ‘demo’/social gambling may have on the take up on monetary gambling, none of the pupils were aware of the relationship that has been highlighted in academic literature. Some suggested that such a link might exist but all of them displayed the “*Third Person Effect*”⁶⁶⁴, whereby individuals believe that particular advertisements, or other action, influences others significantly more than it does themselves, and none of them thought that such a link would be particularly strong.

For instance: *“I think there is a link, I don’t think it is strong but if you play video games it’s like you clearly have got much enjoyment in winnings ... when maybe if you do start gambling you are more likely to get addicted or want to do it all the time” (Twinker, 18, f)*

Others addressed the potential learning aspect of practice games and the experience it might bring:

“It would be some practice, if I would then go and really gamble I would be like I actually gambled before, not new although I haven’t so it’s like I have already have a great experience” (P1,18,m)

Some pupils thought that if someone kept winning in the ‘demo’/social games they would eventually want to “*try their luck*” for real. Those with this view all seemed to appreciate that the odds in real gambling are different to ‘demo’ gambling, but they still thought that winning in ‘demo’ games may encourage them to try to play with real money. However, all of the pupils who expressed such views were emphasising that they were referring to

⁶⁶⁴ Fang Wan and Seounmi Youn, ‘Motivations to Regulate Online Gambling and Violent Game Sites: An Account of the Third-Person Effect’ (2004) 5(1) Journal of Interactive Advertising 46

what others may think or do, and that such behaviour was not reflective of what they, themselves, thought or did as they were clearly aware of the difference between non-monetary gambling and real gambling. Nevertheless, some of the comments may indicate that practising in ‘demo’/social gambling games may desensitise pupils from the stress associated with real money gambling and disinhibit their previously held restraining feelings.

Others did not think that there was any link at all. For example:

“I don’t think there is anything to learn from it, I can’t really think how, what you could really learn from that. There are some people who basically go out and try to get better deals and trade with players and they may go on eBay and sell those items off; so in a way people learn sort of basic economics but I don’t think they can learn a great deal about gambling or what is behind the game” (David,17,m)

John (17,m) also did not think that interest in non-monetary gambling and interest in real money gambling was transferrable because he believed people played such games for different reasons. Some pupils also pointed out that experience of gambling-like activities within video games, or ‘demo’/social gambling, may actually be negative in the short-term but protective in the long-term, as it may discourage children from playing for real money due to exposure to the feelings of a loss, even though no real money was involved. For example, Zulu (14,m) referring to his own experience, said that *“it may teach you some things”* and those things listed were in fact that an individual may lose, and this may cause the person to feel really upset and realise that it is not worth playing.

3.4.1.5. Have pupils displayed cognitive misconceptions with regards to the difference between video gaming, ‘demo’/social gambling and real money gambling?

All pupils conceded that persistent practice and prolonged playing of video games would enable them to increase their skills and become more successful gamers, although none acknowledged that this was because the video games were specifically designed to enable that to happen.

With regards to real money gambling, only two pupils believed that they were able, to some extent, to control the outcome. Karm (14,m) thought that it was possible to improve reaction times to better control *‘the stop button’* on a slot machine in order to ensure that all fruit symbols match. This may be possible on a few types of British slot machines and

his view was not based on any experience with ‘demo’/social games. Karm also thought that he could increase his chances of winning by carefully observing the pattern of play on a given slot machine and by choosing the one that had not paid out in a while. Eric (17, m) thought that players were always guaranteed to win on roulette if they play only black or red, and always double the amount after each loss. He also used the ‘demo’ games as a warm up in order to learn the rules and discover the odds.

Several pupils claimed that their skills may improve their chance of winning in gambling, but they were referring only to those activities where some skill does, in fact, play a part such as poker (mathematical ability as well as bluffing were both mentioned) and betting on sport (on the assumption that if the gamblers know the teams/horses/sportsman they may be better at predicting the outcome), while still recognising that their influence is not complete.

The risk of subconsciously becoming excited about gambling due to exposure to gambling-like activities within hybrid games or social gambling (without recognising them as such), materialised for two pupils during their adolescence. However, their lack of understanding was corrected during further development and did not necessarily influence their subsequent behaviour.

Jaffa (17,f) and Twig (17,f) did not think that they were gambling where they (i) played dice roll in Habbo Hotel with real money and (ii) played card games for money with family, respectively, when they were young. However, they were clearly aware of this once they got older. For Jaffa, the experience of gambling-like activity was in fact negative, as she not only lost her virtual furniture that she was keen to have, but also her parents prevented her from continuing to play the game that she liked and enjoyed following her loss of £50 on the dice roll. Here parental intervention, despite the immediate displeasure, had some protective effect; yet she subsequently engaged in other types of real money gambling (e.g., betting on the Grand National horse race. Twig, on the other hand, had fond memories of playing cards with family members for money, despite not realising at the relevant time that she was gambling. However, her memories did not cause her to develop any desire to gamble for real on any commercial sites or in betting shops.

3.4.2. Discussion

The purpose of the study was to contribute primarily to the debate as to whether, in young people's views, 'demo'/social gambling and gambling-like activities within video games increase minors' propensity towards real-money gambling, and whether it should be regulated and only available to those who are over the age of 18 years.

As it has already been discussed in the introductory parts of this chapter, various speculations have been made as to the reasons why young people may potentially move from playing 'demo'/social gambling or hybrid games into real money gambling. No evidence as yet has been presented as to how young people capture these activities and whether they perceive the two activities as similar or a different proposition.

Despite the qualitative nature of the focus groups, some comparisons with available quantitative data can be made which further evidences the value of the data collected in the present study. The prevalence rates of video gaming (95.5%) and real money gambling (15%) within the current sample were directly comparable to the prevalence rates of 99% reported in the Ipsos Mori Futurelab Gaming in Families Research for video gaming, and the 16% reported by the Young People Omnibus 2014, indicating that the present sample seemed fairly representative of their age cohort⁶⁶⁵.

The findings from the focus groups indicated that, for the sample, the two forms of entertainment represented different propositions. Pupils' recognition of gambling-like activities within video games appeared very accurate. This suggested a good ability amongst the sample to recognise the structural nature of gambling activities and appreciate which features within the game can be influenced, and which depend purely on chance or random events. Only two focus groups mentioned that they had not come across any gambling activities within video games. Nevertheless, in all other groups, pupils were able to name various games containing not only overt gambling, but also covert types of gambling, and to explain why they classified them as such.

Pupils in the present study were making a very clear differentiation between video gaming (including hybrid games and 'demo'/social gambling) and real money gambling. Video gaming was visibly constructed as a socially accepted, valuable, leisure activity amongst all participants. Real money gambling was mainly considered to be a vice and was

⁶⁶⁵ Young People Omnibus 2014, para 3.1

approached by many of them with some misapprehension. It can be argued that this demonstrates that the existence of legal regulation applicable to real money gambling does, at least to some extent, influence minors with regards to their behaviour. It also reinforces the need to ensure that all activities which encourage minors to try out real gambling should fall within the remit of the Gambling Commission.

Nevertheless, most pupils in the sample treated ‘demo’/social gambling as just a game, and those who considered it as equivalent to real money gambling still tended to treat it as a “*less harmful*” or softer form. Indeed, those pupils who gambled for real money indicated that their involvement in either ‘demo’/social gambling and real money gambling was influenced by different motivations. Those who engaged in social gaming were not necessarily interested in “trying out” with real money either, even though some of them thought that others may be so interested. This supports the recent empirical findings by Gainsbury et al⁶⁶⁶ who suggested that social gaming and real gambling, despite similarities, may attract different types of individuals.

With regards to motivations, the initial appearance of similarities between video gaming and real money gambling became less important when further considerations applicable to real money gambling were considered. Both activities were engaged in due to family influence and peer pressure, to bond with family members, and to experience competitive but friendly banter. However, the scale and strength of emotions (both positive and negative) was substantially stronger with respect to real money gambling with the desire to win money, to try their luck, to experience the stress of risking something of value, and the thrill of suspense when something real was at stake, being much more influential and felt more strongly. Social gambling and playing video games were instead played predominantly to pass the time or to socialise. The strong preoccupation with money, and the need to risk something of value, meant that the adoption of video like audio-visual effects in real money gambling games seemed to have little motivating influence.

The suggestion that adolescents may transfer incorrect misconceptions from ‘demo’/social gambling or gambling-like activities in video games into real money gambling with regards to odds, skills, or chance of winnings, received negligible support. The sample generally had an excellent understanding that, while they can improve their

⁶⁶⁶ Sally M Gainsbury, Jeffrey L Derevensky, ‘What Do We Currently Know About the Impact of Social Media Gambling Games Upon Current and Future Gambling Among Young People?’ (15th International Conference on Gambling and Risk Regulation, Las Vegas, May 2013)

skills in a typical video game, this does not apply to gambling (whether ‘demo’/social or with real money) unless it is a game with some skill such as poker or sport betting. Only one pupil thought that he could improve his chances of winning on a slot machine by improving reaction time when pressing the stop button, but his belief was not caused by anything related to video games or ‘demo’/social gambling. He also thought that he could increase his chances by carefully observing the pattern of play on a given slot machine, and by choosing the one that had not paid out in a while. As this strategy may indeed work on some British slot machines, this may not necessarily have been a misconception, especially as he was aware that this process only increased his chances slightly, but did not offer any certainty of winning. However, another pupil used ‘demo’ games (but not social games) as a ‘warm-up’ in order to work out the odds or work out the system that he could apply in real money gambling. However, he was in a significant minority with many other pupils clearly stating that ‘demo’ gambling games deliberately misrepresent the odds of winning in order to give the impression that wins are frequent so as to encourage the take-up of real money gambling. In the main, the pupils thought this never reflected the true pay-outs.

Several participants (with both positive and negative views of gambling) suggested that practice play may ultimately lead players to monetary gambling, especially if during the ‘demo’/social games they kept winning, either against a computer or against other individuals. Some pupils felt that such players may become bored with having no external incentive or, if winning, may want to have similar feelings but with real money. However, all of them demonstrated the ‘Third Party Effect’⁶⁶⁷ as none of them considered that these arguments applied to themselves, arguing that they were not susceptible to such influence and this may happen only to others. Nevertheless, some support was given to the suggestion that ‘demo’ gambling can be seen as a practice ground to learn the rules or work out the odds. This supported the argument proposed by Messerlian et al⁶⁶⁸ that such sites may be used for practice. However, it seems that they were used by those who already knew that they wish to gamble for real but want to experience it or learn the rules in a “safe mode” first. Those in the sample who already gambled for money were no longer equally excited with ‘demo’/social gambling.

⁶⁶⁷ Fang Wan and Seounmi Youn, ‘Motivations to Regulate Online Gambling and Violent Game Sites: An Account of the Third-Person Effect’ (2004) 5(1) *Journal of Interactive Advertising* 46

⁶⁶⁸ Carmen Messerlian, Andrea M. Byrne, Jeffrey L Derevensky, ‘Gambling, Youth and the Internet: Should We Be Concerned?’ (2004) 13(1) *The Canadian Child and Adolescent Psychiatry Review* 3

An important insight also emerged demonstrating that, for some pupils, playing video games with or without gambling-like elements, or participating in social gambling games, taught them that real money gambling is “*not a risk worth taking*”. They liked being able to experience the fun and enjoyment elements of playing, as well as the social interaction with their families and friends without taking any financial risks or exposing themselves to the fear or stress of possibly losing money. This supports the more recent findings by Gainsbury et al⁶⁶⁹ that, for some players, the ‘demo’/social gambling games represent a less financially risky alternative to real money gambling which may limit their overall financial risk. Although losing social games or video games still created negative feelings, they were nowhere near as strong or significant as losing in a real money gambling game which, for some individuals, generated quite substantial amounts of aggressive and violent behaviour.

3.5. Conclusion

The pupils in the present sample clearly viewed real money gambling and social gaming as very different propositions. Despite similar characteristics, pupils clearly differentiated between activities with real life consequences and those that only result in losing points or in-game credits in a video game, with the first being significantly more important and serious than the second. Winning, losing, or even merely playing video games, generated substantially lower levels of emotions than was the case with monetary forms of gambling that invoked additional physical reactions of stress, tension, fear, aggression and more intense competitiveness. The views from the sample did not support the initial hypothesis that the cross-over between ‘demo’/social forms of gambling and real gambling could be attributed to the minors’ lack of understanding of the differences between these two forms, or from sufficient similarities in motivating factors.

Only a small number of pupils displayed beliefs and perceptions which may have put them at risk from gambling-related harm resulting from ‘demo’/social gambling. In line with the overall argument of this thesis it could be argued that, in order to protect this group of children and young people who may be at risk, such activities should become regulated and prohibited to anyone under the age of 18 years. However, despite the appearance of initial attractiveness of such an argument, this proposition becomes more

⁶⁶⁹ Sally M Gainsbury ‘and others’, ‘An Exploratory Study of Interrelationships Between Social Casino Gaming, Gambling, and Problem Gambling’ (2015) 13 Int J Ment of Health Addiction 136

complicated by the emerging evidence that for some young people, ‘demo’/social gaming represents a substitution of real gambling, removal of which could prompt them back to try monetary forms of gambling. In such a situation, such trade-off may prove counterproductive. Therefore, a compromise solution is suggested that corresponds to the recommendations made by the EU Commission Recommendation 2014/478/EU⁶⁷⁰ which asks Member States to ensure that “*play-for-fun games used in commercial communication are subject to the same rules and technical conditions as the corresponding play-for-money games*”⁶⁷¹. This should be extended to any ‘demo’/social gambling games, irrespective of whether they are considered to be a form of advertisement or not. During the free mode, the real money gambling websites should not be permitted to advertise monetary versions and such ‘demo’/social games should include a warning message similar to the ones which are displayed on real money gambling sites under the social responsibilities measures.

The regulation should also ensure that ‘demo’/social gambling games are truly permitted to be played only for points and in-game credits which are not transferrable in any form between the players or outside the game itself, but still permits them to be played by young people. This would potentially address both sides of the argument and would, at least to some extent, protect vulnerable youngsters, while allowing those who do not like financial risk a viable alternative.

⁶⁷⁰ Commission, Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (2014/478/EU) Official Journal of the European Union L214/38

⁶⁷¹ Commission’s Recommendation 2014/478/EU, Art VIII 42

4. Chapter 4 – Are minors effectively protected from gambling advertising exposure?

4.1. Introduction

A direct consequence of the liberalisation of the gambling industry is the proliferation of a variety of marketing activities designed to promote either a specific gambling product, or a gambling provider that has been directly facilitated by the Gambling Act 2005. This led to a natural but phenomenal expansion of gambling-related marketing activities. The overall volume of gambling advertisements increased from 234,000 in 2007 to nearly 1.4 million in 2012⁶⁷². The resulting ubiquity of gaming and betting advertisements led Maria Miller, in April 2014, who was (then) the Secretary of State for Culture, Media and Sport, to call on the relevant authorities to review the existing provisions in order to identify if any changes were necessary, stating that “*we’re in the same kind of space as we were 10 or 15 years ago when they asked whether it was appropriate for smoking to be advertised*”⁶⁷³.

Liberalisation of any industry automatically invokes the right to freedom of speech, protected under Art.10 of the European Convention of Human Rights that has been confirmed in *Markt-Intern Verlag GmbH and Klaus Beerman v Germany*⁶⁷⁴ to extend to commercial speech, including advertising. The protection of commercial speech is substantially less rigorous than the protection of e.g., political or artistic speech⁶⁷⁵, but any impediments to advertising have to comply with the proportionality principle and must be based on valid grounds. Acceptable justifications include protection of market competition⁶⁷⁶ and, as held in *R. (on the application of British American Tobacco UK Ltd. and five others) v. Secretary of State for Health*, the protection of public health⁶⁷⁷.

Member States have to provide valid justifications for the imposition of restrictive measures on commercial speech, but conclusive proof that such advertising is actually

⁶⁷² Ofcom Report, ‘Trends in Advertising Activity – Gambling’ (November 2013)

<http://stakeholders.org.ofcom.org.uk/binaries/research/tv-research/Trends_Ad_Activity_Gambling.pdf?utm_source=updates&utm_medium=email&utm_campaign=gambling-ads> accessed May 2014

⁶⁷³ Maria Miller, ‘Radical New Curbs on Gambling Advertising Mooted’ *The Guardian* (3 March 2014) <<http://www.theguardian.com/society/2014/mar/03/radical-curbs-gambling-advertising-maria-miller>> accessed May 2014

⁶⁷⁴ [1989] ECHR 21

⁶⁷⁵ Patricia Ferguson, ‘Tobacco Advertising and Freedom of Speech – Why the Greater Does Not Include The Lesser’ (2003) 10 UCL Juris Rev 315

⁶⁷⁶ *Jacobowski v Germany* [1994] ECHR 21

⁶⁷⁷ [2004] EWHC 2493 (Admin), [2005] A.C.D.27

harmful is not required and a precautionary approach to legislation is permitted. In the context of gambling advertising this principle is crucial as the actual impact of advertising on stimulating and increasing consumptions, as opposed to merely influencing the distribution of market share, raising brand awareness⁶⁷⁸, or simply providing information to enable adults to make an informed choice, continues to be strongly contested⁶⁷⁹.

Demands for the imposition of gambling advertising restrictions are typically supported by studies that demonstrate the correlation between exposure to commercials featuring gambling, alcohol, cigarettes or food high in fat, sugar and salt (HFSS foods) and an increased uptake of these advertised products. Support also comes from those who argue that gambling advertisements may exacerbate the conditions of persons who have already developed gambling problems and prevent them from being able to successfully recover⁶⁸⁰. They are further supported by claims of possible indirect effects that may lead to the overall reduction of societal restraints that have traditionally limited British public engagement in gambling⁶⁸¹. Furthermore, claims that “*gambling advertising may contribute to a positive attitude in society towards gambling*”⁶⁸² may particularly affect minors who can either lose the restraints that may have been instilled on them during their minority, or who may not develop sufficient restraints in order to protect themselves from risky levels of gambling.

Arguments in favour of freedom to advertise gambling highlight the inherent methodological difficulties suffered by many studies that demonstrate the aforementioned correlations. The validity and reliability of the findings are challenged and are claimed not to constitute an appropriate evidence base for policy making. They accordingly focus

⁶⁷⁸ Per Binde, ‘Selling Dreams – Causing Nightmares? On Gambling Advertising and Problem Gambling’ (2007) 20 *Journal of Gambling Studies* 167; ‘CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes’ (2014) <<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~media/Files/CAP/Reports%20and%20surveys/CAP%20and%20BCAP%20Gambling%20Review.ashx>> accessed November 2014; Per Binde, ‘Gambling advertising: A critical research review’ (RTG 2014) <http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014

⁶⁷⁹ Per Binde, ‘Gambling Across Cultures: Mapping Worldwide Occurrence and Learning from Ethnographic Comparison’ [2005] *International Gambling Studies* 1

⁶⁸⁰ Per Binde, ‘Gambling advertising: A critical research review’ (RTG 2014)

<http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014

⁶⁸¹ Jim Orford, ‘Gambling in Britain: the Application of Restraint Erosion Theory’ (2012) 107 *Addiction* 2082

⁶⁸² Binde (n 680)

on the lack of conclusive proof that gambling advertising has negative impact⁶⁸³ and argue that, in such situations, restrictions are unwarranted.

4.2. The aim of this chapter

This thesis accepts that conclusive proof of the gambling advertising impact, or lack of it, on the generic population of youth is likely to remain elusive, and even a comprehensive synthesis of the existing vast literature on this topic, would not solve this debate. Instead, this chapter evaluates gambling marketing and their regulation from a different perspective.

As already considered in paragraph 2.2.2.1., s.46 of the Gambling Act makes it a criminal offence to intentionally target children and young people with gambling advertising. Furthermore, all advertising must comply with the self-regulatory Codes that have been adopted by the Advertising Standards Authority and the Committee of Advertising Practice. This now includes specific sections that relate to gambling⁶⁸⁴ as well as the Industry Code for Socially Responsible Advertising endorsed by the Gambling Commission. All of them contain provisions designed to ensure that advertisements are not targeted at children and that they do not appeal to them.

The above concessions demonstrate that the undesirability of minors' exposure to gambling advertising has been, at least to some extent, assumed by the legislation despite the absence of conclusive proof that gambling marketing harms minors. This thesis firmly supports this precautionary approach and recommends that, in the interest of minors' protection, further restrictions should indeed be imposed. This recommendation does not rely on the argument that such advertising is harmful to minors, as this candidate is unable to provide evidence that would support such a wide reaching claim. Instead, it will be argued that the existing statutory provisions, and the associated self-regulatory codes are too weak to ensure that their own stated objectives are achieved, i.e., that gambling advertisements do not appeal to minors and that minors' exposure is sufficiently limited. It also aims to demonstrate that, despite the existence of the pre-clearing protocol for radio and television advertisements, any enforcement actions are reactive, too reliant on

⁶⁸³ See, e.g., Per Binde, 'Selling Dreams – Causing Nightmares? On Gambling Advertising and Problem Gambling' (2007) 20 *Journal of Gambling Studies* 167

⁶⁸⁴ Part 16 and Part 17, 'CAP Code: The UK Code on Non-Broadcast Advertising, Sales Promotion and Direct Marketing' (12th ed., 2010); Part 17 & Part 18 'BCAP Code: The UK Code of Broadcast Advertising Sales, Promotions and Direct Marketing' (5th Ed., 2010)

complaints from the general public or pressure groups, and do not sufficiently prevent inappropriate conduct.

This chapter also provides further insight by presenting what children and young people themselves stated about gambling advertisement during the focus groups carried out by this candidate. It is perhaps worth repeating⁶⁸⁵ that the original schedule of focus groups did not intend to discuss gambling advertisements. This was formally added after three focus groups as it became very clear, in the course of the discussion, that pupils were very eager to express their views on this matter. This also highlights a clear need to include minors in advertising studies in order to consider their views with regards to what adverts do, or do not, appeal to them as adults' determination of this may prove inaccurate⁶⁸⁶.

It is this candidate's submission that comparisons with studies on alcohol, tobacco and HFSS foods advertisements are justified, despite the criticism made by the CAP report, albeit for different reasons. Such transposition from the alcohol and tobacco industries is considered by this candidate legitimate, not only because legislators draw similar comparisons⁶⁸⁷, but also because they share many similarities despite some important distinctions⁶⁸⁸.

Each of them is exposed to a varying degree of moral opprobrium from those who object to the availability of the product based on religious or moral grounds that is materially higher than towards other more "neutral" products such as domestic appliances or cars. Each is recognised as potentially leading to harmful consequences and accordingly regulations, justified by the need to protect minors and consumers as a whole, are imposed. They are also generally unlawful to be consumed or used by those who are underage but, at the same time, appear quite attractive to the youth and may constitute a "rite of passage" into adulthood⁶⁸⁹. Furthermore, there is a wealth of available data with regards to the controversies of marketing these products to children as prospective future

⁶⁸⁵ As stated in the methodology section

⁶⁸⁶ The ASA study on Public Perceptions of Gambling Advertising in the UK only included adults as participants

⁶⁸⁷ See e.g., statement of Maria Miller when announcing a review of the existing provisions relating to gambling advertisements

⁶⁸⁸ The differences relate to the legal variations but also to factors such as: alcohol and tobacco are goods whereas gambling is a service, consumptions of alcohol and cigarettes amongst adolescents is still reported to be higher than engagement in gambling and public awareness of risks associated each product differs.

⁶⁸⁹ D Kirk Davidson, *Selling Sin The Marketing of Socially Unacceptable Products* (2nd edn, Praeger 2003) 2-6

customers, and in particular, how such marketing can be disguised as allegedly only targeting adults when, in fact, it is also aimed at minors⁶⁹⁰.

Reference to HFSS foods studies is considered legitimate, not only because the Committee Advertising Practice found it legitimate, but also because they are specifically and openly directed at children, and they can provide valuable insight into what type of advertisements do or do not appeal to minors⁶⁹¹.

4.3. What is an advertisement?

Advertisements and commercial practices are generally defined very broadly both in s.327 and s.252 of the Gambling Act, and in Art. 2(1)b of the Consumer Protection from Unfair Trading Regulations 2008. S.327 includes any activity that is designed to persuade other people to engage in gaming or betting activities⁶⁹², and s.252 specifies that anyone “*promotes lottery if he makes or participates in making the arrangements for a lottery*”. This includes making arrangements for printing or distributing of the lottery tickets or marketing materials, or effectively doing any act that directly relates to this category of gambling⁶⁹³.

Commercial communication is equally broadly defined by Art. 2(1)b of the 2008 Regulation and will effectively include any activity that aims to promote a particular product, company or service⁶⁹⁴. The existing advertising techniques are not confined to traditional television, radio and press advertising, or direct marketing communication posted by the traditional mail or electronically. The marketing departments are making increasing use of other more discreet forms of commercials, such as product placements, advergames, and sport sponsorship that is often personalised⁶⁹⁵.

Advertisements are also increasingly becoming blurred with personal endorsements, as many online sites incentivise players to share their gaming or social gaming successes with their friends via social networking sites⁶⁹⁶, or directly by email. This may give the

⁶⁹⁰ D Kirk Davidson, *Selling Sin The Marketing of Socially Unacceptable Products* (2nd edn, Praeger 2003) 2-6

⁶⁹¹ Barrie Gunter, Caroline Oates and Maria Blades, *Advertising to Children on TV: Content, Impact, and Regulation* (Routledge 2005)

⁶⁹² Full text of the section listed in Appendix I

⁶⁹³ Full text of the section listed in Appendix I

⁶⁹⁴ Full text of the section listed in Appendix I

⁶⁹⁵ Nancy J King, Pernile Wegener Jessen, ‘Profiling the Mobile Customer – Privacy Concerns When Behavioural Advertisers Target Mobile Phones – Part 1’ (2010) 26 *Computer Law & Security Review* 455

⁶⁹⁶ Nerille Hing ‘and others’, ‘Do Advertising and Promotions for Online Gambling Increase Gambling Consumption? An Exploratory Study’ (2014) 14(3) *International Gambling Studies* 394

recipient the impression that the communication is not in fact an advertisement but comes as a personal recommendation from a friend⁶⁹⁷. Indirectly, it has also been noted that gambling companies test their products by making them available online for free in order to determine their appeal. If they prove sufficiently attractive, similar land-based machines are produced and made available in betting shops and casinos⁶⁹⁸.

Despite the wide “*catch-all*” definition, the analysis in this chapter is confined to marketing that is broadcast on radio or television, or placed in press, on billboards or on the Internet to the exclusion of promotional activities directed at individual consumers by way of personalised incentive or offers for which no sufficient data is publicly available.

4.4. To what extent does the law and self-regulatory Codes ensure that minors are not targeted with gambling advertisements and that adverts do not appeal to the youth?

4.4.1. The legal framework

Gambling advertisements are subject to the Gambling Act 2005 as well as other laws applicable to commercials, of which the Consumer Protection from Unfair Trading Regulations 2008, as amended, is the most important⁶⁹⁹. This regulation implemented the Unfair Commercial Practices Directive 2005/29/EC and is designed to offer a high level of general consumer protection⁷⁰⁰. It prohibits practices that are misleading, either due to the relevant information being omitted, or due to the provided statement being inaccurate, or that give a false impression. Under the 2008 Regulation an advertisement will be misleading if it “*deceives or is likely to deceive the average consumer*”⁷⁰¹ and influences them to take a transactional decision. However, minors, due to the prohibition of intentional advertising to them⁷⁰², are unlikely to be included in the definition of an average consumer⁷⁰³.

⁶⁹⁷ Sally M Gainsbury ‘and others’, ‘An Exploratory Study of Interrelationships Between Social Casino Gaming, Gambling, and Problem Gambling’ (2015) 13 Int J Ment of Health Addiction 136

⁶⁹⁸ Gainsbury (n 697)

⁶⁹⁹ Other general primary laws affecting advertisements are: The Trade Description Acts (in parts now repealed); The Property Misdescription Act 1991; but they are not relevant to minors’ protection from gambling advertisements

⁷⁰⁰ Giles Crown, Oliver Bray, Rupert Earle, *Advertising Law and Regulation* (Bloomsbury Professional 2010) 17

⁷⁰¹ Consumer Protection from Unfair Trading Regulations, SI 2008/1277, Art 5(2)a with regards to misleading statements and Art 6(1)d with regards to misleading omissions

⁷⁰² GA2005, s 46(3)

⁷⁰³ Under Unfair Commercial Practices Directive 2005/29/EC, Art 18 an average consumer is someone “*who is reasonably well informed and reasonably observant and circumspect, taking into account social,*

Restrictions that relate specifically to gambling advertisements are based on the provisions of the Gambling Act as amended by the Gambling (Licensing and Advertising Act) 2014 and the self-regulatory codes adopted by the advertising industry⁷⁰⁴. Minors' protection from advertising under the Gambling Act is based on the same principles as the prevention of actual engagement and s.46(3) makes it a criminal offence to target children and young persons with gambling advertisements. This has already been considered in paragraph 2.2.2.1. Part 11 and Part 16 of the Gambling Act that deal with advertising of lotteries, gaming and betting respectively are surprisingly brief. The provisions define the meaning of advertisements⁷⁰⁵, determine their territorial application⁷⁰⁶, and create the offence of advertising gambling that is unlawful⁷⁰⁷.

They further specify that the Secretary of State may devise regulations aimed at controlling gambling advertisements⁷⁰⁸, if appropriate. Such regulation, if enacted, could not relate to advertisement on television or radio which is the exclusive domain of Ofcom or, with respect to the BBC, services that are regulated separately by the BBC Trust. At the time of writing no regulations have been issued. The regulation of radio and telephone advertising falls within the remit of Ofcom which retains the ultimate control but, in practice, it is delegated to the Advertising Standards Authority⁷⁰⁹.

Further guidance as to the proper conduct of advertising is contained in the industry voluntary CAP and BCAP Codes, the Gambling Commission's Code on Responsible Advertising, and can also be discerned from the rulings of the Advertising Standards Authority that has the power to adjudicate on complaints brought against advertisements by individual members of the public and other stakeholders.

cultural and linguistic factors". This has been held in *Office of Fair Trading v Purely Creative Ltd* [2011] E.C.C.20 (Briggs J) to mean a "consumer who took reasonable care of themselves, rather than the ignorant, careless of over-hasty." Although it would be unfair to accuse children of ignorance, they cannot be expected to display the same level of carefulness and consideration as adults

⁷⁰⁴ Also, targeting minors with gambling advertisements would be automatically deemed to be unfair commercial practice under Consumer Protection from Unfair Trading Regulation, SI 2008/1277, Art 5(3)b as it is in breach of the relevant Codes

⁷⁰⁵ GA2005, ss 327 and 252

⁷⁰⁶ GA2005, ss 332 and 333 as amended by Gambling (Licensing and Advertising) Act 2014, ss 4 and 5

⁷⁰⁷ GA2005, s 330

⁷⁰⁸ GA2005, s 328

⁷⁰⁹ Under Memorandum of Understanding, the latest one entered into in October 2014

<<http://www.asa.org.uk/General/Transparency/~media/Files/CAP/Transperancy/CAP%2011%20and%2014%20Memorandum%20of%20Understanding%20between%20Ofcom%20ASAB%20BCAP%20and%20OBASBOF%20May%202004.ashx>> accessed December 2014

4.4.2. The Industry Codes

The CAP Code of Non-Broadcast Advertising, Sales Promotions and Direct Marketing⁷¹⁰ regulates non-broadcast advertisements and includes commercials in print, on billboards, via direct marketing and, since March 2011, on the Internet. Parts 16 and 17 of the Code deal specifically with gambling and lotteries respectively. Due to the overall prohibition of advertising gambling services **to children**, Part V of the Code that regulates children’s commercials does not directly apply. In line with the Gambling Act’s definitions, the Code also considers a child to be a person who is under the age of 16 whereas young persons are those who are 16 and 17 years old.

Under Part 16 gambling advertisements must be “*socially responsible, with particular regards to the need to protect children, young persons and other vulnerable persons from being harmed or exploited*”⁷¹¹, and *must not exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children, young persons or other vulnerable persons*”⁷¹². In particular, the Code specifies that advertising must not “*suggests gambling to be a rite of passage*”⁷¹³, must not be “*likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture*”⁷¹⁴, be directed at those aged below 18 years (or 16 if the advertisement relates to products permitted to those who are over the age of 16)⁷¹⁵, or include a child or young person in the advertisement itself. Anyone who appears to be under the age of 25 cannot be seen as engaged in gambling or play any other “*significant role*”⁷¹⁶. However, advertisements where gambling facilities are merely part of a wider leisure environment may feature children or young persons, provided they also feature an adult and do not portray the gambling facilities that would be age restricted under the Act, but allows for permitted gambling to be included⁷¹⁷.

Part 17 deals with lottery advertising and contains corresponding provisions regarding the susceptibilities and inexperience of children and young persons⁷¹⁸. No advertising that

⁷¹⁰ ‘The CAP Code: The UK Code of Non-Broadcast Advertising, Sales Promotions and Direct Marketing’ (12th ed, 2010)

⁷¹¹ CAP Code, Rule 16.1

⁷¹² CAP Code, Rule 16.3.2

⁷¹³ CAP Code, Rule 16.3.10

⁷¹⁴ CAP Code, Rule 16.3.12

⁷¹⁵ CAP Code, Rule 16.3.13

⁷¹⁶ CAP Code, Rule 16.3.14

⁷¹⁷ CAP Code, Rule 16.4

⁷¹⁸ CAP Code, Rule 17.12

appeals to the youth⁷¹⁹, or one that is directed at them⁷²⁰, or those that include children, young people or those who look under the age of 25 in the content of the commercial, are permitted⁷²¹.

Both parts must be read in conjunction with the general principles that apply to all advertisements, regardless of advertised product. These relate to the requirements that advertisement must be easily recognisable⁷²², must not be misleading⁷²³ and must not cause harm or offence⁷²⁴.

The BCAP Code, The UK Code of Broadcast Advertising, is the equivalent code but for commercials⁷²⁵ that are broadcast on television and radio. In a similar fashion to the CAP Code, Parts 17 and 18 are dedicated to gambling and lottery and they contain identical provisions that are listed in the CAP Code with only a few additions. The BCAP Code additional requirements specify that all radio gambling and lottery advertisement must obtain clearance from the Radio Advertising Centre (RACC)⁷²⁶, while television advertising receive pre-air clearance from Clearcast. Furthermore, the BCAP specifies that *“children should be considered for all advertisements ... that could harmfully influence them even if not of direct interest to them”*.

The Gambling Industry Code for Socially Responsible Advertising, additionally, requires all advertisement to carry educational/warning messages such as *“don’t let the game play you”* or *“know your limits and play within it”*. The Gambling Code’s statement that *“gambling advertisements should not be specifically and intentionally targeted towards people under the age of 18”* appears superfluous as this is already a legal requirement, but the Code’s further clarification is useful. It highlights that such targeting can materialise *“through the selection of media, style of presentation, content or context in which they appear”*⁷²⁷, thus focusing the industry’s attention on all features of their marketing campaigns.

⁷¹⁹ CAP Code, Rule 17.13

⁷²⁰ CAP Code, Rule 17.14

⁷²¹ CAP Code, Rule 17.15

⁷²² CAP Code, Part II

⁷²³ CAP Code, Part III

⁷²⁴ CAP Code, Part IV

⁷²⁵ The BCAP Code is split into BCAP Code, BCAP Television Code, BCAP Radio Code, BACP Text Code and BCAP TV Scheduling Code;

⁷²⁶ BCAP Code, Rule 18.1 for lotteries and Rule 17.1 for gaming and betting

⁷²⁷ ‘Gambling Industry Code for Socially Responsible Advertising’ (August 2007)

<http://www.gamblingcommission.gov.uk/pdf/Industry%20code%20of%20practice%20-%20August%202007.pdf> accessed January 2014

Moreover, the Code specifies that broadcasted gambling commercials, except those that were already permitted prior to the implementation of the Gambling Act, should not be aired before the watershed time of 9pm. However, this rule does not apply to broadcasting of sports betting ads if they take place around televised sporting events, or which take place by way of sponsorship of sport but excluding sponsorship of other programmes⁷²⁸. Furthermore, no gambling advertisements should appear on sports clothes or other merchandise that is produced to be worn or used by children, defined as those products that attract value added tax at zero rates⁷²⁹.

Non-compliance with the self-regulatory codes does not automatically invoke any penalties, although the ASA typically direct that advertisements found in breach must be withdrawn. However, persistent offenders can be referred by the ASA to the Office of Communication who has the power, under the Communication Act 2003, to fine those who do not comply with the self-regulatory codes or the ASA ruling.

4.4.3. Why the provisions are insufficient to shield minors from gambling advertising exposure.

The elaborate nature of the above rules do not seem to be able to prevent children and young people from viewing gambling advertisements. In this candidate's submission this result is due to the inherent and fundamental flaws in the root concept of trying to differentiate between what appeals to minors and adults, with the exception of the very narrow group of pre-adolescent children.

4.4.3.1. What appeals to children?

The difficulties with identifying whether marketing campaigns target minors have been amply demonstrated in the context of cigarettes and alcohol advertising both in the UK and in other jurisdictions. What industries publicly admit to doing, and what they actually aim to achieve, is not necessarily the same. However, the perplexity exists, not only when some industry players are plainly deceitful, but also when they act in good faith.

In the context of smoking, mounting evidence emerged in US law suits that, even though executives of cigarette companies were acutely aware of the addictive and harmful properties of cigarettes⁷³⁰, they continued to market tobacco products as “*desirable*,

⁷²⁸ ‘Gambling Industry Code for Socially Responsible Advertising’ (n 723) para 31 and 32

⁷²⁹ ‘Gambling Industry Code for Socially Responsible Advertising’ (n 723) para 33

⁷³⁰ Philip B Heymann, *Living the Policy Process* (OUP 2008) 219

socially acceptable, safe, healthy and prevalent in society”⁷³¹. In 1995 the U.S. Food and Drug Administration formed a very clear opinion that “*cigarette manufactures knew that young people are vital to their markets and that they need to develop advertising that appeals to young people*”. But this assessment was only possible after investigating internal documents that revealed the extent of market research carried out by these companies, and this evidence was not discernible from watching the advertisement themselves⁷³².

In the UK the promotional campaign of cigarette brand Regal that was widespread in north England, Scotland and certain parts of Wales, and which featured the character Reg, was supposedly aimed at those who were over the age of 35 years old. However, qualitative and quantitative research was carried out on this campaign by Hastings et al⁷³³ with a statistically representative sample of 5,451 children aged between 11 to 15 years of age, 437 aged between 5 to 10, and 814 people aged 15 to 65. This research identified that it had a particular appeal to smoking teenagers rather than adults, and in particular to those between 14 and 15 years of age. They reported that this age group understood the message conveyed by the campaign and associated themselves with the attitudes it portrayed, while adults between the age of 18 to 24 years old did not find the advert appealing, despite understanding the message. Those who were over the age of 35 years old typically did not appreciate the message at all⁷³⁴. This research ultimately contributed to the campaign being withdrawn but, understandably, only after it had been exposed to a large number of children and young people. Such empirical studies can, in any case, be carried out for a very small fraction of available promotional campaigns.

There was no suggestion that producers of Regal promotion deliberately attempted to disguise the appeal of the message⁷³⁵, but it does highlight the complexities faced by the advertising industry to differentiate between what appeals to teenagers and what appeals to the adult population, even assuming the industry’s best intention. This may be

⁷³¹ Philip B Heymann, *Living the Policy Process* (OUP 2008) 212

⁷³² Chris Lovato ‘and others’, ‘Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviours’ (2003) 3 Cochrane Database of Systematic Reviews 1

⁷³³ GB Hastings ‘and others’, ‘Cigarettes Advertising and Children’s Smoking: Why Reg Was Withdrawn?’ (1994) 309 BMJ 933

⁷³⁴ Hastings (n 733)

⁷³⁵ As opposed to genuine misjudgement

relatively easy to establish for the pre-teen children who tend to find “*adult*” advertising boring⁷³⁶, but this is unlikely to hold true for adolescents.

It is submitted that this flaw stems from the legal construct adopted in this area that treats childhood too independently from adulthood. Furthermore, it appears to ignore young people’s natural curiosity about ‘*adult products*’ that is often heightened by their actual or perceived inaccessibility⁷³⁷, as well as their overall aspirations towards adulthood⁷³⁸. Indeed, there is some evidence that some adolescents are more likely to actively look for information about products that are prohibited to them. Others may deliberately pay more attention to the adverts that they are not supposed to see⁷³⁹. This also means that the ‘watershed’ and ‘zoning’ restrictions are also likely to have a very limited effect, as discussed below.

4.4.3.2. ‘Watershed’ and ‘zoning’ restrictions

One method often adopted in order to minimise exposure is the restriction of potentially ‘*harmful*’ advertising to specific timeslots when children or teenagers are less likely to watch. The UK Advertising Standard Authority does not support timing restrictions, highlighting that the indirect effect of the ‘*watershed*’ policy is the high clustering of specific advertisements during limited periods of viewing times⁷⁴⁰. However, many regulatory provisions accept this measure as useful. The Audiovisual Media Service Directives⁷⁴¹, which codified all amendments to the original 89/552/EEC Directive, does not restrict gambling advertisements but provides that content that “*might seriously impair minors*”, such as pornography or gratuitous violence, must not be broadcasted at all⁷⁴². If the impairment is less than serious it can be aired as long as it is ensured “*by selecting the time of the broadcast or by any technical measure ... that minors in the area of transmission will not normally hear or see such broadcast*”⁷⁴³.

⁷³⁶ Barrie Gunter, Caroline Oates and Maria Blades, *Advertising to Children on TV: Content, Impact, and Regulation* (Routledge 2005)

⁷³⁷ Shelly Rodgers and Esther Thorson, *Advertising Theory* (Routledge 2012), 137

⁷³⁸ Pamela Pennock, ‘Televising Sin: Efforts to Restrict the Televised Advertisement of Cigarettes and Alcohol in the United States, 1950s to 1980s’ (2005) 25(4) *Historical Journal of Film, Radio and Television* 619

⁷³⁹ Marije Nije Bijvank ‘and others’, ‘Age and Violent-Content Labels Make Video Games Forbidden Fruits for Youth’ (2009) 123(3) *Paediatrics* 870; by analogy to other prohibited activities

⁷⁴⁰ Candidate’s discussion with ASA, May 2014

⁷⁴¹ Audiovisual Media Directive 2010/13/EU of 10 March 2010

⁷⁴² Audiovisual Media Directive 2010/13/EU of 10 March 2010, Art 27(1)

⁷⁴³ Audiovisual Media Directive 2010/13/EU of 10 March 2010, Arts 27(2) and 27(3)

The principles dictated in the original Directives have been implemented by a series of related Regulations⁷⁴⁴ that introduced amendments to the relevant legislations, including the Communication Act 2003 and the Gambling Act 2005⁷⁴⁵. In the context of minors' protection, the most important is the prohibition of any product placements in children's programmes⁷⁴⁶, defined as "*programmes made ... for viewing primarily by persons under the age of sixteen*"⁷⁴⁷, either broadcast or offered '*on demand*', and the prohibition of any product placements relating to gambling services in any other programmes⁷⁴⁸. The Gambling Industry Code for Socially Responsible Advertising specifies that gambling commercials (except those that were already permitted prior to the implementation of the Gambling Act), must not be broadcast before the watershed time of 9pm unless such marketing takes place during, or adjacent to, televised sports events⁷⁴⁹.

However, the viewing patterns of adolescents are not confined to programmes aired before the specified times, or to programmes that are directed at children. According to the recent Ofcom report, 19.8% of all television viewing amongst children aged between 4 and 15 years old took place after the 9pm slot. This proportion rose to 26.6% when children aged between 10 and 15 years old were singled out, with 8% of them viewing television after 11pm at night⁷⁵⁰. No specific data was provided by the report for young people but it is legitimate to assume that the proportions of late night viewing of 16 and 17 years old are even higher.

The effectiveness of this somewhat arbitrary chosen timeslot is further undermined by the popularity of '*on demand*' services. As already noted above, product placements relating to gambling are prohibited in '*on demand*' services but no equivalent direct restriction relates to gambling advertisements prior, after, or during the programme. The Audiovisual Media Services Regulations 2014, that came into force on the 1st December

⁷⁴⁴ Audiovisual Media Services Regulations, SI 2010/419; Audiovisual Media Services (Product Placement) Regulations, SI 2010/831; Audiovisual Media Services (Codification) Regulations, SI 2010/1883; Audiovisual Media Services Regulation, SI 2014/2916

⁷⁴⁵ And by Wireless Telegraphy Act 2006 and Broadcasting Act 1990

⁷⁴⁶ Communication Act 2003, sch.11A, s 3, inserted by Audiovisual Services (Product Placement) Regulations, SI 2010/831

⁷⁴⁷ Communication Act 2003, sch 11A, s 3(2)b, amended

⁷⁴⁸ Communication Act 2003, sch 11A, s 6(2)f, amended

⁷⁴⁹ 'Gambling Industry Code for Socially Responsible Advertising' (August 2007)

<http://www.gamblingcommission.gov.uk/pdf/Industry%20code%20of%20practice%20-%20August%202007.pdf> accessed January 2014

⁷⁵⁰ Ofcom Report, 'Trends in Advertising Activity – Gambling' (November 2013)

http://stakeholders.org.ofcom.org.uk/binaries/research/tv-research/Trends_Ad_Activity_Gambling.pdf?utm_source=updates&utm_medium=email&utm_campaign=gambling-ads accessed May 2014

2014⁷⁵¹, missed the opportunity to amend s.368F of the Communication Act 2003⁷⁵² and to prohibit gambling advertisements from being included in ‘*on demand*’ programmes either in entirety or for those requested for viewing prior to the watershed time of 9pm⁷⁵³.

Any argument that gambling advertising should not feature in ‘*on demand*’ programmes would have to rely on s.368F(4)(e) that prohibits advertisements that “*cause physical or moral detriment to persons under the age of eighteen*”. As already indicated in the introduction to this chapter, the actual risk of gambling advertising causing detriment to minors is heavily contested, rendering successful reliance on s.368F(4)(e) improbable. Nevertheless, the ASA Help Note: Placement of advertising in video-on-demand services⁷⁵⁴, issued on the 25th of September 2014, reminds providers of their social responsibilities to ensure that gambling adverts do not target children and young people and suggests, amongst others, that programmes containing such commercials could be offered within specific times only. Nonetheless, the widespread popularity of ‘on-demand’ services and sporting events to which the watershed restriction does not apply means that in practice, the timing restrictions effectively catch only a very narrow group of the youngest children.

‘Zoning’ restrictions aim to remove “harmful” advertising from programmes that have minors as their primary audience. To this end, the ASA devised a formula of audience indexing that helps with determination of what programmes appeal to children⁷⁵⁵. However, this does not fully address the significant overlap of interests between adults and minors⁷⁵⁶. A substantial number of teenagers often watch programmes that are classified as designed to be of interest primarily to adults, or for family viewing with or without any parental supervision⁷⁵⁷. These include football, athletics and other sporting

⁷⁵¹ Audiovisual Media Service Regulation, SI 2014/2916

⁷⁵² As amended

⁷⁵³ Although it is acknowledged that the time in which the programme is downloaded does not necessarily correspond to the time it is actually watched

⁷⁵⁴ CAP, ‘Placement of Advertising in Video-On-Demand Services: Guidance For Service Providers’ (Help Note) <http://www.cap.org.uk/News-reports/Media-Centre/2014/~media/Files/CAP/Helpnotesnew/2014-09-24_VOD_FINAL.ashxm> accessed September 2014

⁷⁵⁵ BCAP, ‘Scheduling and Audience Indexing’ (Advertising Guidance Note No.4) <<http://cap.org.uk/~media/Files/CAP/Help%20notes%20new/Guidance%20note%20on%20Scheduling%20%20MASTER%20FINAL.ashx>> accessed December 2014

⁷⁵⁶ Julia Hörnle, ‘A Critical Review of the Recommendation – Advertising Standards and Self-Exclusion’ (Regulating Online Gambling in the EU- Recommendation 2014/478/EU on Player Protection – Where Do We Go From Here?, Paris, 25 November 2014)

⁷⁵⁷ Ofcom Report, ‘Trends in Advertising Activity – Gambling’ (November 2013) <<http://stakeholders.org.ofcom.org.uk/binaries/research/tv->

competitions as well as ‘adult’ comedies, sitcoms or movies such as *Sex in the City* or *Friends*. In 2013 *Childwise* reported that the most popular television programmes watched by girls were *Geordie Shore*, *EastEnders*, *Family Guy* and *Friends*; and *Family Guy*, *Match of the Day*, *The Simpson* and *Bad Education* by boys⁷⁵⁸. None of them is dedicated specifically to children. Although the above listed programmes, except for *EastEnders*, are unlikely to contain gambling, it demonstrates adolescents’ preference toward more ‘grown-up’ content and also shows that zoning advertisements only from programmes where the audience consists predominantly of children, is unlikely to be effective.

Furthermore, and despite the overall pervasiveness of television advertising in respect to any other media, any restrictions on broadcasting are further undermined by the ubiquity of gambling commercials in public places and the Internet. This is due to the proliferation of online access both on home computers, smart-television sets, smartphones and other portable devices, with more children than adults possessing a ‘smart’ mobile phone⁷⁵⁹.

Teenagers are frequently visiting internet sites that are designed for the general population such as *YouTube* or *FunnyJunk*; online gaming sites such as *FreeOnlinegames* or *Miniclip*; social networking or messaging sites like *Instagram*, *Facebook* or *Twitter* as well as generic informational sites like *BBC News* and *Google* search engines, in addition to the wealth of many shopping websites⁷⁶⁰. Amongst children between 10 and 15 years old the most popular websites in 2013 were *Facebook*, *YouTube*, *Twitter*, *Instagram* and *Google*, all of which aim to attract general readership. Children under the age of 13 should not even be permitted on *Facebook*. However, as pointed out by Livingstone et al⁷⁶¹, a significant number of children misrepresent their age in order to appear older when registering with social networking sites. This may lead them to being exposed to advertising that is targeted at adults. Reports from previous years indicated a similar

[research/Trends Ad Activity Gambling.pdf?utm_source=updates&utm_medium=email&utm_campaign=gambling-ads](#)> accessed May 2014

⁷⁵⁸ CHILDWISE, ‘Pocket Fact Sheet 2014’ (2014) <<http://www.youthblog.org/CHILDWISE%20-%20Pocket%20Fact%20Sheet%202014.pdf>> accessed May 2014

⁷⁵⁹ Sonia Livingstone ‘and others’, ‘Risks and Safety on the Internet: The Perspective of European Children’ Full Findings’ (EU Kids Online, LSE, 2011) <<http://www.lse.ac.uk/media%40lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/EUKidsOnlineIIRReports/D4FullFindings.pdf>> accessed January 2015

⁷⁶⁰ Agnes Nairn, ‘“It Does My Head It ... Buy It, Buy It, Buy It!” The Commercialisation of UK Children’s Web Sites’ (2008) 9(4) *Young Consumers* 239

⁷⁶¹ Sonia Livingstone, Kjartan Olafsson and Elizabeth Staksrud, ‘Social Networking Age and Privacy’ (EU Kids Online, 2011) <<http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/EUKidsOnlineIIRReports/ShortSNS.pdf>> accessed May 2015

position with the result that children may view advertisements that they should be protected from.

Fielder et al⁷⁶² analysed the advertising content of forty websites that were favoured by children. They identified that less than 1/3 of those websites that were most popular with teenagers had been designed specifically for them. Furthermore, of the 70 commercials that were observed on those sites and subsequently analysed, 25% promoted products/services not suitable for minors with 9% of them advertising gambling⁷⁶³. Although UK children report higher parental supervision, with resulting positive mediating effects of a responsible adult than is the case in other European jurisdictions, a large number of children still encounter harmful material online⁷⁶⁴. Those include sexual images, hate messages, eating disorder sites or depiction of drug use. More worryingly, some teenagers positively seek out⁷⁶⁵, or accidentally come across, pornographic sites online that often contain gambling advertisements⁷⁶⁶. Those who seek out such sites are also more likely to suffer from other maladaptive behaviours or even already experience problems with their gambling⁷⁶⁷. While children's exposure to pornography is arguably the more acute concern, the cumulative effect of enticement to both potentially hazardous activities may be particularly detrimental.

4.4.3.3. Do minors view gambling advertisements?

The fact that minors view gambling advertisements also has empirical support. The Ofcom report 2013⁷⁶⁸ indicated that children's gambling exposure has increased three-fold between 2005 and 2012, with children currently viewing approximately “*just over four gambling commercials*” on television per week⁷⁶⁹. The majority of viewing in 2012

⁷⁶² Anna Fielder ‘and others’, ‘Fair Game? Assessing commercial activity on children's favourite websites and online environments’ (2007)

<http://www.agnesnairn.co.uk/policy_reports/fair_game_final.pdf> accessed August 2014, 8

⁷⁶³ Fielder (n 762)

⁷⁶⁴ Sonia Livingstone ‘and others’, ‘Risk and Safety on the Internet: the UK Report’ (EU Kids Online, LSE 2011) <<http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/National%20reports/UKReport.pdf>> accessed May 2014

⁷⁶⁵ Culture, Media and Sport Committee, *Online Safety* (HC 2013-14, HC729-I) para 81-82

⁷⁶⁶ Comments from focus groups' discussion and candidate's own observation

⁷⁶⁷ Sally Monaghan, Jeffrey Derevensky, Alyssa Sklar, ‘Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendation to Minimise Harm’ (2008) 22 *Journal of Gambling Issues* 252

⁷⁶⁸ Ofcom Report, ‘Trends in Advertising Activity – Gambling’ (November 2013)

<http://stakeholders.org.ofcom.org/uk/binaries/research/tv-research/Trends_Ad_Activity_Gambling.pdf?utm_source=updates&utm_medium=email&utm_campaign=gambling-ads> accessed May 2014

⁷⁶⁹ CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes’ (2014)

occurred on sports channels on terrestrial television that enjoy the exception to the watershed restrictions, followed by all other television channels, commercial PSB portfolios and music channels⁷⁷⁰.

Research projects from a variety of jurisdictions also allege that minors in other countries view gambling commercials on a frequent basis. For example, Derevensky et al⁷⁷¹ reported that 96% of the 12 to 19 years old participants in their study admitted to having seen gambling ads on television. Qualitative empirical study with 50 young persons aged between 13 and 18 years old in six focus groups carried out by McMullan et al⁷⁷² not only found that a large number of young people have “*considerable exposure*” to gambling advertising, but also that many of them identified themselves with the message conveyed. Only the younger participants were more likely to find the adverts unattractive⁷⁷³.

A very similar indication has been seen during the focus group discussions facilitated by this candidate. Although the study was of a qualitative nature, the desire to discuss gambling advertising was remarkable. While the views of the pupils on other issues were suitably diverse, all groups not only confirmed that they had seen gambling advertisements shortly prior to the focus groups taking place, on television or online, but many pupils were also able to recall names of many brands that were being promoted. Several pupils were able to provide quite a detailed summary of the content/plot or text of the advertisements, with some being even able to sing the relevant tunes. Unsurprisingly, most of the advertisements referred to were viewed around sport television programmes or on the Internet.

More worryingly, Susan (f, 14) reported seeing gambling adverts on the Disney channel and Tay (f, 14) found the online gambling ads annoying because she did not know how to avoid them, saying “*they are annoying, they always follow you to the end on the computer*”. Many of the pupils were of the view that there were far too many gambling

<<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~~/media/Files/CAP/Reports%20and%20survey/s/CAP%20and%20BCAP%20Gambling%20Review.ashx>> accessed November 2014, 23

⁷⁷⁰ Ofcom Report, ‘Trends in Advertising Activity – Gambling’ (November 2013)

<[http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends Ad Activity Gambling.pdf?utm_source=updates=updates&utm_medium=email&utm_campaign=gambling-ads](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends%20Ad%20Activity%20Gambling.pdf?utm_source=updates&utm_medium=email&utm_campaign=gambling-ads)> accessed May 2014

⁷⁷¹ Jeffrey Derevensky ‘and others’, ‘An Empirical Study Examining the Impact of Gambling Advertisements on Adolescent Gambling Attitudes and Behaviors’ (2007) 8 In J Ment Health Addiction 21

⁷⁷² John L McMullan, Delthia E Miller, David C Perrier, “‘I’ve Seen Them So Much They Are Just There’’: Exploring Young People’s Perceptions of Gambling in Advertising’ (2012) 10 Int J Ment Health Addiction 829

⁷⁷³ McMullan (n 772)

advertises generally, both on TV and online, with David (m, 17) and John (m, 17) pointing out that they had seen them so much that “*it gets to the point where every time you just get angry and close the window*”.

4.4.3.4. Do gambling adverts appeal to adolescents?

In light of the evidence that prevention of viewing gambling advertisements does not appear to be entirely effective, the importance of ensuring that those to which they are exposed to does not appeal to them, comes to the fore. Children and young people, in the same way as adults, do not represent a homogenous group and different messages and themes may differently appeal to each of them⁷⁷⁴.

However, an adolescent’s attention may be attracted by the audio-visual stimuli in terms of colour, graphics, music or actual plot of the advert, regardless of what is being advertised; the promoted product may be of particular interest to them, or they may be interested and aspire to the image and message that the advert portrays.

Studies of marketing campaigns of other industries (such as alcohol, cigarettes or food) identified that the use of animals, animated characters and youth-oriented music are particularly attractive to adolescents⁷⁷⁵, as well as the use of cartoons or other popular teenagers’ motifs⁷⁷⁶. In 2004 Duff⁷⁷⁷ carried out six focus groups with children aged 7 to 11 years old and examined data of approximately 1,200 children aged 5 to 16 years old based in the UK. She identified that children enjoy adverts that are “*humorous and well executed*” regardless of the actual product being advertised, with the 11 to 16 years old liking the advertisements for the alcohol industry most⁷⁷⁸.

Duff further reported that, while children up to the age of 8 years old appreciate mostly advertisements directed at them, older children’s focus tended to be directed at more ‘grown-up’ adverts⁷⁷⁹. Endorsement by various celebrities or professional gamblers has

⁷⁷⁴ John L McMullan, Delthia E Miller, David C Perrier, “I’ve Seen Them So Much They Are Just There”: Exploring Young People’s Perceptions of Gambling in Advertising’ (2012) 10 Int J Ment Health Addiction 829

⁷⁷⁵ MJ Chen ‘and others’ ‘Alcohol Advertising: What Makes It Attractive to Youth?’ (2005) 10(6) J Health Commun 553

⁷⁷⁶ CL Perry, ‘The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Legislation’ (1999) 153(9) Arch of Paediatr Adolesc Med.935

⁷⁷⁷ Rosemary Duff, ‘What Advertising Means to Children’ 5(2) Young Consumers 41

⁷⁷⁸ Duff (n 777)

⁷⁷⁹ Duff (n 777)

also been found to increase a positive attitude towards the adverts⁷⁸⁰, as well as associating gambling with sporting teams or sport figures⁷⁸¹. Yet, these are allowed and frequently utilised, especially in the context of sports sponsorship where gambling companies present themselves as popular and legitimate entertainment, a sophisticated and exciting world to which young people would be welcome as soon as they reach maturity.

The advertising industry Codes set the standard that must be achieved but the individual method of attaining it is not prescribed, with only one definitive provision, i.e., that an advertisement “*must not include a child or young person*” and that “*no-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role*”⁷⁸² [in the advert] as this is assumed to increase the appeal amongst the youth by suggesting that gambling is a popular and common youthful consumption irrespective of the prohibition.

All other provisions of the Code are less prescriptive and whether marketing communication complies, or is in breach, is open to interpretation. Most of the provisions have been devised with the protection of the general population in mind but, in light of adolescents’ aspirations towards adulthood, they are equally important from the perspective of minors’ protection. In addition to the rules already listed in paragraph 4.4.2, they include the requirements that marketing communication must not encourage irresponsible gambling⁷⁸³, must not suggest that gambling can offer a solution to personal problems⁷⁸⁴ or financial difficulties⁷⁸⁵, must not portray gambling as more important than other life activities⁷⁸⁶, as a rite of passage⁷⁸⁷ or within the working environment⁷⁸⁸. Furthermore, gambling must not be linked with increased self-image or self-esteem⁷⁸⁹, with sexual success or seduction⁷⁹⁰ or with criminal or anti-social behaviour⁷⁹¹.

⁷⁸⁰ Sally Monaghan, Jeffrey Derevensky, Alyssa Sklar, ‘Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendation to Minimise Harm’ (2008) 22 *Journal of Gambling Issues* 252

⁷⁸¹ Sophie Lindsay ‘and others’, ‘Eat, Drink and Gamble: Marketing Messages About ‘Risky’ Products in an Australian Major Sporting Series’ (2013) 13 *BMC Public Health* 719

⁷⁸² CAP Code, Rules 16.3.14 and 17.14

⁷⁸³ CAP Code, Rule 16.3.1

⁷⁸⁴ CAP Code, Rule 16.3.3

⁷⁸⁵ CAP Code, Rule 16.3.4

⁷⁸⁶ CAP Code, Rule 16.3.5

⁷⁸⁷ CAP Code, Rule 16.3.10

⁷⁸⁸ CAP Code, Rule 16.3.17

⁷⁸⁹ CAP Code, Rule 16.3.6

⁷⁹⁰ CAP Code, Rule 16.3.8

⁷⁹¹ CAP Code, Rule 16.3.16

These principles go a long way in restraining the gambling industry from exploiting many of the acute vulnerabilities of people who otherwise may be induced into wishful, as opposed to rational thinking⁷⁹². However, they are not sufficiently definite to eliminate the possibility of emotive appeal, and are not expansive enough to ensure that gambling adverts focus on providing information rather than influencing choices and increasing uptake.

The above allegation was supported by many pupils who participated in the focus groups. Despite the tendency to verbalise an overall derogatory attitude towards gambling marketing campaigns, or the advertising industry in general, many pupils admitted that many of the advertisements were interesting, appealing and “*draw you in*”. For example, O (17, f) stated “*they draw you in; they draw, as you may see it on a TV advert and you might think that you can bet on a football match and they say like, place like £1 to be in a chance of winning £50; and once you are inside ...; they may just put £10 like that; I think they do it really smart to target people and they do it really hard*”. Misha (14, f) found the adverts equally persuasive. She stated “*the adverts make it look like it makes you want to play*”⁷⁹³ and Forest (14, m) comments “*the gambling adverts are appealing; if you see gambling presented in a way obviously you want it; isn't there always like a hot girl in or around the advertisement?*”

While pupils recognised that some of the commercials are “*not really attractive*” (Carly, 17, f) and “*off-putting*” (Twinker, 17, f) others allured to the portrayal of glamour⁷⁹⁴, having fun⁷⁹⁵, gambling as an exciting way to socialise with others⁷⁹⁶, humour⁷⁹⁷, coolness⁷⁹⁸ and even links with sexual appeals⁷⁹⁹ that is specifically prohibited by the advertising codes.

Many of the pupils also displayed feelings of distrust towards real money gambling advertisements, with a substantial number of them thinking that the commercials do not illustrate real money gambling activities in an honest way. Some thought that the focus is

⁷⁹² Shelly Rodgers and Esther Thorson, *Advertising Theory* (Routledge 2012) 514

⁷⁹³ Similar view as also expressed by Quentin (14, m)

⁷⁹⁴ E.g. Misty (17,f)

⁷⁹⁵ E.g. Cookie (14,m)

⁷⁹⁶ E.g. Kid (14,m)

⁷⁹⁷ E.g. John (14,m)

⁷⁹⁸ E.g. Bubble (14,m)

⁷⁹⁹ E.g. Forest (14,m)

too much on displaying people winning lots of money but not showing the faces of those who lose or those individuals who gamble and get really upset or angry in the process.

But this did not stop them from being potentially attracted to them. For Cookie (14, m) the advertisement that he had seen was clearly misleading as it did not match the reality. However, it also showed an example of a minor acting directly in response to seeing an advertisement. He described his experience as follows: *“yeah, you know the advertisement, you know this thing like I am watching TV and you see like this guy with all this 3-D dashing around with all the cool graphics and then you finds it’s poker and all, no lie, it makes you want to go online and play poker but then you go online and it’s nothing like that; it gives you the wrong sense that gambling is like fun, like fun experience but when you really go out there it is like – aargh”*.

The above summary clearly demonstrates that the minors in the sample were exposed to a large number of gambling-related commercials and that they found that many of these adverts appealed to them, with some of them trying to find out more about the activity precisely in response to seeing such an advert. If it is assumed that the provisions contained in the Advertising Codes are adequate, the findings from the present focus groups, and other studies, could be taken to indicate that there are widespread breaches of the rules, and that the real issue lies not with the rules themselves, but only with lack of enforcement. However, this is not the assessment reached by the Advertising Standards Authority itself and brings us back to the issue of adequacy of the rules themselves.

4.5. Advertising Standards Authority’s rulings

4.5.1. Introduction

Compliance with the CAB and BCAB Codes is being monitored by the Advertising Standards Authority under the supervision of Ofcom. The Office of Communication alone has the power to issue formal sanctions for breaches of advertising broadcasting laws. The Gambling Commission has the power to bring criminal prosecution against any gambling operator in breach of any provisions under the Gambling Act 2005. To this candidate’s knowledge there has not, as yet, been any criminal prosecution for gambling advertising.

The ASA has the power to assess advertisements and to direct amendments or complete withdrawal if necessary. However, their adjudication is reactive as it must be triggered by a complaint made either by a member of the public, or a pressure group such as *The*

Gambling Reform and Society Perception Group. Once the complaint is made the ASA has the power to investigate issues relating to the advertisement of its own volition, even if it was not raised by the complainant, but the ASA does not instigate investigations. This automatically implies that rulings come after the potentially “*non-compliant*” advertisement has been exposed to the general public and someone then felt strongly enough about it to actually raise it with the regulatory authority.

In light of the pre-broadcast clearance procedures one could suggest that this should not be concerning. However, a quick look at the weekly rulings of the ASA demonstrated that there continues to be a significant number of advertisements that are found in breach of the Code, despite receiving the relevant endorsement from the clearance bodies prior to the broadcast. For example, in the weekly rulings published on the 23rd of April 2014 of all different types of advertisements, there were 70 complaints made in total, of which 23 resulted in formal adjudication, 45 were resolved informally and 2 related to direct mail marketing⁸⁰⁰. Of these 23 official rulings, eight related to television advertising and of these eight, five were found to be in breach of the BCAP Code, despite receiving prior clearance from Clearcast.

The ASA rulings give a reasonably good insight into the methodology of assessment that is utilised by them in discharge of their duties. What becomes apparent is the technical approach adopted that focuses predominantly on assessing the advert against a specific objection being made under the CAP or BCAP Codes. This does not necessarily facilitate a more in-depth look at the potential wider impact of the image portrayed. This candidate submits that the examples selected below will show that it can be discerned, especially from the rulings where the complaint has not been upheld, that ASA still largely bases their decisions on the transmission theory of communication⁸⁰¹ that assesses communication from the perspective of the sender, but this does not necessarily correspond to how young people construct and react to advertisements. Furthermore, if there is a clear breach of the Code, the ASA is likely to uphold the allegations, but where there is scope for interpretation the rulings are likely to give preference to the view of the industry rather than the complainant.

⁸⁰⁰ <<http://www.asa.org.uk/Rulings/Adjudications.aspx?date=22/04/2014#results>> accessed April 2014

⁸⁰¹ Barrie Gunter, Caroline Oates and Maria Blades, *Advertising to Children on TV: Content, Impact, and Regulation* (Routledge 2005)

4.5.2. Gambling advertisements’ rulings

In the context of gambling advertisement, it may be considered as a very positive indicator that, between October 2009 and September 2014, a search on the ASA website showed only 66 formal rulings⁸⁰² and 61 informal resolutions that have been published in total⁸⁰³. It must be remembered, however, that these only represent adverts against which a complaint has been made. Most of the commercials attracted a complaint from only a small number of people (usually one or two), with some notable exceptions.

For example, a *PaddyPower* TV commercial that gave the impression of a cat being hurt by blind football players in the course of the game attracted 1,091 objections. None of these objections specifically criticised the gambling aspects of this commercial but protested against it as they considered it “*offensive to blind people*” and as “*encouraging or condoning cruelty to animals*”⁸⁰⁴. This advert was approved by Clearcast prior to broadcast and was supported by the England Blind Football Team. The ASA did not uphold the complaint as in their assessment the advert “*would be interpreted by most viewers as a humorous depiction of a fictional situation*” and that “*because it was surreal, farcical and light-hearted in tone they considered it was unlikely to be seen by most viewers as a gratuitous or realistic portrayal of cruel treatment*”⁸⁰⁵.

Two aspects of this decision are worth highlighting. The ASA’s justification that “*most viewers*” would interpret the adverts in line with ASA’s interpretation is open to challenge. The level of opposition, especially seen in the light of the number of complaints against other adverts, was quite remarkable, thus reinforcing the allegation made earlier with regards to reliance on transmission theory. Secondly, it was accepted that the commercial was not broadcast in or around children’s programmes and was not targeting minors. This suggestion permitted the adjudicators to exclude children from their consideration of the characteristics of “*most viewers*”. However, just because the advert was not directed at minors, it does not mean that they did not see it, especially as

⁸⁰² <<http://www.asa.org.uk/Rulings/Adjudications.aspx?SortBy=Date&SearchTerms=gambling%20gaming%20casino&Type=1#adj>> (September 2014). The number of formal rulings displayed is 84 following a search with terms: gambling, gaming and casino. Of those, 18 did not relate to gambling

⁸⁰³ ASA Ruling

<<http://www.asa.org.uk/Rulings/Adjudications.aspx?SortBy=Date&SearchTerms=gambling%20gaming%20casino&Type=1#2>> accessed September 2014

⁸⁰⁴ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2010/7/Paddy-Power-plc/TF_ADJ_49797.aspx> accessed September 2014

⁸⁰⁵ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2010/7/Paddy-Power-plc/TF_ADJ_49797.aspx> accessed September 2014

it still continues to be available on *YouTube*⁸⁰⁶ where it can be seen by many teenagers who may be affected as the complainants suggested, and not as the ASA interpreted the adverts.

This candidate identified only 11 complaints that included a specific allegation that they may appeal to children. The ones that have been upheld by the ASA tended to have committed an unequivocal breach of the Code. For example, adverts for Betfair and Paddy Power were held as non-compliant for including persons who were under the age of 25, in direct contravention of what was the equivalent to the current 16.3.14 CAP rule. The email ad for Betfair Ltd⁸⁰⁷ contained a picture of Annette Obrestad, a 20-year-old professional poker player, who was made to appear to be even younger by giving her an address of Annette_15 and by using the strapline “*online experience is measured in games, not years*”. Paddy Power’s advert⁸⁰⁸ that was published in the national press included the picture of the footballer Luiz Suarez who, at the time of print, was 24 years old. Turner Broadcasting System Europe Ltd t/a The Cartoon Network and Boomerang⁸⁰⁹ were also obviously in breach when they broadcast 9 times an advertisement on behalf of coral.co.uk during children’s programmes in the morning slot between 6.42am and 8.42am, as was the Club Website⁸¹⁰ that sent an email promoting Bet Butler’s £25 free bet to a 10-year-old boy.

A television commercial on behalf of the website King.com can be argued to represent a clear attempt to disguise what was, in fact, a gambling advertisement that was designed to appeal to minors. The King.com is a site for playing computer games such as Bejeweled, but it also had a link to RoyalGames.com, a gambling website. The advert featured a cartoon caricature of a woman against a pink background who was overjoyed after winning 20 pence in one of the games. The background contained colourful graphics and the accompanying text referred to the possibility of £30,000 jackpots. The ASA was clearly correct when they consider that “*the overall impression, including the simple language, video game-like examples, cartoon images and pocket money-type winning*

⁸⁰⁶ <<http://www.youtube.com/watch?v=ispFwTHxtg>> accessed April 2014

⁸⁰⁷ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2013/6/Betway-Ltd/SHP_ADJ_224966.aspx> accessed September 2014

⁸⁰⁸ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2012/1/Paddy-Power-plc/SHP_ADJ_174843.aspx> accessed September 2014

⁸⁰⁹ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2013/6/Turner-Broadcastin-System-Europe-Ltd/SHP_ADJ_227765.aspx> accessed September 2014

⁸¹⁰ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2014/1/Club-Website-Ltd/SHP_ADJ_244042.aspx> accessed September 2014

sums, was likely to be of particular appeal to children or young persons”⁸¹¹ and directed for the advert to be withdrawn. However, it is submitted that this commercial had clearly targeted children, and it is unfortunate that no further action was taken either by the ASA or by the Gambling Commission itself.

The use of characters that are known to appeal to children, but which also appeal to adults, causes more controversies as their compliance, or breach, is dependent on the more subjective evaluation of the ASA panel. The use of Spiderman in a comic format⁸¹² to promote www.888.com online casino was found to be of particular appeal to children as well as featuring characters from the famous toy brand Transformers. Both press adverts for Metro Play Ltd⁸¹³ and Trinity Mirror Plc t/c Mirror.Casino.com⁸¹⁴, contained the character Optimus Prime from the popular cartoon, and was deemed not to comply with the Code, but featuring Robin Hood in a TV commercial was not⁸¹⁵.

This decision was taken because the references were made to the Robin Hood movie that was played in 1938 rather than the newer versions. The actors were wearing medieval style clothes and used medieval style language, with the actresses behaving in a girly and coquettish manner but being referred to as ladies rather than girls. This, in the view of the ASA adjudicator, would imply an older person. Although this candidate accedes that this advert was aimed at adults, the ruling is not persuasive in that it does not also appeal to children. Especially, the member of Cassava Enterprises (Gibraltar) Ltd who submitted that *“the full-sleeved floor-length dresses with trains, head dress, rings and handkerchief, would have been foreign to younger viewers”*⁸¹⁶ does not appear to have ever seen *“Swashbuckle”* broadcast on *Cbeebies* (targeted to those who are under the age of 8 years old), *“Horrible Histories”* played on CBBC or the teenagers’ blockbuster movies *“Pirates of the Caribbean”*. Such statements should not be endorsed by the ASA adjudicator’s panel, even if the overall assessment of the particular advert was correct.

⁸¹¹ Complaint no. 62249, details no longer available on the ASA website

⁸¹² ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2013/7/Cassava-Enterprises-Gibraltar-Ltd/SHP_ADJ_227765.aspx> accessed July 2014

⁸¹³ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2014/1/Metro-Play-Ltd/SHP_ADJ_246212.aspx> accessed July 2014

⁸¹⁴ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2012/11/Trinity-Mirror-Plc/SHP_ADJ_207001.aspx> accessed July 2014

⁸¹⁵ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2012/8/Cassava-Enterprise-Gibraltar-Ltd/SHP_ADJ_198328.aspx> accessed July 2014

⁸¹⁶ Comments taken from the response that Cassava Enterprise (Gibraltar) Ltd submitted in response to the complaint

The preference to the interests of the industry can also be seen from the ASA decision not to uphold a complaint made against an advert promoting Mecca Bingo that was displayed on the X Factor *Facebook* page and referred to Little Mix and Miss Dynamix⁸¹⁷. Despite acknowledging that this advert was likely to appeal to under 18s, the ASA decided to accept the respondents' statement that this post was restricted to *Facebook* users who are over the age of 18. This was despite the well-known evidence of the severe inadequacy of *Facebook*'s age verification process, as well as the appeal of X-Factor itself to a large teenage audience. The ruling did not refer to any further evidence that would prove that the advert was, in fact, age-gated other than purely by reference to Facebook registration as was the case on behalf of Profitable Play⁸¹⁸ in an unrelated decision, and it is likely that no other forms of age verification was taking place.

Another example of an official ruling where protection of children was expressly mentioned related to an advert on behalf of Charon Communication Ltd/Swank Poker. The claim was brought by the Remote Gambling Association and it was alleged that the advertorial that appeared in *Flush* magazine was linked with seduction and sexual success, and was contrary to the need to protect minors⁸¹⁹. While the ASA accepted that the advertorial linked gambling with sexual success, it stated that the advert was not likely to affect children as it was contained in an age-restricted adult magazine. This was despite the fact that this complaint was brought by the Gambling Association itself, and despite the evidence that age-restricted magazines may still be read by minors. The complaint against the advertorial was ultimately upheld due to the breach of the Code that prohibits gambling being linked with sexual success, but the claim that related to minors' protection was rejected.

Other rulings that related to links between gambling and increased attractiveness, sexual seduction or success did not even consider or refer to minors' protection. While it is correct to say that “*adult*” material should not be available to minors, existing evidence shows, as already noted above, that this is not the case and adolescents are exposed to, and access, pornography on an increasingly regular basis. What is highlighted by the advertising rulings is that the decisions are still reached on the basis of what teenagers

⁸¹⁷ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2014/3/FremantleMedia-Ltd/SHP_ADJ_250656.aspx#.VK112rmzV9A> accessed July 2014

⁸¹⁸ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2012/10/Profitable-Play-Ltd/SHP_ADJ_205246.aspx> accessed July 2014

⁸¹⁹ ASA Ruling <http://www.asa.org.uk/Rulings/Adjudications/2009/6/Charon-Communication-Ltd/TF_ADJ46344.aspx> accessed July 2014

should or are deemed to be doing, or what they are supposed to be interested in, as opposed to what they in fact do or actually are interested in, thus effectively leaving them to protect themselves.

4.5.3. The ASA Qualitative Study on Public Perceptions of Gambling Advertising in the UK⁸²⁰

The ASA findings from the qualitative studies carried out by the Research Work, on behalf of the ASA, concluded that the participants in the sample were relatively content with the volume and the content of existing gambling advertising, and with the work of the ASA itself. Although the sample recognised the potential negative impact of such adverts on minors or other vulnerable groups, they gave preference to the right of people to view the ads and disliked the concept of censorship. The report indicated that the sample thought that existing restrictions are adequate and work well.

However, the findings from this study in the context of minors' protection should be treated with caution, particularly because the participants of the focus groups excluded anyone who was under the age of 18 years old. Additionally, potential participants were also excluded if they utilised the ASA, either in the past or at the time of the focus group to voice their concerns about any type of commercials; if they had been identified to have too strong anti-gambling views due to moral or religious convictions, or if they considered that they had a gambling problem and had looked for help⁸²¹. These categories, taken together, constitute a significant proportion of the population; they also represent the groups of people who are less likely to be indifferent to gambling advertisements and more likely to be particularly affected by them. The ASA's rationale for exclusions may have been justified by the purpose of the study but it does not eliminate the consequence that the sample was composed of people who could have been predicted to provide the response that ASA sought.

Finally, one of the decision of the ASA in response to one of the earlier complaints against the Foxy Bingo.com advert featuring a fox that was analysed during the ASA focus groups is worth highlighting. This advert was challenged on the basis that the 'foxy' character may appeal to children, but was dismissed because the 'foxy' was made to look

⁸²⁰ ASA, 'Public Perceptions of Gambling Advertising in the UK' (October 2014) <<https://www.asa.org.uk/News-resources/~media/Files/ASA/Reports/ASA%20Gambling%20Advertising%20Research%20Agency%20Report.ashx>> accessed December 2014

⁸²¹ 'Public Perceptions of Gambling Advertising in the UK' (n 820) 6

like an older character and, as the advert was subject to scheduling restrictions, it was deemed not to appeal to children. All participants of the focus groups clearly “*believed that this advertising would definitely be appealing to children, since all colourful material featuring music and animal characters is known to do so. Equally, however, none believed that it would be likely to encourage children to gamble because of when the advertising is likely to be shown*”⁸²². The report then stated that “*a majority of the sample ultimately agreed with the ASA’s judgment in this case, feeling that the restrictions in place on showing the advertising would be enough to protect children*”⁸²³.

Without undermining the conclusion reached in the above mentioned study in respect of the Foxy Bingo advertising, it is submitted that two issues have been confused. The scheduling restrictions and the prohibition of advertising that appeals to children are interrelated but separate. As it has been demonstrated in paragraph 4.4.3, scheduling restrictions do not fully prevent minors from viewing the advertisements and accordingly, if the commercial’s content is considered to appeal to minors, it should not be justified by its aired time. Anecdotally, the Foxy Bingo advert was mentioned by the pupils during the focus groups carried out for this thesis. This clearly demonstrated that the scheduling restrictions did not prevent the pupils from the sample from seeing it, although their views varied as to whether this particular advertisement was appealing to them or not.

4.6. Conclusion

This thesis accepts that the actual impact of advertising, whether positive or negative, remains uncertain and this chapter did not aim to prove either way. Nevertheless, the legislation itself and the advertising regulatory authorities, all acceded by necessary implication that gambling advertising may have some negative impact as otherwise there would be no need for any restrictions to be imposed. Accordingly, it is submitted that if such restrictions are deemed necessary they should be effective at achieving their stated aims. In the context of gambling marketing this requires that gambling-related advertisements are not aimed at minors, are designed in a manner that will not appeal to them, and that children’s and young person’s exposure is limited as much as possible.

⁸²² ASA, ‘Public Perceptions of Gambling Advertising in the UK’ (October 2014) <<https://www.asa.org.uk/News-resources/~media/Files/ASA/Reports/ASA%20Gambling%20Advertising%20Research%20Agency%20Report.ashx>> accessed December 2014, 14

⁸²³ ‘Public Perceptions of Gambling Advertising in the UK’ (n 822) 15

This chapter demonstrated that the existing regulatory provisions do not necessarily achieve the aforementioned objectives. Teenagers may be exposed to a large number of gambling commercials, some find them appealing and attractive and some of them even seek out further information about gambling as a direct response to viewing related advertisements.

It is submitted that the weaknesses of the existing regulation stems from the failure of policy makers, the ASA and the industry to openly admit that the determination of what appeals to adults, while still being unattractive to children, is a formidable, if not impossible, task except with regards to very young children. Neither adults nor children are a homogeneous group but what appeals to adults often tends to appeal to teenagers in the same fashion, and sometimes even more than it attracts adults themselves.

Despite a substantial amount of market research being regularly carried out by the industry, whether a particular campaign will prove successful or not often remains within the remit of educated speculation. This is not only due to the potential disparities between producers' interpretation of the adverts' meaning and the way it is construed by the receivers⁸²⁴, but also due to the fact that “*a child takes into a viewing situation his unique background, experience, needs, personality, and ability to process information*”⁸²⁵. The substantial overlap of interest⁸²⁶ between minors and adults in the era of television in children's bedrooms⁸²⁷, widespread use of internet enabled portable devices⁸²⁸ and “*on demand*” programmes, means that ‘*watershed*’ and ‘*zoning*’ restrictions are unlikely to achieve the intended aim either.

The famous slogan of the advertising industry that only “half of the advertisements work but nobody knows which half”⁸²⁹ illustrates the ongoing struggle of marketers to make commercials alluring to the intended target while still staying within the parameters of the law. This also shows, coupled with the increasing amounts of expenditure allocated

⁸²⁴ Sonia Livingstone, ‘The Challenge of Engaging Youth Online: Contrasting Producers’ and Teenagers’ Interpretation of Websites’ (2007) 22(2) European Journal of Communication 165

⁸²⁵ Alan J Resnik, Bruce L Stern, Barbara Alberty, ‘Integrating Results From Children’s Television Advertising Research’ (1979) 8(3) Journal of Advertising 3

⁸²⁶ Julia Hörnle, ‘A Critical Review of the Recommendation – Advertising Standards and Self-Exclusion’ (Regulating Online Gambling in the EU- Recommendation 2014/478/EU on Player Protection – Where Do We Go From Here?, Paris, 25 November 2014)

⁸²⁷ Sonia Livingstone ‘and others’, ‘Risk and Safety on the Internet: the UK Report’ (EU Kids Online, LSE 2011) <<http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20%282009-11%29/National%20reports/UKReport.pdf>> accessed May 2014

⁸²⁸ Livingstone (n 827)

⁸²⁹ John Wanamaker, ‘The Advertising Century’ (29 March 1999) <<http://adage.com/century/people006.html>> accessed May 2015

to commercials, that the industry believes that at least some of them have the desired effect, i.e., retaining existing customers and bringing new ones. Whether drawing from social learning, cognitive or behavioural theory, or simply looking at economic considerations, it is clear that advertising impacts on people in multiple manners, many of which may not be consciously recognised or which may appear only after a long period of time.

In light of the above evidence, it is submitted that the policy makers should reconsider their policy towards gambling commercials and strengthen the provisions on the basis of precautionary principle. This thesis concedes that banning gambling advertising is an unrealistic proposition in the current political climate and a compromise solution is proposed. The typical argument against restricting any forms of advertising is that customers are entitled to receive relevant information in order to make an informed choice. However, such information does not have to come in the form of an advert with colourful graphics, exciting plots or other motifs that tend to appeal to the emotional states of viewers rather than providing actual information. Accordingly, it is suggested that the gambling industry should be permitted to give such information, but it should be transmitted in a plain, '*news-type*' format, should contain all relevant details including the probability of winning the advertised prize, and should not use abstract graphics or other emotional materials. This would benefit the current youths while satisfying the need to resist censorship or restrict adults' freedom to be informed of their choices.

Furthermore, it has also been identified in this chapter that there is a group of young people who are very eager to discuss views relating to gambling commercials. Accordingly, it is submitted that the ASA, in addition to the qualitative focus groups that they run with adults, should run a similar one with young people in order to gain further and more in depth insight as to how they receive and construe gambling advertising.

Chapter 5 – To what extent does regulation contribute to the prevention of gambling-related harm amongst minors? The role and effectiveness of the Gambling Commission

5.1. Introduction

The introduction of the Gambling Act 2005 represented the outcome of the political decision of the (then) Labour government to legitimise gambling and to portray it as a normal form of entertainment, as opposed to being seen as a “vice”. The movement was triggered by the perceived changes in the political and social attitudes towards gambling⁸³⁰, as well as the rapid increase in the utilisation of the World Wide Web for commercial and personal purposes⁸³¹, that could not have been addressed with legislation enacted prior to the creation of the Internet. The preceding statutes were increasingly out of date and, within the online environment, created an anomaly that saw British operators being banned from offering and advertising gambling services in their home jurisdiction, while providers licensed abroad were allowed a free access to British customers⁸³².

The archaic nature of the law, the anomaly affecting remote operators, and the growth of the gambling industry had to be addressed and modernisation of the law became unavoidable. However, what amounted to a political choice was the “*dramatic shift in policy from regulatory containment to market-led expansion*”⁸³³. The Gambling Act 2005 did not create the gambling industry, as this was already firmly established well before the statutory amendment came into force. But it was the Act that removed the “*demand test*” that facilitated its rapid expansion, proliferation of opportunities and ‘normalisation’ of gambling.

It is submitted that the timing of the liberalisation was no coincidence in their appearance shortly after the implementation of anti-tobacco legislation that was intended to actively contribute towards the suppression of smoking within the society as a whole, and by the young generation in particular. The public recognition of harm caused by nicotine to the individual smoker, and the enhanced sensitivities towards smoking externalities⁸³⁴, made

⁸³⁰ WA Bogart, *Permit but Discourage: Regulating Excessive Consumption* (OUP 2011) 203

⁸³¹ Chris Reed, *Making Laws for Cyberspace* (OUP 2012) 5

⁸³² Department for Culture, Media and Sport, *Gambling Review Body Report* (Cm.5206, 2001)

⁸³³ Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70(4) MLR 626

⁸³⁴ Such as harm caused by passive smoking

anti-smoking legislation politically desirable and somewhat deflected attention from other “vice” activities. While the public awareness of harm caused by cigarettes is frequently overestimated⁸³⁵, and cultural embedding of alcohol consumptions nearly always caused significant restrictions to be resisted, the risk of gambling-related problems are not always well recognised and are often dismissed by the general public⁸³⁶.

Gambling has constituted an inherent part of the British culture since the aristocratic times⁸³⁷ and, over the course of the last 200 years, the social outlook was in regular flux⁸³⁸. However, at the time of the Gambling Bill’s passage, the prevailing attitudes were still more negative. This meant the pure liberalisation would amount to a political suicide and placed gambling regulation at the forefront of significance as it provided defensible arguments to alleviate anti-gambling concerns. Accordingly, the Act only produced the relevant framework, with the responsibility for the achievement of the controlling objectives of the Act being primarily delegated to the powers of regulations⁸³⁹. This was positioned as a sufficient measure to counterbalance unintended effects of liberalisation. Adherence to the provisions of the Act must be ensured by the gambling operators⁸⁴⁰, but the duty to develop a strategy to protect minors from gambling-related harm was clearly allocated to the Gambling Commission.

The enforcement powers are shared between the Commission, local authorities and the police, who contrary to Black’s⁸⁴¹ assertion, continue to retain an important albeit only supportive role. The Commission that took over its functions from the Gaming Board and merged with the National Lottery Commission in October 2013, was established by s.20 of the Act itself as the main regulator of the gambling industry.

The Commission is officially independent but it reports to the Department of Media, Culture and Sport and is funded by the gambling industry licence fees⁸⁴². In its function it is supported by co-regulatory authorities listed in s.2 of the Gambling Act. They

⁸³⁵ W Kip Viscusi (Ed), *Regulation through Litigation* (Brookings Institution US 2002)

⁸³⁶ Gill Valentine, ‘Literature Review of Children and Young People’s Gambling’ (2008)

<<http://www.gamblingcommission.gov.uk/pdf/Literature%20review%20of%20children%20and%20young%20peoples%20gambling%20-%20Sept%202008.pdf>> accessed October 2010

⁸³⁷ David Miers, *Regulating Commercial Gambling: Past, Present and Future* (OUP 2004)

⁸³⁸ WA Bogart, *Permit but Discourage: Regulating Excessive Consumption* (OUP 2011)

⁸³⁹ S Smith (ed), *Smith and Monckom: The Law of Gambling* (3rd Ed, Tottel Publishing 2003)

⁸⁴⁰ David Miers, ‘Regulatory Perspectives from the Member States’ (Recommendation 2014/478/EU on Player Protection: Where Do We Go From Here? Paris, 25 November 2014)

⁸⁴¹ Julia Black, ‘Tensions in the Regulatory State’ (2007) P.L.58

⁸⁴² Gambling Commission Webpage <www.gamblingcommission.gov.uk> accessed July 2014

comprise of: district council or county council, the Common Council of the City of London, the Council of the Isles of Scilly, and in Scotland also the licensing board created under s.1 of the Licensing (Scotland) Act 2005.

This tripartite arrangement causes some overlaps but the boundaries can be discerned in a reasonably precise way. While the Gambling Commission is responsible for the development of the overall strategy for gambling regulation and for offering support to, and control of, the industry players who in principle want to remain, at least officially, within the parameters of the law, all three bodies (the Gambling Commission, local authorities and the police) are responsible for ensuring that gambling is provided in a lawful, crime-free and fair manner.

5.1.1 The aims of this chapter

The black letter legal provisions often play only a very marginal role in the overall regulatory policies that underpin and influence the gambling industry's conduct⁸⁴³. The Gambling Commission, in its role as the regulator, has wide-ranging powers to compensate for the statutory weaknesses that were identified in the previous chapters to ensure that the objective of minors' protection, alongside the other two licensing objectives, is placed at the forefront of significance.

Accordingly, this chapter examines how the Gambling Commission uses its authority and argues that the regulator does not place enough emphasis on the third licensing objective, a position that is detrimental to minors. While it is recognised that the Gambling Commission operates under significant constraints, it will be shown that its activities in relation to minors' protection are still too confined to only making sure that operators comply with the legally prescribed age verification requirements and, accordingly, are insufficient to operate as an effective countermeasure to statutory liberalisation of gambling.

5.2. Principles of regulation

5.2.1. General principles

The traditional definition of regulation is typically attributed to Selznick who described it as "*a sustained and focused control exercised by the public agency over activities that*

⁸⁴³ Julia Black, 'Talking about Regulation' (1988) P.L.77

are valued by the community”⁸⁴⁴. This definition can be contrasted with a wider understanding that argues that regulation encompasses all activities undertaken by the government, and regulatory agencies, and includes the principle of corporate governance that work together to achieve the intended outcome⁸⁴⁵.

In the context of gambling in the UK, regulation encompasses rules set out by the Gambling Commissions and local authorities that are supplemented by several self-regulatory measures, of which the most important ones deal with gambling advertisements. The National Audit Office expects all regulators to consider whether self-regulation or other alternatives would reach the policy aims in a more cost-effective way⁸⁴⁶ and the gambling industry produced several self-regulatory measures. However, with the exception of gambling advertisements that still are governed predominantly by self-regulatory Codes (as discussed in paragraph 4.4.2), other self-regulatory measures are not intended to replace, but to supplement existing provisions devised by the Commission.

This must be correct. The necessary pre-requisites for successful self-regulation were identified by Gunnigham and Rees⁸⁴⁷ as either “(1) *a strong natural coincidence between the public and private interest in establishing self-regulation; or (2) the existence of one or more external pressures sufficient to create such a coincidence of interest*” that is capable of minimising free-riding to acceptable levels⁸⁴⁸. None of these pre-requisites are met within the gambling environment. While gambling providers typically are not deliberately trying to attract minors onto their premises or websites, their natural interest lies with revenue maximisation and long term sustainability of which current-minors-future-adults-potential-customers are an inherent part.

The natural interest of the gambling industry and the society protection agenda diverges and conflicts. The development of effective procedures to prevent underage access is not

⁸⁴⁴ P Selznick, ‘Focusing Organisational Research on Regulation’ in R Noll (ed), *Regulatory Policy and the Social Science* (Berkeley California 1985) cited by Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 2

⁸⁴⁵ John SF Wright and Brian Head, ‘Reconsidering Regulation and Governance Theory: A Learning Approach’ (2009) 31(2) *Law & Policy* 192

⁸⁴⁶ National Audit Office, ‘Using Alternatives to Regulation to Achieve Policy Objectives’ (Better Regulation Executive, June 2014) <www.nao.org.uk> accessed July 2014

⁸⁴⁷ Neil Gunnigham and Joseph Rees, ‘Industry Self-Regulation: An Institutional Perspective’ (1997) 19(4) *Law & Policy* 363

⁸⁴⁸ Gunnigham (n 847)

cost free and while the advertising should not appeal to children, the gambling providers must continue to keep attracting new customers in order to remain in business. It could be argued that the adoption of socially responsible measures that would exclude minors contributes to the positive image of the industry as a whole and it better the reputation of specific providers. This in turn may facilitate higher profits due to customers' loyalties⁸⁴⁹, but such a link is too tenuous and too remote to successfully eliminate excessive free-riding and cannot be relied upon⁸⁵⁰.

The policy choice to liberalise the gambling market that was previously legally restrained, and the overall number of diverse industry players with a variety of operational models and priorities, also renders it unlikely that external pressures, outside of formal regulation, would organically develop with sufficient strength to force the industry to get together by itself and voluntarily protect minors and other vulnerable people from gambling-related harm.

Indeed, the industry representatives, when discussing reasons for compliance with the legal requirements during the International Association of Gambling Regulators' Conference, placed only one vote on "*intrinsic moral responsibility*" as the reasons for compliance⁸⁵¹. This demonstrates that gambling as a commercial activity should not be left to spontaneous social developments or voluntary industry agreements.

5.2.2. Rationale of regulation

The traditional justification for imposition of regulation relate to (1) prevention of market failure, (2) rectification of power imbalances of natural or actual monopolies, (3) fairness in distributions of public wealth and shared resources, (4) correction of information asymmetry, and (5) minimising and compensating for externalities⁸⁵². The first three rationales do not have any application to gambling. This type of service does not give rise to a natural monopoly⁸⁵³ and gambling providers cannot be compared to financial

⁸⁴⁹ Ye Cai, Hoje Jo, Carrie Pan, 'Doing Well While Doing Bad? CSR in Controversial Industry Sector' (2012) 108(4) *Journal of Business Ethics* 467

⁸⁵⁰ John SF Wright and Brian Head, 'Reconsidering Regulation and Governance Theory: A Learning Approach' (2009) 31(2) *Law & Policy* 192

⁸⁵¹ Peter Cohen, 'The "Official" List of Reasons Why Licensees Comply' (2010) 14(6) *Gaming Law Review and Economics* 455

⁸⁵² Martin Lodge & Kai Wegrich, *Managing Regulation: Regulatory Analysis, Politics and Policy* (Palgrave Macmillan 2012) 18-25

⁸⁵³ Although such monopoly can be imposed mandatorily by the government

institutions, who are characterised by long-term fiduciary obligations. They also do not have the capability to affect public safety in a similar manner to, for example, transport or nuclear power industries⁸⁵⁴; neither do they provide essential services such as household utilities.

However, gambling has the scope to be manipulated to the detriment of consumers without them necessarily being able to notice it, thus leading to a potential lack or inadequate information being available to individuals. This is unlikely to apply to betting on sport events as results can be verified by reference to available information from public sources that are independent from the betting shops. But gamblers are unlikely to be able to verify themselves that the pay-outs on gaming machines or results of lotteries, bingo or casino games, or virtual games online, comply with the prescribed requirements, thus necessitating reliance on pre-approval process and checks carried out by the Gambling Commission to ensure that operators comply with the relevant standards⁸⁵⁵.

Externalities refer to the costs that are caused, but not borne by, the providers of the goods or the services and that are not necessarily paid for by the end-user of the product but are imposed on the society as a whole⁸⁵⁶. Gambling externalities potentially include, but are not limited to, increased public spending on dealing with crimes and public disorder; cost of benefits if the adult loses employment and can no longer support his family; concerns that gambling may detract people from other “*more respectable*” activities such as volunteering or charity work, as well as attracting minors and potentially causing them to develop gambling-related problems. Moderation of these externalities typically require financial resources that can be obtained if levies are imposed on the industry that contribute towards moderation of these externalities.

Finally, gambling regulation also aims to counterweigh the effects of removal of legal paternalism, defined by Dworkin as “*the interference with a person’s liberty justified by reasons referring exclusively to the welfare, good, happiness, interest or values of the*

⁸⁵⁴ Glen Atkinson, Mark Nichols and Ted Oleson, ‘The Menace of Competition and Gambling Deregulation’ (2000) XXXIV(3) *Journal of Economic Issues* 621

⁸⁵⁵ Such as Gambling Commission, ‘Remote Gambling and Software Technical Standard’ (July 2015) <<http://www.gamblingcommission.gov.uk/pdf/Remote-gambling-and-software-technical-standards.pdf>> accessed July 2015

⁸⁵⁶ Martin Lodge & Kai Wegrich, *Managing Regulation: Regulatory Analysis, Politics and Policy* (Palgrave Macmillan 2012) 18-25

*person being coerced*⁸⁵⁷. Such legal paternalism was influential in the policy that was being implemented in the UK prior to the 2005 Act as it was characterised by limiting gambling only to the irreducible demand without active commercial stimulation. Those restraints on propensity to gambling have now disappeared and the regulator must identify a different approach that can successfully protect minors.

5.3. Gambling Commission’s regulatory powers

5.3.1. Licensing regime

The Commission’s statutory powers are extensive and commence with activities associated with the issuance of the gambling licences to any company or persons that wishes to lawfully offer commercial gambling to British customers⁸⁵⁸. Operating and personal licences are granted under s.65 and Part VI of the Act respectively. An operating licence grants the holder the right to offer specified gambling activities. There are several types of operating licences and each has a subtype that determines whether the provision of services is permitted to be offered remotely or in land-based establishments. The main ones are: Casino, Pool Betting, Betting Intermediary, Gaming Machine General (For Adults Gaming Centres), Gaming Machine General (for Family Entertainment Centre), Gaming Machine Technical, Gambling Software and Lottery⁸⁵⁹.

Personal licences authorise the carrying out of the functions associated with the provision of gambling services and are issued to individuals who are typically employed by those in possession of the operating licence. Two separate types may be required. A personal management licence is only needed to be held by those who perform management roles within the company. However, a personal functional licence is effectively necessary for anyone who wishes to be involved in the provisions of gambling services, or who is able to control or influence gambling activities. Such tasks include accepting money for betting slips from clients, inputting bets into the computer, calculating the odds, announcing the winners, maintaining and programming of the gaming machines and similar.

⁸⁵⁷ Gerald Dworkin, ‘Paternalism’ (1972) 56(1) *The Monist* 64

⁸⁵⁸ Gambling Act 2005 as amended by the Gambling (Licensing and Advertising) Act 2014

⁸⁵⁹ Harris Hagan, ‘United Kingdom’ in Julian Harris & John Hagan (eds), *Gaming Law: Jurisdictional comparisons* (Thomson Reuters 2012) 341

A premises licence is required before any premises can be used for the provision of gambling facilities and these are granted by the local authorities under Part VIII of the Act. All three types of licences are needed before any commercial facility can be open in land-based venues but the remote operators only need the first two. As already discussed in Chapter 2, paragraph 2.2.1.1.2, premises do not extend to online spaces that are not considered for this purpose to be virtual equivalent of physical locations.

The requirement to possess a licence before gambling service can be offered stems from the Gambling Act itself. However, the Commission has a wide scope to determine what must be satisfied before anyone can be granted such a licence and what conditions should be imposed on the licence holders. The licensing regime plays an important pre-emptive function as it allows the authorities to screen prospective applicants in order to exclude those that are being assessed *ab initio* as presenting too high risk of non-compliance, and to keep an accurate register of those who are lawfully permitted to offer gambling services.

The pre-screening mechanism relies on disclosure of all relevant information that needs to be supplied during the application. These must include details of any convictions for any of the relevant offences listed in Schedule 7 of the Gambling Act as well as any other offences⁸⁶⁰. A criminal conviction does not automatically disqualify the applicant from being granted the licence⁸⁶¹ but the Commission is expected to take it into account when determining the outcome of an application. Such conviction may affect the regulator's view regarding the applicant's "*integrity*"⁸⁶² or "*suitability to carry out the licensed activity*"⁸⁶³, and contributes to the overall assessment of whether the applicant wants and has the competence to abide by the legal provisions. Such determination requires a delicate balancing act and will result from a combination of technical rules adopted by the Commission, coupled with the subjective assessment of the applicants' propensity for non-compliance.

⁸⁶⁰ GA2005, s 69

⁸⁶¹ GA2005, s 71

⁸⁶² GA2005, s 70(1)a

⁸⁶³ GA2005, s 70(1)b

Moreover, the licensing regime opens up the possibility of regular dialogue and co-operation between the regulator and the industry members⁸⁶⁴. Once the licensees are brought within the system, better and more effective supervision is enabled. Although licences do not expire and the licensees are permitted to operate their enterprises in accordance with their business models, licences can be amended, suspended or revoked⁸⁶⁵. If the applicant's circumstances change following the grant of the licence, the holder is obliged to notify the Commission of the change⁸⁶⁶. This includes any conviction of a relevant offence⁸⁶⁷. Failure to notify the authorities of such a conviction without a reasonable excuse is a criminal offence with a possible penalty of, on summary conviction, a fine not exceeding level 2 of the standard scale⁸⁶⁸.

Licence holders are required to file annual or quarterly returns⁸⁶⁹ where they are obliged, amongst other information, to stipulate the number of underage customers who gambled due to age verification failures⁸⁷⁰ as well as the number of those who attempted to gamble but who were successfully challenged⁸⁷¹. Again, failure to provide the required information, or providing false data on the returns without a valid reason, constitute a criminal offence under s.342 of the Act, with the possible penalty of imprisonment of up to 51 weeks or a fine up to Level 5, or both⁸⁷².

These returns are critical in the overall regulatory process as they form the baseline of the Commission's risk assessment of where resources are best deployed and which operators may present risks. They also necessitate the licence holders to carry out regular reviews of their own operations and may be particularly helpful with identification of potential

⁸⁶⁴ Julia Black, 'Enrolling Actors in Regulatory Systems: Examples From UK Financial Services Regulation' (2003) PL 63

⁸⁶⁵ Harris Hagan, 'United Kingdom' in Julian Harris & John Hagan (eds), *Gaming Law: Jurisdictional comparisons* (Thomson Reuters 2012) 338

⁸⁶⁶ GA2005, s 101

⁸⁶⁷ GA2005, s 109(2)

⁸⁶⁸ GA2005, ss 109(4) and 109(5)

⁸⁶⁹ Depending on the gambling business; most providers produce annual returns but not casinos, remote gambling providers and licence fee Category D and E betting providers who are required to submit their returns quarterly

⁸⁷⁰ Details of which were provided in paragraphs 2.4.2 for offline venues and 2.4.5 for online providers

⁸⁷¹ Gambling Commission, 'Betting Annual/Quarterly Regulatory Returns (BE/2): Guide to Completing the Regulatory Return' (June 2011)

<http://www.gamblingcommission.gov.uk/pdf/Betting%20Annual%20and%20Quarterly%20Regulatory%20Return%20Guidance%20-%20June%202011.pdf> accessed May 2015

⁸⁷² GA2005, s 342(2)

weaknesses of, for example, age verification procedures that may prompt providers to review their processes that in turn, should aid better overall corporate governance.

5.3.2. The LCCP

The licensing activities represent regulation on a micro level. On a macro level the Commission is required to issue, monitor compliance with, and review as appropriate, Codes of Practice. These are meant to facilitate the achievements of the licensing objectives by helping businesses to better understand what is legally expected of them, by providing clear guidance as to what is, and what is not, acceptable and, when appropriate, by setting out the standards that are deemed compliant with the legislation.

The LCCP is split into three parts. Part I lists conditions of the operating licence and deals with issues relating to technical standards, financial considerations and a duty to provide information and details about the disclosure requirements. Part II addresses anti-money laundering issues, rules that relate to overall customer service, and details about social responsibility measures that include specific provisions with regards to age verification, as already discussed in Chapter 2. Part III lists the conditions that are attached to personal licences. Although the LCCP technically does not have statutory force⁸⁷³ unless otherwise specifically indicated in the Act itself⁸⁷⁴, the courts are required to take into account in any civil or criminal proceedings when it is relevant for the determination of the case⁸⁷⁵ and, if a dispute arises, in practice the LCCP is likely to be decisive.

Finally, the Commission also needs to provide guidance to the local authority as to how best to further the licensing objectives⁸⁷⁶ and must manage the relationship between the local authorities, the police and the Commission⁸⁷⁷. It must also carry out activities and research that will allow it to advise the Secretary of State about “(a) the incidence of gambling, (b) the manner in which gambling is carried on, (c) the effects of gambling, and (d) the regulation of gambling”⁸⁷⁸.

⁸⁷³ GA2005, s 24(8)

⁸⁷⁴ This applies to social responsibility measures that are legally binding on the operators

⁸⁷⁵ GA2005, s 24(9)

⁸⁷⁶ GA2005, s 25

⁸⁷⁷ GA2005, ss 29 and 32

⁸⁷⁸ GA2005, s 26

5.3.3. Enforcement powers

Unlike the mandatory provisions discussed above, all enforcement powers are permissive in nature and are employed when appropriate. These are granted to the Gambling Commission, local authorities and the police under Part XV of the Act. Their enforcement obligations are not confined to ensuring compliance by the licensed industry members, but extend to work designated to eradicate unlawful gambling. Minimising unlawful gambling is of particular importance in the context of minors' protection because those who organise illegal gambling are unlikely to pay regards to the social responsibility agenda. They may even be actively preying on the willing but potentially vulnerable young people in order to exploit their natural curiosity and rebelliousness to try out things that are not permitted.

S.305 of the Gambling Act grants the Commission generic all-inclusive powers to “*undertake any activities for the purpose of assessing compliance with provisions made by or by virtue of this Act*”⁸⁷⁹. Entries to commercial⁸⁸⁰ premises without a warrant in order to carry out inspection are permitted subject to the entry taking place at reasonable hours⁸⁸¹ and provided that the authorised inspector has reasonable grounds to believe that unlawful activities are taking place or are about to take place⁸⁸²; to determine whether illegal gambling may be being offered⁸⁸³; to ascertain whether licensed gambling is taking place in accordance with the licence terms and conditions⁸⁸⁴, or upon application for premises licence in order to make an assessment whether the premises are suitable for the provision of gambling facilities⁸⁸⁵.

However, such entry still depends on the permission of the individuals present on the premises that renders these powers somewhat superfluous as, under common law, entry is always permitted if the owner/occupier allows it. The Commission provides incentive for co-operation by specifying that lack of it may lead to adverse inference in the course of licence review. Such negative inference is specifically permitted by the LCCP but

⁸⁷⁹ GA2005, s 305(a)

⁸⁸⁰ Domestic dwellings are excluded by s 318 where entry is permitted only with a warrant issued by the justice of the peace

⁸⁸¹ GA2005, s 320

⁸⁸² GA2005, s 306(1)

⁸⁸³ GA2005, s 307(3)

⁸⁸⁴ GA2005, s 308(3)

⁸⁸⁵ GA2005, s 313

naturally it can only influence those who are licensed, to the exclusion of those who provide the services unlawfully or only on an “ad hoc” basis. If entry has been refused⁸⁸⁶, is likely to be refused⁸⁸⁷, if there is nobody on the premises who may authorise such entry⁸⁸⁸, or if securing a cooperation of the owners/occupiers is likely to seriously prejudice or frustrate the collection of the evidence⁸⁸⁹, the authorised officer may apply to the justice of the peace for a warrant that may authorise forceful entry. If access is obtained by force, the public agent must take all reasonable steps to ensure that the property is left as secure as it was before the entry was made. A police officer is allowed to use a reasonable amount of force during investigating any of the activities undertaken under the Act⁸⁹⁰ but an enforcement agent, other than a police officer, is permitted to use force only if an offence is actually being suspected⁸⁹¹.

Such entry must also be directly connected with the suspected offence and force cannot be used for entry on the basis of any other speculative purposes, unless those relate to the suspicion that licence terms and conditions are being breached⁸⁹². All enforcement agents are also granted individually listed powers to enter, for the same reasons as stated above, family entertainment centres⁸⁹³, premises with alcohol licence⁸⁹⁴, premises subject to prize gaming permits⁸⁹⁵ or clubs⁸⁹⁶. Once entry has been secured, whether with permission or by force, the agent can take any of the actions listed in s.317. Those actions include generic inspection rights of any part of the premises⁸⁹⁷ or any equipment located there⁸⁹⁸, rights to ask questions⁸⁹⁹ or to request documents kept on the premises in order to view⁹⁰⁰, or to receive a copy of them⁹⁰¹. If the enforcement agent believes that any of the evidence constitutes a manifestation of unlawful activities then such evidence may be removed and retained without a copy as long as they relate to the suspected offence or

⁸⁸⁶ GA2005, s 306(3)a

⁸⁸⁷ GA2005, s 306(3)b

⁸⁸⁸ GA2005, s 306(3)d

⁸⁸⁹ GA2005, s 306(3)c

⁸⁹⁰ GA2005, s 323(1)

⁸⁹¹ GA2005, s 323(3)

⁸⁹² GA2005, s 323(2)

⁸⁹³ GA2005, s 309

⁸⁹⁴ GA2005, s 310

⁸⁹⁵ GA2005, s 311

⁸⁹⁶ GA2005, s 312

⁸⁹⁷ GA2005, s 317(1)a

⁸⁹⁸ GA2005, s 319(1)a

⁸⁹⁹ GA2005, s 317(1)b

⁹⁰⁰ GA2005, s 317(1)c

⁹⁰¹ GA2005, s 317(1)d

breaches of the licence conditions⁹⁰². Obstructing the collection of information, or jeopardising the inspection itself, constitutes a criminal offence under s.326 with the potential penalty on summary conviction up to Level 3 on the standard scale⁹⁰³.

All licensing authorities, except Scottish authority, are entitled to initiate prosecution for any offence under the Act. This excludes non-gambling related crimes, even when they may have been committed on the gambling premises or during gambling, such as breaking a gambling machine in order to steal money or assaulting a cashier in a betting shop. Such offences should be dealt with under the common law or other statutory provisions as, although they may relate to gambling, they do not fall within the regulatory remit of the Commission⁹⁰⁴.

Irrespective of the right to prosecute, the Gambling Commission has a range of regulatory civil sanctions at their disposal. They have the authority not to issue licence in the first place, or to review licences under s.116(1) and s.116(2) once they have been granted. Such a review may result in no further action, issuance of a formal warning to the licensee, addition, amendment or removal of a condition of a licence, imposition of financial penalties, suspension of a licence until compliance is achieved and, ultimately, revocation of a licence altogether⁹⁰⁵.

5.4. How effectively is the Gambling Commission using its powers?

Various criteria can be deployed in order to assess regulatory effectiveness. In light of the statutory objective, the most salient measure should consider the actual harm that has been prevented that would otherwise occur if regulation and enforcement were absent⁹⁰⁶. However, such precise evaluation appears impossible due to the multitude of variables that interact together and contribute towards minors potentially experiencing gambling-related harm or being protected from it. A purely speculative example may illustrate this point. For instance, a very low number of underage customers being able to gamble online

⁹⁰² GA2005, ss 317(1)e and 317(1)f

⁹⁰³ GA2005, s 326(2)

⁹⁰⁴ Gambling Commission 'The Gambling Act 2005: Advice for British Police Services: Consultation Document' (June 2008)

<http://www.gamblingcommission.gov.uk/pdf/Advice%20to%20Police%20Services%20-%20consultation%20-%20June%202008.pdf> accessed May 2015

⁹⁰⁵ GA2005, s 17

⁹⁰⁶ A Mitchell Polinsky and Steven Shavell, 'The Economic Theory of Public Enforcement Law' (2000) 38(1) Journal of Economic Literature 45

may be taken as an indication of regulatory effectiveness in this area, but it may equally be due to e.g., minors' reluctance to use their payment cards online. Accordingly, an equitable assessment must adopt the triangulation method in order to accommodate different standpoints and recognise the balancing exercise that the Commission must make in order to discharge their regulatory duties.

5.4.1. Problem gambling prevalence amongst minors

Due to the harm that gambling disorder causes, the prevalence rates of children and young people who suffer from problem gambling, or who are at risk of developing such gambling behaviour, must constitute the most important performance indicator, despite the multitude of factors that may contribute to increases or decreases of such levels.

The rates of problem and at risk gambling amongst children up to the age of 16⁹⁰⁷ are measured by the Young People Omnibus, of which the latest results were published in December 2014. Until 2010, young people aged 16 and 17 years old were included in the British Gambling Prevalence Studies that, since 2012 have been taken over by the Health Survey for England and the Scottish Health Survey. However, in both of the surveys (the British Gambling Prevalence Study and the Health Surveys), young persons have not been treated separately but were analysed together with those who are between the age of 18 to 24 years old. This means that it is impossible to ascertain the prevalence rates amongst those who are 16 or 17 years old and reliance must be placed on rates applicable to the combined age group.

The Young People Omnibus⁹⁰⁸ 2014 observed that 0.7% of children aged between 11 and 16 years old have been identified as having problems with their gambling, compared to the 2% reported in 2008/2009, with a further 1.2% being considered to be at risk compared to 3.4% in 2009/2009⁹⁰⁹. A similar trend has been reported for the overall population by the Health Survey that indicated that in 2012, according to the DSM-IV criteria, 0.8% of men and 0.2% of women who are over the age of 16 years old were classified as problem gamblers in comparison to 1.5% of men and 0.3% of women being

⁹⁰⁷ Young People Omnibus also surveys children that are 16 years old but they are excluded from the analysis relating to problem gambling, see Young People Omnibus 2014 20

⁹⁰⁸ Young People Omnibus 2014

⁹⁰⁹ Young People Omnibus 2008/2009

equally classified in 2010. Rates under the PGSI screening were respectively 0.6% for men and 0.1% for women in 2012 compared to 1.3% and 0.2% in 2010.

Prima facie these most recent headline figures seem very optimistic as they appear to indicate that the rates of problem and at risk gambling have substantially fallen, despite the significant proliferation of the gambling opportunities that occurred since 2007. However, reliance on these headline results would be too simplistic and potentially inaccurate, and must be treated with caution. This is due to the fact that there have been material changes in the methodology between the compared years which may have resulted in “*paper-based*” figures appearing lower, but which may not necessarily reflect an actual reduction of the problematic behaviour within the overall population.

The Young People Omnibus 2014 not only changed the screening measure from the Ipsos MORI Mutli-Client Young People Omnibus used in 2008/2009 to DSM-IV-MR-J, but it also significantly reduced the sample size from 8,958 to 2,522. Because different screening measures capture different groups of individuals, the change in the test used for children prevents any actual comparisons. The Health Survey for England and the Scottish Health Survey used the same measure as the British Gambling Prevalence Survey to determine problem and at-risk gambling, but the instrument by which the survey was carried out has changed. It has been expressly acknowledged that “*different survey vehicles can generate different estimates*” and that “*an experiment conducted in Canada showed that gambling screens included within health surveys typically generate lower rates of problem gambling than gambling specific studies*”⁹¹⁰. This means that these figures cannot be used to claim that problematic gambling rates are decreasing, as the real trend with regards to problem and at risk gambling remains uncertain. However, irrespective of whether the actual rates are falling, remain stable or are increasing, the figure of 0.7% of children aged between 11 and 16 who have been identified as suffering from problem gambling, despite not even yet passing the age of 16 years, should be concerning. The Health Survey’s estimates of problem gambling for the whole population are less than 1% but amongst men aged between 16 and 24 years old, 16.6% have been reported to experience some difficulties with their gambling behaviour⁹¹¹. It is

⁹¹⁰ Health Survey for England 2012 15

⁹¹¹ Health Survey for England 2012 12

this candidate's submission that this represents a substantial number of young men for whom the existing protections have proved insufficient.

5.4.2. Prevention of underage access

The responsibility to prevent minors from accessing prohibited gambling ultimately rests with the providers of gambling services⁹¹². While it is undisputedly true that it is the operators' role to stop minors from purchasing gambling products at the point of sale, it is the Gambling Commission's role to ensure that providers take this responsibility seriously, and that the relevant legal provisions that underpin these requirements are effectively enforced.

However, as it has already been discussed in Chapter 2, paragraphs 2.4.2, the non-compliance levels in land-based gambling shops, as assessed by the Gambling Commission's own mystery shopping exercises, fluctuated between 98% in May 2009⁹¹³, 29% to 35.6% in December 2009 and June 2010⁹¹⁴, and then again 50% to 68% in 2013⁹¹⁵, depending on the establishment tested. The Gambling Commission viewed the middle levels of compliance as encouraging⁹¹⁶, despite the fact that it actually represented that one in three attempts by minors may still have been successful.

What amounts to satisfactory outcome ultimately remains a matter of judgment, but it is submitted that even the middle figures are still too high to consider them acceptable. Although comparable position has been found to exist with sales of alcohol⁹¹⁷, arguably

⁹¹² David Miers, 'Regulatory Perspectives from the Member States' (Recommendation 2014/478/EU on Player Protection: Where Do We Go From Here? Paris, 25 November 2014)

⁹¹³ Gambling Commission Press Release, 'Mystery Shopping Tests Continue' (31/07/2009) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingcontinues.aspx>> accessed January 2015

⁹¹⁴ Gambling Commission Press Release, 'Underage Gambling in Betting Shops – Operators Face Further Tests' (3/12/2009) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingpart2.aspx>> accessed January 2015; Gambling Commission Press Release, 'Monitoring Underage Gambling in Adult Gaming Centres' (15/06/2010) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2010/monitoringunderagegambling.aspx>> accessed January 2015

⁹¹⁵ Gambling Commission Press Release, 'Results of Test Purchase Exercise on Smaller Independent Licensed Operators – 2013' (5/12/2013) <http://www.gamblingcommission.gov.uk/gh-press/news_archive/2013/underage_gambling_controls_mus/test_purchase_exercise_2013.aspx> accessed January 2014

⁹¹⁶ Gambling Commission, 'Annual Report and Accounts 2010/11' (2011) <<http://www.gamblingcommission.gov.uk/pdf/annual%20report%20and%20accounts%202010%20-%202011%20.pdf>> accessed May 2015, 16; 'Annual Reports and Accounts 2011/2012' do not provide any details relating specifically to test purchases in land based venues

⁹¹⁷ Paul Willner, 'Alcohol Sales to Underage Adolescents' (Alcohol Research UK) <http://alcoholresearchuk.org/downloads/finalReports/AERC_FinalReport_0001.pdf> accessed May 2015

the gambling industry should aim for much higher rates due to their services being typically offered from dedicated gambling premises (except lottery), unlike alcohol and cigarettes that are sold in mainstream supermarket and shops.

5.4.2.1. Regulatory decisions

The Gambling Commission seemingly agree but, despite the official statements that underage access will not be tolerated⁹¹⁸, since the Commission took over its role from the Gaming Board, there have been only a very small number of enforcement actions that have been applied for breaches of social responsibility provisions. Between May 2011 and March 2014 there were only 68 reported regulatory actions in total that were made following a review of personal or functional licences⁹¹⁹, and only 20 following a review of operating licences⁹²⁰. Of those 68 regulatory sanctions, 28 related to the revocation of a licence or issuing a warning as a result of the licensee committing theft, fraud or misappropriation of funds⁹²¹; ten resulted from gross misconduct⁹²², six related to cheating, providing misleading information or failing to provide information altogether, or falsifying accounts. Two resulted from offering gambling facilities without the appropriate licence. One revocation of a licence followed the holder's conviction for rape and assault, and only 11 dealt with breaches of licence codes and conditions that may have included allowing underage customers to gamble.

Of the 11 decisions only one warning specifically related to minors' protection when Adrian Ballard, a holder of a personal functional licence, was warned on the 25th of May 2011 for bringing his own children onto the casino premises where he worked. The remaining ten adjudications were described in generic terms. Because they all related to carrying out their function in breach of the licensing objectives, they may have included issues of age verification or underage protection in general. In particular, three decisions

⁹¹⁸ Gambling Commission, 'Annual Report and Accounts 2010/11' (2011)
<<http://www.gamblingcommission.gov.uk/pdf/annual%20report%20and%20accounts%202010%20-%202011%20.pdf>> accessed May 2015

⁹¹⁹ Gambling Commission, 'Personal Licences – Regulatory Decisions' (May 2014)
<<http://www.gamblingcommission.gov.uk/pdf/regulatorysanctionregister-personallicences.pdf>>
accessed May 2014

⁹²⁰ Gambling Commission, 'Operators Licence – Regulatory Decision' (April 2014),
<<http://www.gamblingcommission.gov.uk/pdf/regulatorysanctionsregister-operators.pdf>> accessed May 2014

⁹²¹ 25 resulted in revocation of the licence due to theft and 2 resulted in warnings

⁹²² 4 related to gross misconduct for not following the company's procedures that resulted in a financial loss and 6 resulted from gross misconduct of unspecified natures

that related to one particular event, whereby the licence holder was allowed to cash out £4,000 on behalf of a customer without identification, are relevant. The context of this specific incident made it unlikely that the unidentified customer was a minor. However, such possibility cannot be excluded in the absence of additional information that is unavailable.

Of the 20 regulatory sanctions that were applied to the operating licence holders during the same period, only 11 may have directly or indirectly involved child protection issues. Directly relevant sanctions included the decision to issue a warning to *Future Machines Ltd*⁹²³ and to attach conditions to their licence to ensure that gaming machines are only located on premises that are duly authorised. The machines on unlicensed premises were unlikely to have sufficient levels of supervision and the licensee was ordered to immediately rectify the problem. The second decision was to issue a warning to *Celtic Racing CB Limited* for allowing bets to be accepted in various public houses where, amongst other issues, age verification could not have been monitored; a position of which the operator was fully aware⁹²⁴.

The above constitutes negligible levels of civil regulatory penalties for breaches of s.46 of the Gambling Act. The Commission's reluctance to invoke regulatory sanctions cannot be explained by lack of intelligence, as the Commission knows where and when such minors have been allowed to gamble, neither can it be attributed to lack of monitoring visits. Although the Commission praised itself⁹²⁵ for being able to reduce visits to gambling premises from 2,100 to around 1,000, this still represents a significant number of annual visits, bearing in mind that there are approximately 8,875 betting shops in the UK⁹²⁶. Local authorities also carry out inspections and in 2012/2013 they inspected 6,706 premises⁹²⁷ as part of their regulatory activities, of which 3,245 involved premises

⁹²³ Gambling Commission: Operating Licence – regulatory decisions. May 2014

⁹²⁴ Gambling Commission: Operating Licence – regulatory decisions. May 2014

⁹²⁵ Gambling Commission, 'The Year in Focus: Annual Review 2012/13' (2012/13)

<<http://www.gamblingcommission.gov.uk/pdf/annual%20review%202012-13.pdf>> accessed May 2015

⁹²⁶ As of April 2013, see the Association of British Bookmakers 'The Truth about Betting Shops and Gaming Machines' – ABB submission to DCMS triennial review'

<http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248922/Association_of_British_Bookmakers.pdf> accessed May 2015

⁹²⁷ Gambling Commission, '11/12/13 Licensing Authority Statistics 1 April 2010 – 31 March 2013'

<<http://www.gamblingcommission.gov.uk/pdf/licensing%20authority%20statistics%20-%201%20april%202010%20to%2031%20march%202013.pdf>> accessed May 2015

licensed by the Gambling Commission⁹²⁸. Accordingly, such widespread non-enforcement must be based on a different rationale.

5.4.2.2. Enforcement constraints

It may be argued that such a position results from the enforcement constraints that any regulatory body is subjected to. Such constraints can broadly be categorised as being underpinned by (1) public opinion, (2) principles of enforcement pyramid, and (3) resource considerations⁹²⁹.

The overall attitude of enforcement agents and the general public to regulatory crimes remains a powerful, salient but often unspoken consideration. Within any legal context there is a divergence between ideal standards, norms and values, if they can be agreed upon in the first place, and their practical equivalent that shapes regulators' and people's attitudes towards traditional crime⁹³⁰. These attitudes typically differ from their attitudes towards what they consider to be a mere deviance⁹³¹. The majority of people are likely to classify s.46 offences as a mere deviance, if they would classify it as an undesirable behaviour at all. This makes them less likely to report any incidence of which they may be aware and lowers their expectations of such conduct being punished. For example, already a rather long time ago Paterson reported that "*in the abstract every city is against gambling ... but in the concrete, the citizens are not deeply interested in strict enforcement of the laws against games of chance.*"⁹³²

Peterson also highlighted that with regards to many 'vice' industries, the practical objection to their existence amongst the public is often lower than the theoretical arguments expressed by lobbying and pressure groups. Recourses to criminal law for regulatory breaches of such nature are unlikely to meet public approval, even in the presence of widespread breaches⁹³³, as criminal laws should be restricted to crimes that are of serious nature and which correspond to the social conception of real wrongdoing⁹³⁴.

⁹²⁸ Other premises included those that do not normally require a gambling licence such as pubs

⁹²⁹ Robert Baldwin, Colin D. Scott, Christopher Hood, *A Reader on Regulation* (OUP 1998)

⁹³⁰ Geneva Richardson, 'Strict Liability for Regulatory Crimes: The Empirical Research' (1987, May) *Crim LR* 295

⁹³¹ Bruce L Berg, *Law Enforcement: An Introduction to Police in Society* (Prentice Hall 1991) 5

⁹³² Virgil W Peterson, 'Obstacles to Enforcement of Gambling Laws' (May 1950) 269 *Annals of the American Academy of Political and Social Science* 9

⁹³³ Disputed by e.g., Thomas W. Mangione and Floyd J. Fowler, 'Enforcing the Gambling Laws' (1979) 35(3) *Journal of Social Issues* 115

⁹³⁴ Andrew Ashworth, 'Conceptions of Overcriminalization' (2007-2008) 5 *Ohio St J Crim L* 407

Accordingly, although penal measures for breaches of regulatory laws are readily available in the statute books, the regulatory enforcement dynamics have long gathered the favour of employing a compliance enforcement strategy that ensures conformity with the law by preventing non-compliance based on good will and industry willingness to do so as opposed to the deterrence approach that focuses on detection and public punishment that is strong enough to deter others⁹³⁵.

The second rationale for light-touch enforcement that may be submitted relates to the argument that the main purpose of regulatory enforcement is, in fact, not to enforce the law but to prevent harm. Such approach justifies the preference to “*advisory visits and assistance with compliance*”⁹³⁶ over recourse to criminal proceedings and even civil sanctions. This is explicitly confirmed in the Commission’s Licensing, Compliance and Enforcement Policy Statement⁹³⁷ and in the Statement of Principles for Determining Financial Penalties⁹³⁸ that are based on the Enforcement Concordat⁹³⁹. Both statements expressly provide that any review undertaken by the Commission’s agents must take an investigating and co-operative, rather than adversarial, approach and that the duty of the compliance officers is to “*change the behaviour of the licensee*” and to “*eliminate any financial gains from non-compliance*” rather than punish the offenders⁹⁴⁰.

Prima facie this corresponds to the principles of “*good*” regulatory enforcement that advocates the use of the ‘*enforcement pyramid*’ famously introduced by Ayres and Braithwaite⁹⁴¹. The Enforcement pyramid stipulates that regulators should always start by co-operative methods that include “*education and advice, shaming, deadlines, photographic evidence and dramatic techniques*”⁹⁴². This is supposed to give the

⁹³⁵ Neal Shover, Donald Clelland, John Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy* (State University of New York Press 1986)

⁹³⁶ ‘Enforcement Concordat: Good Practice Guide for England and Wales’ (DTI June 2003) <<http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file10150.pdf>> accessed May 2015

⁹³⁷ Gambling Commission, ‘Licensing, Compliance and Enforcement Policy Statement’ (April 2009) <http://www.gamblingcommission.gov.uk/pdf/Licensing%20Compliance%20and%20Enforcement%20Policy%20Statement%20con%20doc%20April%202009.pdf> accessed May 2014

⁹³⁸ Gambling Commission, ‘Statement of Principles for Determining Financial Penalties’ (Sept. 2009) <http://www.gamblingcommission.gov.uk/pdf/statement%20of%20principles%20for%20determining%20financial%20penalties%20-%20september%202009.pdf> accessed May 2014

⁹³⁹ ‘Enforcement Concordat’ (n 936)

⁹⁴⁰ ‘Enforcement Concordat’ (n 936)

⁹⁴¹ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 99

⁹⁴² Baldwin (n 941)

appearance that compliance is treated very seriously but without actually invoking any formal forms of deterrence. Only if persuasion fails the regulators should invoke the second level that comprises of “*written and verbal warning*” followed by “*notices to improve*” and threats of withdrawal of a licence⁹⁴³. If attempts at stage one and two prove unsuccessful the regulator should resort to criminal prosecution⁹⁴⁴.

The desirability of such approach is firmly embedded in the overall regulatory framework. The Regulatory Sanctions and Enforcement Act 2008 directs listed authorities (including the Gambling Commission) to minimise the use of criminal proceedings and the recent European Court of Justice’s decision in the Pfleger case⁹⁴⁵ reinforced the message that any sanctions, whether civil or criminal, should be proportional and in accordance with EU non-discriminatory stipulations. It has been suggested that criminal sanctions constitute a disproportionate response to regulatory crimes especially as criminal convictions, unlike mere civil sanctions, may result in the “*cost to the individual outweighing the advantages to the community in taking the enforcement action*”⁹⁴⁶.

The invocation of criminal law may lead to the loss of employment, closure of the business with the resultant potential damage to the economy⁹⁴⁷, may unnecessarily tarnish the reputation of the offender⁹⁴⁸ and could waste valuable police time⁹⁴⁹. Cultural and social norms typically⁹⁵⁰ associate conventional crimes with disreputable individuals and the margins of the society, while regulatory offences are perceived to be committed by those who are otherwise engaged in a legitimate business that should be respected. Moreover, even if prosecution is initiated and the offender is found guilty, courts are often reluctant to impose any meaningful punishments, thus making cost-benefit analysis further biased against hard enforcement methods.

This causes difficulties as the regulators are running out of options with regards to how to effectively ensure that the rules are complied with. The regulatory principles render

⁹⁴³ Baldwin (n 941)

⁹⁴⁴ Baldwin (n 941)

⁹⁴⁵ Case C-390/12 Pfleger [2014] discussed by Martin Lycka ‘The Pfleger case and implications for gambling’ (May 2014) WOGLR

⁹⁴⁶ M Burch and B Wood, ‘Public Policy in Britain’ (1984) 13(2) Journal of Social Policy 251

⁹⁴⁷ Neal Shover, Donald Clelland, John Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy* (State University of New York Press 1986)

⁹⁴⁸ Shover (n 947)

⁹⁴⁹ Teela Sanders, Keith Soothill, ‘The Policing of Pleasure: ‘What Kind of Police Do We Want?’ (2011) 84 Police J 110

⁹⁵⁰ But not necessarily

any “*dramatic techniques*” ineffective and, if industry knows that criminal sanctions are highly improbable, then even the threat of civil penalties is likely to have lesser impact, especially when such penalties only aim to remove the financial advantage that has been gained by the violation. Many breaches never come to the attention of the enforcement agents that may cause some to conclude that the risks are worth taking. This argument may apply not only to those who intend to carry an inherently illegitimate business under the guise of a lawful licence, but may also appeal to those who find that implementing proper age verification procedures, with the associated training for staff typically characterised by high turn-over, are too expensive or burdensome.

This brings us to a subtly different justification that focusses less on the inappropriateness of effects that the criminal law use may have on the individuals, businesses or overall economy. Rather, it highlights that criminal law should not be used because it is simply ineffective due to the inherent information asymmetry that causes many offences to remain undiscovered, as well as due to the economic constraints⁹⁵¹. Deterrence enforcement strategy can only be effective if risk-calculating players⁹⁵² determine that the risk of discovery, coupled with the severity of consequential punishment, sufficiently outweigh the benefits arising out of non-compliance⁹⁵³. The outcome depends on subjective assessments made by the individuals on behalf of themselves and the companies they control. It will be influenced by a magnitude of other factors, such as their moral standards and attitudes towards legitimacy⁹⁵⁴, but it is likely that periodically such calculations will consciously, or subconsciously, be made⁹⁵⁵.

The Commission employs approximately 250 members of staff, with only around 60 employees performing the function of field compliance officers with investigating and enforcement powers⁹⁵⁶. At the same time there are around 2,951 operating⁹⁵⁷ and 17,580

⁹⁵¹ Jonathan M Barnett, ‘The Rational Underenforcement of Vice Laws’ (2001-2002) 54 Rutgers L Rev 423

⁹⁵² But not those who comply because they agree with the regulation or out of general duty

⁹⁵³ David Downes & Paul Rock, *Understanding Deviance* (6th Edn, OUP 2011)

⁹⁵⁴ Jonathan Jackson ‘and others’, ‘Why Do People Comply With the Law: Legitimacy and The Influence of Legal Institutions?’ (2012) 52 Brit J Criminol.1051

⁹⁵⁵ Anthony Bottoms, Andrew Von Hirsch, ‘The Crime-Preventive Impact of Penal Sanctions’ in Peter Cane and Herbert M Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP 2013)

⁹⁵⁶ Data provided on the Gambling Commission’s website <www.gamblingcommission.gov.uk> accessed May 2015

⁹⁵⁷ With many having multiple premises; Gambling Commission Licence Register <<https://secure.gamblingcommission.gov.uk/gccustomweb/PublicRegister/PRSearch.aspx>> accessed May 2014

personal licence holders⁹⁵⁸. This makes it unsurprising that the Commission, in addition to their activities, has to rely on voluntary co-operation with the industry and on information from the public regarding any potentially criminal or suspicious gambling-related activities that can be submitted via confidential intelligence. This arguably makes any discovery less probable.

Preparation for criminal actions are expensive and time consuming⁹⁵⁹ and would detract limited resources from other equally important activities. The Commission is supported by local authorities, as listed in paragraph 5.1, but their resources are also spread in many different ways, causing gambling offences to be an unlikely candidate for priority treatment. Their financial resources may have been strengthened with the implementation of the Gambling (Licensing and Advertising) Act 2014, but it also extended its responsibilities to operators based abroad. The 2014 Act rightfully withstood the judicial review process⁹⁶⁰ and now foreign operators must comply with British principles of excluding underage customers. However, their location causes any enforcement action to be complex and expensive, as discussed in paragraph 2.3.

Furthermore, economic considerations are not confined to the Commission's limited resources. Drawing an analogy from the financial sector it is not only banks and financial institutions that are "*too big to fail*"⁹⁶¹. For example, William Hill employs over 17,000 people in nine countries including the UK and in 2013 it reported £275 million in taxable profits⁹⁶². Revoking a licence of such a company, or even suspending it, could result in many employees becoming redundant, with the associated adverse social and economic consequences unlikely to be acceptable to the government and the general public.

The validity of the above rationale points to the inappropriateness of criminal law usage for gambling offences, but it cannot explain the lack of civil sanctions and, even in respect of criminal sanctions, is rapidly weakening with the passage of time. The Commission

⁹⁵⁸ Gambling Commission Licence Register
<<https://secure.gamblingcommission.gov.uk/gccustomweb/PublicRegister/PLSearch.aspx>> accessed May 2014

⁹⁵⁹ Jeremy Rowan-Robinson, Paul Q Watchman, Christine R Barker, *Crime and Regulation: a Study of The Enforcement of Regulatory Codes* (T.&T. Clark 2000) at pp.217-255

⁹⁶⁰ Gibraltar Betting & Gaming Association Ltd v The Secretary of State for Culture, Media & Sport [2014] EWHC 3236 (Admin), [2014] WLR(D) 421

⁹⁶¹ Andrew Ross Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial Systems and Themselves* (Penguin 2010)

⁹⁶² Data retrieved <<http://www.williamhillplc.com/investors/why-invest-in-us.aspx>> accessed July 2014

have initiated prosecution when they considered it appropriate, for example, for keeping a gaming machine illegally in a take away shop⁹⁶³. While it was certainly correct to rely on negotiation and teaching when the new requirements were imposed on the industry at their initial stages in 2008/2009, the continuing reliance on stage one on the pyramid scale method more than six years later is significantly less convincing. This is especially so in light of the continuity of the high levels of violations and relapse of those whose compliance originally improved but subsequently worsened again.

In the context of prevention of underage access the information asymmetry is not acute as the Gambling Commission frequently has enough information to know where the breaches have occurred, making the investigation less expensive and less burdensome. Moreover, the advisory approach should by now have produced the required level of compliance amongst those who did not previously do so due to inadvertence or oversight. But it has not, and it is therefore legitimate to assume that those who remain non-compliant do so out of lack of due care or insufficient respect for the law.

Accordingly, the Gambling Commission can no longer be justified in only providing further, albeit tighter, guidance within the LCCP, as already discussed in Chapter 2, but should now identify persistent offenders and take an action with a more powerful deterrent effect. The Commission has a range of civil regulatory sanctions that it can apply, as well as the power to bring criminal prosecution in the most appropriate cases. The civil regulatory sanction includes the removal of a licence. Such removal, even if only enforced for a short period of time, would lead to significant commercial losses and reputational damage of the punished gambling providers. This would clearly indicate that the Commission's commitment to prevention of underage gambling is real rather than rhetorical. A similar effect would be achieved by bringing a prosecution against the persistent offenders, as it would send the right message that underage access will truly not be tolerated. Borrowing from Lessig⁹⁶⁴ theory, the Gambling Commission is constrained by the architecture of the legislative framework but, as the regulator, it has the power to influence this architecture to ensure that all licensing objectives are successfully achieved.

⁹⁶³ Gambling Commission, 'Illegal Siting of gaming machines: A quick guide for small business' (Info 12/09) < <http://www.gamblingcommission.gov.uk/pdf/Illegal-siting-of-gaming-machines-a-quick-guide-for-small-businesses.pdf> > accessed June 2014

⁹⁶⁴ Lawrence Lessig, *Code* (Basic Books 2006)

5.4.3. Does the Commission have a holistic strategy to protect minors from gambling-related harm?

Ensuring that minors do not gamble is a critical, but not sufficient, strategy to prevent minors from experiencing gambling-related harm. The Commission has been explicitly charged with developing an overall strategy, but the current position is confined to primary reliance on working with the industry to ensure that the providers simply comply with the law. The Commission carries out consultations and is certainly moving in the right direction, but only relatively recently⁹⁶⁵ the Commission published revised guides “*What to look out for before gambling*”⁹⁶⁶ and “*Gambling Safely – a quick guide for parents and others*”⁹⁶⁷.

However, there continues to be a distinct lack of other initiatives designed, for example, to ensure that gambling awareness workshops are introduced into the secondary schools’ curriculum, or to fund campaigns to better raise awareness amongst parents, guardians and teachers of the risks that gambling may present to children. A study carried out by Derevensky et al with 390 teachers from Ontario and Quebec revealed that gambling was considered to be “*the least serious issue affecting youth*”⁹⁶⁸. Teachers were also less likely to feel confident that they can help a pupil with a gambling problem than with for example alcohol problem⁹⁶⁹. If similar results were found to apply to English teachers, this would further support the need for awareness raising campaigns and would contribute to the development of the overall holistic strategy aimed at protecting children.

Such campaigns would also contribute to the counterbalancing of advertising influence and would make adults more wary about introducing their children to gambling. This in turn would help with the development of more resilient attitudes towards gambling temptations amongst youth⁹⁷⁰ that would consistently contribute towards minimisation of

⁹⁶⁵ November 2014

⁹⁶⁶ Gambling Commission, ‘What to Look Out For Before Gambling’ <<http://www.gamblingcommission.gov.uk/pdf/What-to-look-out-for-before-gambling-quick-guide-print-version.pdf>> accessed December 2014

⁹⁶⁷ Gambling Commission, ‘Gambling Safely – a Quick Guide For Parents and Others’ <<http://www.gamblingcommission.gov.uk/pdf/Gambling-safely-a-quick-guide-for-parents-and-others-print-version.pdf>> accessed May 2015

⁹⁶⁸ Jeffrey L Derevensky, ‘and others’, ‘Teacher Awareness and Attitudes Regarding Adolescent Risky Behaviours: Is Adolescent Gambling Perceived to be a Problem?’ (2014) 30(2) J Gambl Stud 435

⁹⁶⁹ Derevensky (n 968)

⁹⁷⁰ Rina Gupta, Jeffrey L Derevensky, ‘Reflection on Underage Gambling’ (2014) 1(1) Responsible Gambling Review 37

all aspects of gambling-related harm. The Gambling Commission publishes a wide range of gambling-related guidance and advice papers on their sites, but the Commission's website does not appear to be user-friendly⁹⁷¹, is primarily directed at the industry, and is unlikely to be frequently accessed by minors or teachers looking for information.

5.4.3.1. Regulatory constraints

It may be argued that regulatory constraints should be blamed for this status quo. Despite the black letter law's appearance of authoritative powers, a close evaluation of all regulatory principles demonstrates that the light-touch regulatory framework was indeed mandated by the gambling legislation, further reinforced by other statutory rules, and the wider regulatory policies driven primarily by the Better Regulation Delivery Office. They aim to reduce regulatory burden on business generally, to ensure that any regulation is underpinned by comprehensive risk assessment and is economically efficient. The political, economic and legal pressures often pull the regulator in conflicting directions and any balancing exercise inherently implies that compromises have to be made⁹⁷².

Regulation itself and the "*rise of regulatory state*"⁹⁷³ historically developed a bad reputation. The phrase "*red tape*" demonstrates disagreement with regulatory burdens that lack the support of businesses. It has been accused of hindering their performance and profits due to high compliance costs⁹⁷⁴, inflexibility in application and perceived lack of accountability and transparency. In other words, the name developed to articulate businesses' displeasure with regulatory burdens that are perceived to add cost, restrict the freedom but without producing tangible benefits.

The haphazard development of regulation to respond to identified need, as opposed to it being introduced in a coherent manner, has also been criticised⁹⁷⁵. Small businesses often alleged that regulation implicitly favours larger organisations over smaller ones due to the bigger establishments being better equipped to absorb the additional cost that

⁹⁷¹ Personal opinion of the candidate

⁹⁷² Jerome H Skolnick and John Dombrink, 'The Limits of Gaming Control' (1979-1980) 12 Conn L Rev 762

⁹⁷³ G Majone, 'The Rise of Regulatory State in Europe' in Robert Baldwin, Colin D Scott, Christopher Hood, *A Reader on Regulation* (OUP 1998)

⁹⁷⁴ Malcolm Bruce, 'Forget About It. The Irrelevance of Traditional Gambling Regulation in the Digital Age and the Possible Alternative' (5th International Gambling Conference, Auckland, February 2014)

⁹⁷⁵ PM Kiernan, 'The Regulatory Bodies Fraud: Its Enforcement in The Twenty-First Century' (2003) 24(10) Comp Law 293

regulatory provisions entail. The UK attempts to improve regulation started with the White Paper “*Lifting the Burden*” introduced in 1985 and with the creation of the Enterprise and Deregulation Unit⁹⁷⁶. Since then several initiatives were undertaken by the respective governments that fluctuated between deregulation and movement towards “*better*” regulation, as reflected in the statement of Dr David Clark in 1997 who said that: “*deregulation implies regulation is not needed. In fact good regulation can benefit us all – it is only bad regulation that is a burden*”⁹⁷⁷.

The Commission entered this regulatory landscape at the time of the regulators and regulatory practices being subject to intense scrutiny. It is expressly listed in Part 1 of the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 passed under s.24(2) of the Legislative and Regulatory Reform Act 2006. Accordingly, the Commission must take into account a variety of established Codes and principles when determining their regulatory policies. Most of those principles help the regulator to maintain legitimacy and they support the modern society’s acceptance of co-existence of parallel legal orders⁹⁷⁸. Without mainstream acceptance, regulation is unlikely to succeed but it is recognised that it constitutes a third “*order*” that is independent from the moral norms and the legal rules⁹⁷⁹. They reinforce the view that regulation is designed to benefit the industry and that it is necessary due to informal social processes, market forces or generic laws being insufficient, to lead to the results that are compatible with how the political powers wish the society to function at any given time.

These policies include the principles derived from the Hampton⁹⁸⁰ and Macrory Reviews⁹⁸¹ that are contained in the Enforcement Concordat and the Regulators’ Compliance Code that, as of July 2013, has been put on a statutory basis. These statements emphasise that all regulators should produce and make any advice and guidance open, “*easily accessible and accessed*”, any information requirements should be kept to an absolute minimum and all regulatory rules or principles must be transparent and

⁹⁷⁶ Robert Baldwin, ‘Is Better Regulation Smarter Regulation?’ (2005) PL 485

⁹⁷⁷ Baldwin (n 976)

⁹⁷⁸ DJ Galligan, *Law in Modern Society* (OUP 2007)

⁹⁷⁹ Galligan (n 978)

⁹⁸⁰ Phillip Hampton ‘Reducing the Administrative Burdens: Effective Inspection and Enforcement’ (Hampton Review 2005) <<http://webarchive.nationalarchives.gov.uk/20070701131038/http://www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf>>, accessed May 2014

⁹⁸¹ Richard B Macrory, ‘Regulatory Justice: Making Sanctions Effective’ (Macrory Review 2006) <<http://webarchive.nationalarchives.gov.uk/+http://www.bis.gov.uk/policies/better-regulation/reviewing-regulation/improving-compliance-among-businesses>> accessed May 2014

understandable. The regulation must promote compliant but healthy development of the regulated industry and any imposed economic or other burden must be justified and necessary. This should be achieved by open and ongoing engagement and negotiations with the business and consumers, fully transparent procedural and substantive provisions and by easily accessible, clear and easy to understand guidance that are adhered to during any enforcement activities. However, most important is the introduction of the principle of risk assessment that now governs all regulatory actions.

While transparency, openness and co-operation dictated by the above provisions facilitate the achievement of all licensing objectives, the remaining principle of regulatory risk assessment directly hampers the achievement of the objective that reflects the youth protection agenda. The first three characteristics are critical in ensuring that regulation fulfils its ultimate purpose of modifying organisational behaviour and shaping it to include activities that promote public good, even though they do not tangibly benefit the corporations' profits⁹⁸². Such engagement can only be achieved through an industry “*buy-in*” or effective enforcement. “*Buy-in*” can only be truly gained if those who are regulated can influence the strategies and specific rules, know and properly understand them, not just as an abstract concept but how they affect their business and believe that all processes are fair to all industry players⁹⁸³.

However, the requirements of “*comprehensive risk assessment*” and “*outcome-focusing objectives and targets*” that are directly mandated by the Hampton’s review⁹⁸⁴ apply different philosophy. As explained by Kiernan “*risk in this sense is not the ordinary and natural commercial risk ... but rather is concerned with development, events, or issues which pose significant risk to the statutory objectives*”⁹⁸⁵. Although risk assessment has always been an inherent part of the operational and substantive processes, it gained its prominence relatively recently and stems from the recognition that economic and

⁹⁸² Julia Black, ‘Enrolling Actors in Regulatory Systems: Examples From UK Financial Services Regulation’ (2003) PL 63

⁹⁸³ Virgil W Peterson, ‘Obstacles to Enforcement of Gambling Laws’ (May 1950) 269 *Annals of the American Academy of Political and Social Science* 9

⁹⁸⁴ Hampton Review (n 980)

⁹⁸⁵ PM Kiernan, ‘The Regulatory Bodies Fraud: Its Enforcement in The Twenty-First Century’ (2003) 24(10) *Comp Law* 293

practical constraints force the regulators to focus available resources on the areas mostly in need of intervention. Such risk assessment applies on a macro and micro levels⁹⁸⁶.

On a macro level the Gambling Commission needs to determine what type of behaviour poses the highest threat to the licensing objectives, and to develop a strategy to minimise and, if possible, eliminate these conducts. This is based on the evaluation of the probability of the risk materialising, coupled with the severity of adverse consequences resulting in such eventuality⁹⁸⁷, with different weights given to each component. If the probability is high but the impact is low, preference may still be given to those risks that are less likely to materialise but which would cause a significant damage if they do. This essentially allows the regulators to make a political judgment as to what deficiencies and industry failures are deemed acceptable. What directly follows is the inbuilt acceptance that not all risks will be successfully managed and that not all policy objectives will be met⁹⁸⁸. On a micro level the regulator regularly assesses individual gambling providers in order to decide which of them need to be inspected or monitored or which can be trusted to run their business largely unsupervised.

Risk evaluation also unavoidably focuses regulators' attention primarily on risks that are known. This paradoxically prevents them from allocating too many resources to risks that may be uncertain, unforeseen or which may transpire in the future, thus causing regulation to be too often reactive and responding to specific events as opposed to being preventative and proactive⁹⁸⁹. Future risks are not easily predictable but the regulators' ability to be forward looking is hampered. For example, social gaming or penny auctions have only recently been highlighted as a potential risk, but they are not actively dealt with by the Gambling Commission.

In the context of minors' protection, such need for risk-assessment is likely to repeatedly focus the Commission's limited resources on collection of revenues and eliminating illegal gambling and other criminal activities, such as money laundering, sport fixing or cheating. Stamping out unlawful gambling activities also contributes to minors'

⁹⁸⁶ Julia Black, 'The Emergence of Risk-Based Regulation and The New Public Risk Management in the United Kingdom' (2005) PL 512

⁹⁸⁷ Black (n 986)

⁹⁸⁸ Black (n 986)

⁹⁸⁹ Martin Lodge & Kai Wegrich, *Managing Regulation: Regulatory Analysis, Politics and Policy* (Palgrave Macmillan 2012)

protection⁹⁹⁰ but this is an indirect effect as opposed to a focused and targeted strategy. Carrying out educational campaigns or introducing compulsory gambling-awareness workshops in schools would require expenditure and the source of such funding is likely to be contentious. The Gambling Commission needs to adequately balance all of their responsibilities while at the same time keeping the stakeholders satisfied. The industry demands lie in having regulation that allows them to thrive and profit⁹⁹¹, the government is likely to be more concerned with taxable revenue maximisation and the general public still remains quite ambivalent with regards to the risks that gambling may present to minors.⁹⁹²

The expectation that the Commission must not undermine the commercial interest of gambling operators is directly mandated by s.22(b) of the Gambling Act. It has been further reinforced by the comments made by the inspectors who reviewed the Commission's early activities against its compliance with the Hampton's recommendations⁹⁹³. The inspectors acknowledged that it is not the regulators' role to promote the industry but the Commission was reminded that "*regulators should recognise that the key element of their activities will be to allow, or even encourage, economic progress and only intervene where there is a clear case for protection*"⁹⁹⁴.

The above regulatory constraints, although significant, should not be taken to imply that the Commission's regulatory powers are inherently impaired. In a similar manner to enforcement constraints, as discussed in paragraph 5.4.2.2, the Gambling Commission is responsible for influencing the "*architecture*" of gambling regulation. There is sufficient scope within the Gambling Act to make choices and to give the third licensing objective more prominence. Their regulation was introduced in a coherent and comprehensive manner in a direct response to clearly identified need. This means that many of the aforementioned criticisms of regulation should not apply in this context. The mandatory duty to "*permit*" gambling in s.22(b) is qualified by reference to all licensing objectives.

⁹⁹⁰ On the assumption that illegal providers are unlikely to be willing to exclude minors who are willing and who have the means to pay

⁹⁹¹ Robert Baldwin, 'Regulatory Stability and The Challenges of Re-regulation' (2014) PL 208

⁹⁹² Colin Campbell 'and others', 'Parents' Perceptions of Adolescent Gambling: A Canadian National Study' (2011) 25 Journal of Gambling Issues 36

⁹⁹³ National Audit Office 'Gambling Commission: A Hampton Implementation Review Report' (2009) <<http://www.nao.org.uk/wp-content/uploads/2009/04/Gambling-Commission-Hampton-Implementation-Review-Report.pdf>> accessed May 2015

⁹⁹⁴ National Audit Office (n 993)

While it is recognised that the Gambling Commission is not responsible for the overall liberalisation of gambling facilitated by the Act, it should place more emphasis on developing a holistic strategy in order to achieve s.1(c) objective, instead of placing primary reliance only on compliance with the law.

5.5. Conclusion

The aim of this chapter was to consider whether the statutory weaknesses that were identified in this thesis in respect of minors' protection are effectively counterbalanced by regulatory strategy developed and adopted by the Gambling Commission in its capacity as the regulator of the gambling industry in the UK. As noted in the introduction the Commission was charged with developing a holistic strategy that should ensure, alongside the two other licensing objectives, that "*children and other vulnerable persons are not harmed or exploited by gambling*"⁹⁹⁵ despite the overall philosophy of the Act to permit, facilitate and encourage it.

Despite the rhetoric, the Gambling Commission does not appear to place enough emphasis on the third licensing objective. Although the overall evaluation of any regulatory policy is very complex, individual measures can be assessed fairly. In the gambling context three indicators have been identified as providing an important insight. These are: (1) trends in problem gambling prevalence amongst minors, (2) enforcement of the legal prohibition of underage access and (3) the existence of an overall holistic policy.

The first indicator could not have been relied upon because the actual trend cannot, as yet, be ascertained due to the material changes in the screening test used by the Young People Omnibus 2014 in comparison to 2008/2009 survey, and due to changes in the method of collecting data from the British Gambling Prevalence Study and the current Health Survey.

The evaluation of the second indicator showed that, to date, there are still a large number of minors who, in land-based venues, may gamble easily if they wish to do so. Not many deterrent enforcement actions have been taken, despite having enough information as to when and where the breaches took place. The meaning of regulatory deviance is constructed socially and enforcement practices result from balancing various priorities.

⁹⁹⁵ GA2005, s 1(c)

The Commission is required to apply the principles of “good” enforcement as dictated by the Enforcement Concordat and the enforcement pyramid. It is accordingly accepted that the Commission was entitled to adopt a ‘light-touch’ enforcement strategy in the early stages of its operation, and the priority could have been given to advisory visits and discussion in order to enforce compliance.

However, the reliance on such advisory visits and guidance issued in the LCCP, and the continuing reluctance to invoke more prominent civil or criminal sanctions in light of widespread breaches, can no longer be justified. Certain amount of deviations from the legal requirements is unavoidable but the question remains as to what levels of non-compliance should be deemed socially acceptable. It is submitted that the existing violations remain too high, leaving young people insufficiently protected.

The evaluation of the third indicator also revealed significant shortcomings. The Commission does not appear to have a holistic strategy that would include educational campaigns or working with the Secretary of State for Education in order to ensure that gambling features in the national curriculum as part of Personal Social and Health Education. ‘Demo’/social gaming only attracted limited attention and the regulator did not consider the issue of penny auction from the perspective of minors’ protection. Some interventions that target other areas, such as prosecuting those who offer unlawful gambling, or working with the industry to ensure that social responsibilities measures are fully implemented, seem to have been more successful. They also contribute to the protection of minors, but in an indirect rather than targeted way.

This chapter recognised that the Gambling Commission operates under significant regulatory and enforcement constraints⁹⁹⁶ and that it must prioritise risks that are considered most acute. However, this does not mean that one of the licensing objectives can continue to be ignored in practice. The Commission is under a duty to protect those who are vulnerable in a free commercial setting and those who will not be protected by generic market forces⁹⁹⁷. The regulator should enforce the age verification requirements more rigorously in order to demonstrate to the industry that non-compliance will not be tolerated in practice, as opposed to only rhetorically. This can be achieved by resorting to

⁹⁹⁶ As discussed in paragraphs 5.4.2.2 and 5.4.3.1

⁹⁹⁷ Martin Lodge & Kai Wegrich, *Managing Regulation: Regulatory Analysis, Politics and Policy* (Palgrave Macmillan 2012)

CHAPTER 5 – TO WHAT EXTENT DOES REGULATION CONTRIBUTE TO THE PREVENTION OF GAMBLING-RELATED HARM AMONGST MINORS? THE ROLE AND EFFECTIVENESS OF THE GAMBLING COMMISSION

the more powerful regulatory remedies such as the removal of commercial licence. This would be likely to substantially affect the profit margin of the operators and force adequate compliance or alternatively by bringing criminal prosecution to demonstrate that non-compliance with age verification is a business risk that is not worth taking.

V. Conclusion

The initial question that was posed at the beginning of the thesis was whether the statutory framework created by the Gambling Act incorporated sufficient safeguards to protect children and young people from gambling-related harm, despite creating an environment where minors are permitted to engage in many forms of gambling and where this activity, although regulated, is universally available, highly visible on the High Street and on the Internet, and frequently promoted by advertising and other marketing campaigns.

Due to the introduction of liberalised commercial gambling, the prevention of gambling-related problems requires strong legal and social countermeasures. The joint effects of the opportunity theory⁹⁹⁸ and the total consumption model⁹⁹⁹ introduced in the early parts of this thesis, and noted by the Joint Committee on Draft Gambling Bill¹⁰⁰⁰, means that the proliferation of gambling opportunities may lead to increases in gambling-related harm amongst the general population. This may include children and young people who have been identified as being particularly vulnerable. Due to their natural age and limited life experiences their cognitive abilities and impulse controls are still underdeveloped¹⁰⁰¹. They may not be in a position to fully appreciate risks associated with gambling in order to take an informed decision whether to engage or not, or to fully protect themselves from developing an unhealthy attachment to this form of entertainment. This may ultimately harm future adults and the society as a whole.

To ensure that the protection of minors is effective, a holistic approach is necessary and the government, the Commission and the industry has to continually work in conjunction with parents, teachers and minors themselves. In line with the theory advanced by Galligan¹⁰⁰² this can only be achieved if the regulatory framework ensures that the industry is clear what is expected of them; the regulatory and statutory requirements are powerful enough to exert voluntary adherence amongst the majority and which are enforced robustly against the non-compliant minority, and that the protection of minors

⁹⁹⁸ Simon Planzer and Heather Wardle, 'The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling' (RGF 2011) <<http://ssrn.com/abstract=2045052>> accessed November 2013

⁹⁹⁹ Marianne Hansen, Ingeborg Rossow, 'Adolescent Gambling and Problem Gambling: Does the Total Consumption Model Apply?' (2008) 24 J Gambl Stud 135

¹⁰⁰⁰ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I)

¹⁰⁰¹ Margee Hume and Gillian Sullivan Mort, 'Fun, Friend or Foe: Youth Perception and Definition of Online Gambling' (2011) 17(1) Social Marketing Quarterly 109

¹⁰⁰² DJ Galligan, *Law in Modern Society* (OUP 2007)

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is accepted as sufficiently important by the society as a whole. It is against this background that the legal and regulatory framework has been evaluated.

This thesis also gathered important insights into what a sample of children and young people think about a variety of gambling-related aspects. The study was exploratory in nature and aimed to identify how young people understand, construct and react to the phenomenon of gambling and gambling-like activities. Given the paucity of research involving British minors on gambling-related issues, the majority of comparisons have been made to studies carried out in other jurisdictions in Europe, and in Canada, Australia, and New Zealand.

Overall, this study identified that pupils in the sample had a very good knowledge of the nature of gambling. Similarly to the results reported by Buczkiewicz et al¹⁰⁰³ referred to in paragraph 1.6.1, participating pupils were able to collectively name all traditional gambling games, with the exception of football pools which were unfamiliar. Contrary to the findings reported by Hume and Mort¹⁰⁰⁴ with regards to Australian adolescents, the sample had an excellent awareness that gambling is fundamentally based on chance with skill being significantly less important. Reassuringly, the vast majority of pupils in the sample also had a very good knowledge of the risks that gambling may pose and were clearly aware that it is a potentially addictive behaviour. However, a small number of pupils appeared to trivialise the potential risks or felt immune, stating that such risks would never affect them, making them potentially vulnerable to gambling-related harm. Moreover, the awareness of the risks did not necessarily prevent some of them from engaging in prohibited forms of gambling, indicating that a mere knowledge does not constitute a sufficient protective factor.

What has additionally been learned is that the aforementioned awareness tended to extend only to those forms of gambling that are prohibited to minors. Pupils also focused predominantly on financial risks at the expense of emotional and social risks. To this effect, many pupils did not consider that playing Category D gaming machines may lead to gambling-related harm even though many of them felt immediate, albeit short-term, negative consequences. More importantly, many students did not view school lotteries or other gambling activities organised at schools as potentially hazardous and their risk-

¹⁰⁰³ Martin Buczkiewicz, Mark D Griffiths and Jane Rigbye, 'Adolescent Attitudes Towards Gambling: Some Preliminary Findings' (2007) 25(1) *Education and Health* 6

¹⁰⁰⁴ Margee Hume and Gillian Sullivan Mort, 'Fun, Friend or Foe: Youth Perception and Definition of Online Gambling' (2011) 17(1) *Social Marketing Quarterly* 109

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averse attitudes tended to extend only to gambling offered commercially. This finding is significant as such forms may appear innocuous but they may also constitute an introduction to gambling at too early stage. They also indicate that while existing measures appear to protect minors from suffering financially, the protection does not necessarily extend to other psychological or emotional risks.

The empirical data also confirmed the existence of the environmental risk identified by Blaszczynski et al¹⁰⁰⁵, also reported by the Young People Omnibus¹⁰⁰⁶, whereby a gambling product is purchased by an adult on behalf of a minor or when an adult gives access to their online gambling account to an underage person. It is worth repeating that, of the thirty students who admitted to gambling on prohibited forms, only three gambled by themselves. Everyone else gambled with the assistance of an older person, typically a relative or a friend. Of those who gambled online¹⁰⁰⁷, all stated that they gambled with the express acquiescence of the online gambling account holder and using their payment methods. This further highlights the need for the Gambling Commission to raise awareness amongst the wider adult gambling population that such conduct is against the law and potentially puts young people at unnecessary risk. This is important, especially as amongst the sample family influence played an important factor in pupils starting to gamble and any educational strategies or campaigns should address this aspect.

The main focus of the empirical data collection was to explore the reasons behind the correlation identified in the literature between real money gambling and ‘demo’/social gambling games/gambling-like activities within video games¹⁰⁰⁸. As discussed in Chapter 3, it was posited that (i) both real money gambling and non-monetary gambling adopt similar colourful graphics and attractive audio-stimulants¹⁰⁰⁹; (ii) that gamblers’ and gamers’ motivations are sufficiently similar to allow for similar needs to be satisfied by

¹⁰⁰⁵ Alex Blaszczynski ‘and others’, ‘Operator-Based Approaches to Harm Minimisation in Gambling: Summary, Review and Future Directions’ (RGT 2014), http://www.responsiblegamblingtrust.org.uk/user_uploads/obhm_report_final_version.pdf accessed December 2014

¹⁰⁰⁶ Young People Omnibus 2014

¹⁰⁰⁷ Seven

¹⁰⁰⁸ Ipsos Mori, Appendix 5 ‘British Survey of Children, the National Lottery and Gambling 2008-09: Report of a Quantitative Survey’, (National Lottery Commission 2009) <http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf> accessed May 2015, 133; Hyoun S Kim ‘and others’, ‘Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors’ (2014) *J Gambl Stud* DOI 10.1007/s10899-014-9511-0

¹⁰⁰⁹ Carmen Messerlian, Andrea M. Byrne, Jeffrey L. Derevensky, ‘Gambling, Youth and the Internet: Should We Be Concerned?’ (2004) 13(1) *The Canadian Child and Adolescent Psychiatry Review* 3

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either of the activities¹⁰¹⁰; and (iii) that simulated gambling may facilitate development of cognitive misconceptions that players have more control over the outcome of real gambling than is the case¹⁰¹¹ or that they are able to win as frequently in real life as in the practice rounds. This, in turn, may encourage them to move from free to paying mode¹⁰¹².

None of the aforementioned speculations received significant support. In the main, pupils made clear differentiation between real money gambling and non-monetary forms of gambling. This somewhat contradicts the findings reported by Hume and Mort¹⁰¹³, who noted that the majority of participants aged between 13 and 30 years old had a problem understanding what gambling truly is, with many seeing it simply as a '*sport*' or '*another game*'. The present sample's focus on financial risks, and rewards associated with gambling, allowed for an unequivocal distinction to be made between real money and mere in-game points or credits. While pupils recognised that structurally these activities resembled gambling, they generally treated it as a '*less harmful*' or softer form.

They did not think that it would per se entice **them** to real money gambling even though some of them thought that other people may be so encouraged. Indeed, those engaged in social gaming were not necessarily interested in '*trying out*' with real money and those who indicated that they gambled for real did not seem to be particularly attracted to social gaming. This supports the recent empirical findings by Gainsbury et al¹⁰¹⁴ who suggested that social gaming and real money gambling, despite their similarities, may attract different types of individuals. Although it does not directly contradict Kim et al¹⁰¹⁵, who found that a large proportion of social gamers migrate to real gambling within six months of starting to play on social sites, it contributes to the arguments advanced by Floros et al¹⁰¹⁶ that the association may be merely coincidental and not causative.

¹⁰¹⁰ Mark D Griffiths, 'Amusement of Machine Playing in Childhood: a Comparative Analysis of Video Games and Fruit Machines' (1991) 14(1) *J. Adolesc* 53

¹⁰¹¹ Sally Monaghan, Jeffrey Derevensky, Alyssa Sklar, 'Impact of Gambling Advertisements and Marketing on Children and Adolescents: Policy Recommendation to Minimise Harm' (2008) 22 *Journal of Gambling Issues* 252

¹⁰¹² Carmen Messerlian, Andrea M. Byrne, Jeffrey L. Derevensky, 'Gambling, Youth and the Internet: Should We Be Concerned?' (2004) 13(1) *The Canadian Child and Adolescent Psychiatry Review* 3

¹⁰¹³ Margee Hume and Gillian Sullivan Mort, 'Fun, Friend or Foe: Youth Perception and Definition of Online Gambling' (2011) 17(1) *Social Marketing Quarterly* 109

¹⁰¹⁴ Sally M. Gainsbury 'and others', 'An Exploratory Study of Interrelationships Between Social Casino Gaming, Gambling, and Problem Gambling' (2015) 13 *Int J Ment of Health Addiction* 136

¹⁰¹⁵ Hyoun S Kim 'and others', 'Do Social Casino Gamers Migrate to Online Gambling? An Assessment of Migration Rate and Potential Predictors' (2014) *J Gambl Stud* DOI 10.1007/s10899-014-9511-0

¹⁰¹⁶ Georgios D Floros 'and others', 'Adolescent Online Gambling: The Impact of Parental Practices and Correlates with Online Activities' (2013) 29 *Journal of Gambling Studies* 131

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An important new insight also emerged. For some pupils playing video games with or without gambling-like elements, or gambling socially, suppressed the need to gamble with real money. It also exposed some of them to experiences that taught them that gambling is *'not a risk worth taking'*. Such a finding has not as yet been reported in existing studies on minors and represents a new observation that deserves further exploration. They liked being able to experience the fun and excitement of playing, as well as the social interactions with their families or friends, without taking any financial risks and exposing themselves to the fear of possibly losing money. Although losing social games or video games still created negative feelings, they were nowhere near felt or perceived to be as strong or significant as losing at real money gambling games. For some individuals this generated quite substantial amounts of aggressive and violent behaviour.

This highlighted the nuanced nature of the relationship between non-monetary and monetary forms of gambling. Age restricting such games may prove counterproductive as lack of non-monetary forms of gambling may push them back into real money gambling. Nevertheless, this thesis did not consider how such games may increase minors' familiarity with this form of entertainment, or whether they may constitute a powerful form of advertisement. This may increase minors' propensity towards real gambling even though they may not necessarily be able to recognise it consciously. More longitudinal studies should explore these aspects. Furthermore, the study represents the view of all participants, including those pupils who never actually played 'demo'/social gambling games, and accordingly their views represented their perceptions rather than real experiences. Further research that would focus specifically on minors who have played 'demo'/social gambling games, and who migrated or concurrently started real money gambling games, would provide more specific insight as to the reasons for the cross-over.

It must also be noted that the distinction between real money and in-game points or credits became less unequivocal when pupils discussed games where virtual property could be collected to the exclusion of others. The small number of participating pupils who played such games prevented any meaningful conclusion, but further research into the value of virtual property attributed by minors should be carried out. This would determine whether gambling games for such in-games goods may lead to gambling-related harm and whether it should be treated in a similar manner to gambling games, or gambling-like activities within video games.

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With regards to motivations, the similarities that were initially observed became less significant when further considerations applicable to gambling were considered. Both activities were engaged due to family influence or peer pressure, in order to bond with family members, to relieve boredom, and to experience competitive but friendly banter. Accordingly, the reasons for playing given by the present sample correspond well to the studies that carried out an analysis of players' motivations. They indicated that both video gaming and gambling help produce similar outcomes in terms of emotional needs satisfaction, relief from stress and boredom, socialisation¹⁰¹⁷, arousal and/or escapism¹⁰¹⁸. But the scale and strength of emotions (both positive and negative) was significantly stronger with respect to real money gambling. Social/ 'demo' games were played to pass time or to socialise with others. This means that these activities may fulfil similar, but not identical, needs.

One pupil used 'demo' games (but not social games) as a 'warm-up' in order to work out the odds or work out the system that he could apply to real gambling. This offered some limited support to the argument advanced by Messerlian et al¹⁰¹⁹ that such sites may be seen as a practice ground. However, the relevant pupil already knew that he wished to gamble for real and he used the site to learn the rules or to experiment in a safe environment before placing any money at risk. Moreover, the majority of other pupils did not think that they could learn anything from practice games and many in fact believed that most gambling games are 'rigged' or 'dodgy'. Some clearly stated that the 'demo' games deliberately misrepresent the odds of winning in order to give a false impression that winnings are likely and frequent in order to encourage participation. Such an attitude constitutes a protective factor against some of the attempts, identified by Sevigny et al¹⁰²⁰, to lure consumers by providing inflated pay-out rates during the 'demo' session that did not reflect the actual odds in payable mode, and also against the potential misunderstandings with regards to the difference in skill level that can be acquired in either video games or real money gambling.

¹⁰¹⁷ Mark Griffiths and Richard TA Wood, 'Risk Factors in Adolescents: The Case of Gambling, Video Game Playing and The Internet' (2000) 16(2/3) Journal of Gambling Studies 199

¹⁰¹⁸ Charlotta Hellstrom 'and others', 'Influences of Motives to Play and Time Spent Gaming on The Negative Consequences of Adolescent Online Computer Gaming' (2012) 28 Computers in Human Behavior 1379

¹⁰¹⁹ Carmen Messerlian, Andrea M Byrne, Jeffrey L Derevensky, 'Gambling, Youth and the Internet: Should We Be Concerned?' (2004) 13(1) The Canadian Child and Adolescent Psychiatry Review 3

¹⁰²⁰ Serge Sevigny 'and others', 'Internet Gambling: Misleading Pay-Out Rates During the Demo Period' (2005) 25(1) Computer in Human Behavior 153

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Finally, the empirical data demonstrated that the existing measures that aim to restrict minors' exposure to gambling advertising, and to ensure that those that are viewed do not appeal to them, did not appear to be effective for the sample. As explained in paragraph 4.1, this thesis did not aim to prove that gambling advertising entices minors into premature consumption as the actual negative, or positive, impact of advertising continues to remain uncertain¹⁰²¹ and any allegation of their influence on increased uptake is strongly contested¹⁰²². Nevertheless, not only did the pupils in the sample see many gambling-related advertising but they found many of them attractive and even sought out further information in direct response to seeing an advert.

The study also alluded to the fact that adults do not necessarily assess correctly how advertising is perceived by minors. The adult participating in the focus groups carried out on behalf of the ASA¹⁰²³ were of the unanimous view that the Foxy Bingo advertisement would certainly appeal to children, but that the timing restrictions on when such adverts could be aired would be sufficient to stop them from seeing it. This was directly contradicted by some pupils participating in the current study. The Foxy Bingo advert was in fact often mentioned, demonstrating that many of the pupils saw the advert despite the timing restrictions, but pupils did not agree whether it appealed to them, with only some finding it interesting.

This clearly demonstrates the need to involve children and young people in research studies which investigate issues that concern them. This should include studies outside the context of gambling advertising. Although this candidate found it exceptionally difficult to secure the cooperation of the schools, the pupils themselves have been very enthusiastic and eager to discuss the topics. This has also been identified recently by the Responsible Gambling Strategy Board¹⁰²⁴ and this thesis firmly supports the suggestion to carry out more studies involving children and young people.

¹⁰²¹ Per Binde, 'Gambling advertising: A critical research review' (RTG 2014) <http://www.responsiblegamblingtrust.org.uk/user_uploads/binde_rgt_report_gambling_advertising_2014_final_color_115p.pdf> accessed November 2014

¹⁰²² 'CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes' (2014) <<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~media/Files/CAP/Reports%20and%20surveys/CAP%20and%20BCAP%20Gambling%20Review.ashx>> accessed November 2014

¹⁰²³ Gambling Advertising Review of the ASA's application of the UK Advertising Codes, October 2014

¹⁰²⁴ Responsible Gambling Strategy Board 'Young People and Gambling-Related Harm' (2014) <<http://www.rgsb.org.uk/publications.html>> accessed December 2014

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The thesis accedes that the Gambling Act 2005, as amended by the Gambling (Licensing and Advertising) Act 2014, certainly introduced many improvements to the gambling regulatory framework. It rationalised many aspects of the British gambling legislation to allow it to compete at international levels. It has brought the bookmaking business under the proper control of the Gambling Commission and it created enough impetus for the remote gambling providers to introduce effective age verification procedures that prevent underage customers from accessing gambling online. It also gave the Commission a wide canvass in order to develop a strategy aimed at protecting minors from gambling-related harm.

This thesis also identified that, despite the seeming popularity of gambling amongst the general population¹⁰²⁵, perception of gambling amongst a sample of minors still tends to lean toward negative views, with a large number of them having no interest in gambling, that has been unaffected by the liberalising effects of the legislations.

However, the political decision to ‘normalise’ gambling and to position it alongside other forms of adult entertainment, created inevitable tensions with the need to protect children and young people from gambling-related harm. Commercial gambling providers have legitimate expectations to be able to expand and to offer a variety of the ever increasingly enticing gambling forms, while the protection of minors and other vulnerable people usually requires the opposite.

The thesis recognised that it advocates an approach required to protect a minority. Under the adaptation theory¹⁰²⁶ the majority is typically able to adapt to the expansion of opportunities and does not suffer any negative consequences as a result. However, for some individuals the risk remains that the adaptation process will fail. The most recent Young People Omnibus classified 0.7% of children aged between 11 and 16 years old as having a problem with their gambling. In this candidate’s view this number is too high, especially when taking into account that this relates to children who should not even be engaged in any form of gambling that may lead to such harm. Therefore, the adoption of a precautionary principle to the regulation of gambling that relates to minors is recommended. As minors have been identified to be at increased risk, it is submitted that such approach is justified in order to safeguard the future adults of the society.

¹⁰²⁵ Health Survey for England and Scottish Health Survey

¹⁰²⁶ Simon Planzer and Heather Wardle, ‘The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling’ (RGF 2011)
<<http://ssrn.com/abstract=2045052>> accessed November 2013

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Accordingly, the current status quo would benefit from certain improvements, as recommended throughout the thesis. These would further reduce the aforementioned tensions and strengthen the protection of minors

Recommendations:

1.

The first recommendation stipulates that all forms of commercial and publicly organised gambling should be permitted only to those who are over the age of 18 years old.

The Gambling Act does not prevent minors from being engaged in all forms of gambling. The Act missed the opportunity to rationalise the previous delimitation of which forms of gambling should be prohibited. Accordingly, minors are legally allowed to play Category D gaming machines and to be engaged in certain forms of lotteries or equal chance gaming, while young people are allowed to lawfully purchase lottery tickets, participate in football pools or play Scratchcards. The decision to remove Category D gaming machines from unsupervised locations was correct but insufficient.

The continuing permissibility for children and young people to be engaged in soft/medium forms of gambling was justified by the apparent lack of proof that such engagement causes direct harm to them¹⁰²⁷. However, as it has also been expressly recognised by the Joint Committee on Draft Gambling Bill¹⁰²⁸, this lack of proof resulted from the severe paucity of recent research on those issues, rather than from evidence that such play causes no direct or indirect harms. The Committee accordingly suggested that the regulator should commission further research in this field but this recommendation has not as yet been implemented.

Nevertheless, while the claim that there is no evidence of direct harm continues to be correct, there are many indications, as discussed in paragraphs 1.3.3 and 1.5.4, that these forms of gambling are not risk free and may, amongst minors, lead to several negative consequences either immediately, such as getting violent, experiencing high levels of stress or losing their lunch money, or in the future by becoming behaviourally conditioned to associate gambling only with fun and excitement. This also undermines effectiveness of any potential educational campaigns, even with respect to ‘harder’ forms of gambling,

¹⁰²⁷ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 260-284

¹⁰²⁸ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 260-284

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as distinctions between the different types are not necessarily easily discerned, and young people do not necessarily appreciate that the relative riskiness of different types of gambling products differs. It equally makes it more difficult to warn children and young people that the risks of all forms of gambling, and not only of the prohibited forms, are real, and may be severe, if the law allows them to be engaged in some types and when such gambling can be organised and promoted in schools.

The most significant contraindication to this recommendation remains financial. Such increase in age would be likely to reduce the income from lotteries, Scratchcards, or football pools and it would almost certainly bring to a halt the production and supply of many Category D gaming machines that are typically designed to attract children. However, in the context of lottery products, the evidence that was given to the Joint Committee on Draft Gambling Bill by the relevant stakeholders implied that the impact would actually be very small. Indeed, Camelot expressly stated that “*it is a matter of record that on a couple of occasions we have said to the Department for Culture, Media and Sport that we in fact would not oppose a change to 18*”¹⁰²⁹. Similar to other addictions, gambling disorder has been categorised as a progressive illness and, accordingly, the benefit of such delay in initiation amongst many minors should outweigh this small financial disadvantage.

The degree of economic hardship resulting from the removal of Category D gaming machines would be substantially higher amongst the family entertainment venues that rely on these machines for their revenues, such as seaside piers or bowling alleys. While this aspect is acceded to, it is submitted that this represents a clear indication that the regulatory framework prioritised the economic needs of the seaside resorts over the need to protect those who may find themselves vulnerable.

The continuing reliance on lack of proof that such play causes harm should also be challenged. As it has been demonstrated in Chapter 1, several studies exist that point to risks caused by ‘fruit machine’ playing¹⁰³⁰ and the Royal College of Psychiatrist unequivocally submitted to the Joint Committee on Draft Gambling Bill that “*it has been firmly established that all gaming machines, regardless of the size of the stake or the*

¹⁰²⁹ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 263

¹⁰³⁰ As discussed in Chapter 1.3.3.

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*amount of prize money, are unsuitable for children and young people*¹⁰³¹. In light of the continuing dismissal of the evidence that points to risks associated with such machine playing amongst minors, the onus should be placed on the industry to prove that these soft forms do not indeed pose any risks. Until such proof is achieved it is submitted that, despite the aforementioned financial disadvantage, a precautionary approach to this form of gambling is justified, and minors should not be permitted to play any forms of gambling machines, regardless of the value of stakes or prizes.

In order to minimise the economic hardship the industry should be given sufficient time to adjust. The increased proliferation and popularity of non-gambling video games and other entertainment forms attractive to children such as bouncy castles, rides, sport machines or ice-hockey, and similar should assist with the transition, and such a move would clearly demonstrate that the protection of children receives the attention it deserves. Finally, it is submitted that this recommendation is not as radical as it may, in the first instance, appear as many venues already offer a variety of activities and many forms of family entertainment venues continue to be financially viable in UK and in other jurisdictions, even though they do not offer gambling to children.

2.

Secondly, this thesis recommends that the regulator should again reconsider its approach towards age verification failures in land-based gambling venues. Although, fortunately, the majority of children and young people do not appear to be interested in gambling, those who wish to do so can still access it too easily. The Commission should now recognise that stage one of the enforcement pyramid scale, as discussed in paragraph 5.4.2.2, has failed to produce acceptable levels of compliance and, accordingly, further recourse to more stringent regulatory measures, and even criminal prosecutions against those who continue to ignore the requirements of s.46, should be made. Additionally, with respect to online providers, the Commission should remove from their LCCP the 72-hour period during which the age verification must be completed, but during which the unverified customer is permitted to gamble. Online gambling operators must be permitted sufficient time to carry out the age verification effectively. However, in the interim period the potential customer should not be allowed to gamble.

¹⁰³¹ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL 2003-04, HL63-I/HC139-I) para 269

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As demonstrated in paragraph 2.4.3, the latest results of a mystery shopping exercise carried out on behalf of the Gambling Commission¹⁰³² showed that more than half of the test purchases attempted by an underage customers in land-based gambling venues were successful. In this thesis it is submitted that such rates of non-compliance represent a significant threat to the third licensing objective. It has been recognised and discussed in paragraphs 5.4.2.2 and 5.4.3.1 that the regulator should aim to exert compliance by advice and negotiations, and without recourse to the criminal law, in line with the regulatory and enforcement theory advanced by Ayres & Braithwaite¹⁰³³, and further developed by Baldwin¹⁰³⁴ and Black¹⁰³⁵, especially as such approach is now embedded in the principles of ‘smart’ regulation¹⁰³⁶ and the Enforcement Concordat¹⁰³⁷.

However, with the passage of time the rationale behind the reluctance to refer to harsher civil sanctions and even criminal prosecutions against even persistent offenders in a more prominent way, increasingly seems to be based more on priority being given to commercial considerations of the operators over the need to protect minors, and less due to the reliance on the principle of ‘smart’ enforcement. The Commission continues to strengthen the guidance in the LCCP in order to improve refusal rates in land-based venues and to develop a compliance culture amongst the employees of the offline gambling providers. Nevertheless, the LCCP still does not fully deal with the inherent difficulties of subjectively ascertaining the customers’ age, or with issues relating to work ethics or overall workload of the responsible staff.

The strengthening of the LCCP is also unlikely to improve refusal rates among those who do not comply due to insufficient regard for the law or due to lack of fear of enforcement action. As shown in paragraph 2.4.2, the original non-compliance rates of 98%¹⁰³⁸ fell

¹⁰³² Gambling Commission Press Release, ‘Results of Test Purchase Exercise on Smaller Independent Licensed Operators – 2013’ (5/12/2013) <http://www.gamblingcommission.gov.uk/gh-press/news_archive/2013/underage_gambling_controls_mus/test_purchase_exercise_2013.aspx> accessed January 2014

¹⁰³³ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999)

¹⁰³⁴ Baldwin (n 1033)

¹⁰³⁵ Julia Black, *Critical Reflections on Regulation* (LSE 2002)

<<http://core.ac.uk/download/pdf/219186.pdf>> accessed May 2015

¹⁰³⁶ Robert Baldwin, ‘Is Better Regulation Smarter Regulation’ (2005) PL 485

¹⁰³⁷ ‘Enforcement Concordat: Good Practice Guide for England and Wales’ (DTI June 2003)

<<http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file10150.pdf>> accessed May 2015

¹⁰³⁸ Gambling Commission Press Release, ‘Mystery Shopping Tests Continue’ (31/07/2009)

<<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingcontinues.aspx>> accessed January 2015

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significantly shortly after the Commission placed more emphasis on this area¹⁰³⁹, only for it to rise substantially again¹⁰⁴⁰. Since its original publication the LCCP has been amended or updated on several occasions. This clearly indicates that the Commission has given the industry sufficient freedoms to develop satisfactory age verification practices, but without the requisite success.

Accordingly, the Commission should now be more proactive in imposing substantive civil punishments on persistent offenders, or even initiate widely publicised criminal prosecutions. This would signal to the industry that they had already had sufficient time to reach proper levels of compliance and that continuing failure will attract reputational or financial penalties. Alternatively, the Commission could impose the requirements that all customers should be identified before they are allowed to gamble. This solution is likely to prove unattractive to the industry and a mere threat of such a proposal, as long as perceived as real, might give enough impetus for reaching satisfactory compliance. If implemented it would ensure that no underage customers can be sold a gambling product, unless they use high quality fake identity documents, and would clearly demonstrate that gambling is indeed an adult only activity.

The age verification processes adopted by the online gambling industry have compared favourably, as shown in paragraph 2.4.5, primarily due to the impossibility of reliance on subjective face-to-face identification, but also due to the extensive digital footprint that British adults typically have. Irrespective of the underlying causes of the online providers' successes, their processes make a positive contribution towards protecting minors and should be commended. However, the online industry benefits from 72 hours 'grace' period. This thesis does not accept that this concession is necessary for UK residents for the reasons discussed in paragraph 2.2.2.1. Such permission should be removed from the Commission's Code because it contravenes the black letter statutory provisions and allows online gambling companies to directly breach s.46 of the Gambling Act, even though the unverified customers can only gamble short-term.

¹⁰³⁹ Gambling Commission Press Release, 'Underage Gambling in Betting Shops – Operators Face Further Tests' (3/12/2009) <<http://www.gamblingcommission.gov.uk/Press/News-archive/2009/mysteryshoppingpart2.aspx>> accessed January 2015

¹⁰⁴⁰ Gambling Commission Press Release, 'Results of Test Purchase Exercise on Smaller Independent Licensed Operators – 2013' (5/12/2013) <http://www.gamblingcommission.gov.uk/gh-press/news_archive/2013/underage_gambling_controls_mus/test_purchase_exercise_2013.aspx> accessed January 2014

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3.

Thirdly, this submission advises the Gambling Commission to be more proactive at addressing the environmental risk of adults purchasing gambling products with the intention of giving to minors, or of adults facilitating underage play. This should include a requirement imposed on the gambling providers to warn gambling customers that helping an underage person to gamble is a criminal offence. Such warning should appear alongside the current mandatory “no under 18” signs and should draw the adults’ attention that such facilitation of gambling is potentially harmful to minors.

In light of the importance of family influence, and the evidence showing that mere knowledge of gambling risks does not necessarily prevent engagements, educational strategies and promotional campaigns should target the whole family and should highlight the impact that gambling may have, not only on the individuals but on the extended families as well. Schools should be encouraged to run gambling-awareness workshops for children and sessions for teachers to enable them to identify gambling-related problems amongst their pupils and to offer support, when appropriate. As recognised by Taylor and Hillyard such initiative is unlikely to attract opposition from stakeholders and would contribute to the overall holistic strategy that aims to protect minors from gambling-related harm¹⁰⁴¹.

4.

This thesis also suggests, contrary to the conclusion reached by the BCAP report¹⁰⁴², that further restrictions on gambling advertising are in fact warranted. It accepts that no proof exists that gambling advertising is harmful to minors. Equally, there is no proof that they do not stimulate consumption at too early a stage, and this thesis demonstrated that current measures do not sufficiently shield young people from being exposed to such advertising. As demonstrated above, the impact of gambling marketing on participating pupils was strong enough to make them want to voice their concerns and demonstrated that they clearly felt affected by such advertising in multiple ways.

¹⁰⁴¹ Lisa M Taylor, Pamela Hillyard, ‘Gambling Awareness for Youth: An Analysis of the “Don’t Gamble Away our Future™” Program’ (2009) 7 Int J Ment Health Addiction 250

¹⁰⁴² ‘CAP and BCAP Gambling Review: An Assessment of The Regulatory Implications of New And Emerging Evidence for The UK Advertising Codes’ (2014)
<https://www.cap.org.uk/Newsreports/MediaCentre/2014/~/_/media/Files/CAP/Reports%20and%20surveys/CAP%20and%20BCAP%20Gambling%20Review.ashx> accessed November 2014

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This thesis argued that the weakness of existing provisions is primarily due to the refusal of the legislators and the advertising industry to admit that the extensive overlap between the interest of adults and teenagers makes ‘zoning’ and ‘watershed’ restrictions ineffective, except for the very young children. The same reasons underpin the difficulties with being able to establish what does, or does not, appeal to this age group. It is even more complex, if at all possible, to determine what appeals to adults while being unattractive to adolescents. Accordingly, further restrictions that would be based on attempting to differentiate between what appeals to adults and what appeals to minors are unlikely to change the status quo.

Therefore, this recommendation focuses on the content. It suggests that gambling advertising should not be permitted to appeal to emotional states of viewers in order to encourage uptake or to increase consumption. Instead, the focus should be on providing relevant information that enables customers who wish to gamble to easily locate where and when they can do so, to differentiate between different brands, to find out about new offers and their chances of winning, but in a more ‘news’ informational style format as opposed to presenting gambling as a glamorous and exciting form of leisure. The recommendation aims to strike a balance between the right of the operators to promote their products and the need to protect minors who should not be enticed into premature consumption, and would still respect the liberties of adults to be informed of their choices.

5.

The thesis also identified certain gaps where further research would be beneficial in order to ensure that minors’ protection of gambling is as holistic as possible.

As it has been argued in Chapter 1, the structural and psycho-social characteristics of penny auctions are nearly identical to gambling. However, no studies have identified whether young people actually participate in such auctions and what impact such engagement may have on them. As participation in penny auctions may lead to identical harm as gambling may do, this omission is unfortunate and, accordingly, further studies should be carried out to quantitatively explore levels of engagements in this form of shopping. The Gambling Commission should also be more transparent as to why they concluded that such auctions do not constitute gambling so that their reasoning can be assessed and endorsed, or challenged as appropriate.

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Further research should also be carried out to ascertain whether the impact of losing or gaining virtual property in a gambling game can be equated with the impact of losing or gaining real money. This should be differentiated from the impact of losing mere in-game points or credit, which has been identified by the current study to be clearly different for the participating pupils. This would produce further insight into whether virtual property is more akin to ‘money or money’s worth’, as discussed in paragraph 1.2.7.1, or whether it is more similar to mere in-game points or credits. Equally, further and preferably longitudinal research should be carried out with regards to the risks associated with minors playing Category D gaming machines. Although this candidate is convinced that sufficient documentation already exists, the policy makers have not been persuaded and, accordingly, further studies should be carried out to either rebut the existing evidence or prove that the risks are real and should not be neglected.

In the context of ‘demo’/social gaming the empirical data collected in the present study suggests that the cross-over between non-monetary and monetary forms of gambling cannot necessarily be attributed to similarities in motivating factors, cognitive misconceptions or similarities in audio and visual effects. Nevertheless, as the correlation between these two forms continues to be found in studies, as discussed in Chapter 3, further qualitative research only with minors who either migrated from non-monetary into monetary gambling, or who started both forms concurrently, could give an important indication as to whether the correlation is merely coincidental or whether in fact causative effect may be found. This would be of particular value to the Gambling Commission to determine how best to address these aspects.

Finally, any research studies that aim to ascertain the impact of gambling advertising on minors, or that are designed to develop educational campaigns, should involve them as participants. The insight provided by the pupils themselves cannot be replicated by adults deliberating amongst themselves as to what affects minors and what interventions are likely to be effective.

With the exception of Chapter 3, this thesis demonstrated that existing statutory safeguards are insufficient to protect those minors who are attracted to gambling. The Gambling Commission, in its role as the regulator, must be more proactive and must place more emphasis at the third licensing objective than is currently the case. Fortunately, the majority of minors do not appear to be interested in this form of leisure and the headline figures appear to indicate that problem gambling is declining. However, the regulator and

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the industry must not be complacent, especially as the long term effects of the 'normalisation' of gambling initiated by the Gambling Act remain uncertain and any harm to children will ultimately result in harm to adults and to the society as a whole.

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Appendices

A. Appendix A – list of search terms

List of search terms used during the research included but is not limited in a variety of combinations to: gambling; gaming; minors gambling; adolescent's gambling/gaming/betting; gambling problems; pathological gambling, social gaming/gambling/betting; professional games; gambling/gaming regulations, regulatory theory; regulatory approaches; gambling/gaming jurisprudence; strict liability offences; gambling & EU; harmonisation; enforcement principles; enforcement strategies/theory; vice industries, minors' protection, children and young peoples' issues; vulnerable persons; social networking; video gaming, advertisement, psychology of advertisement; advertisement impacts; commercials; age verification; age restricted products/services; age verification issues/method/technology, technological convergence.

Academic databases predominantly referred to include: *Westlaw*, *LexisLibrary*, *LexisPSL*, *HeinOnLine*, *JSTOR*, *Oxford Scholarship Online*, *Lawtel*, *House of Commons Parliamentary Papers*, *EBSCO (Business Source Complete)* and *Scopus*.

B. Appendix B – list of conference attended

- 8th International Conference on Internet, Law & Politics: Challenges and Opportunities of Online Entertainment (Barcelona, July 2012);
- Athens Institute for Education and Research Conference in Law (Athens, July 2012)
- 15th International Conference on Gambling and Risk Taking (Las Vegas, May 2013)
- QMUL workshop Cumberland, (Windsor, June 2013)
- Conference on Risk Perceptions, Measurement and Policy, (London, December 2013)
- 5th International Gambling Conference: Gambling in the Mobile Era (Auckland, February 2014)
- QMUL Paris Event: Regulating Online Gambling in the EU – Where do we go from there? (Paris, November 2014).

C. Appendix C – Emails to schools and youth clubs regarding focus groups.

Dear [...] name

I am writing to enquire if your school would be willing to participate in a research project on children's gaming and gambling exposure within the online environment. Please be assured that this email is not a spam. My name is Margaret Carran; I am a lecturer in law at City University London and I am undertaking a PhD studies at Queen Mary, University of London in conjunction with Nottingham Trent University. The research is funded by the Responsible Gambling Trust and has been ethically approved by the University's Ethical Committee.

The aim of the project is to find out the behaviour of 14 and 17 years old with regards to online gaming activities. In particular I would like to find out how much the children know about the law relating to this area; whether this knowledge, if any, has any impact on their gaming behaviour; how they encounter the online gaming world and what they understand as social v. solitary activity.

With your permission, I would like to conduct focus groups with children attending Year 10 and Year 13 classes in your school during the Personal Social and Health Education session. The finding from the focus groups would underpin subsequent survey which I would like to carry out also as part of my research. I have already had my Enhanced CRB check completed and I am permitted to work with children unsupervised. I believe students would find the session quite interesting and also it would be a good experience for them to participate in a focus group.

As a "Thank You" for allowing me to carry out those focus groups and the surveys within your school I would be more than happy to deliver a workshop/talk on gaming risks awareness that has been specifically developed for the relevant age group or alternatively I could deliver a talk on studying law at a University or e.g. on English Legal System whichever would be most preferable to you.

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Information Sheet to Pupils

Hi,

My name is Margaret; I am a PhD student at the University of London, Queen Mary.

I am carrying out research on teenagers' attitudes towards gaming and gambling and I would like to chat to you and some of your friends from your school during your PSHE lesson about your online video and computer gaming; your understanding of what it means to play a solitary game and what a social game might be; what you know and don't know about the law that relates to this area and what you like and dislike about what is available online. During the session I will ask your group some questions on the above topics. You will be able to answer it, express your opinion, discuss it with your friends or you can just sit and listen to others. The session will not take more than one hour. I would like to record the session but please be assured that anything you say will remain confidential and anonymous. I will ask you to choose a nickname to use during the chat to ensure that nobody will be able to recognise what you said and when. I will never mention your real name or the name of your school in any way. I will use your comments in my writing on an anonymous basis. After the session I will also design a survey that will relate to the same issue that we discussed during our chat. The actual questions will depend on what you will tell me during the session and what ideas you give me. I will email you the questions afterwards so you can let me know what you think about them if you wish so.

Thank you for agreeing to participate in the focus group please let your teacher know. Please remember that even if you agree to participate in the focus group now you may change your mind at any time including during the session or after the session. You will not need to give your reason for that and nobody will be told that you have decided not to take part. If you would like to withdraw after the session please email me on Margaret.Carran.1@city.ac.uk The project has been ethically approved by Nottingham Trent University. If you would like to ask me any further questions please email me on Margaret.Carran.1@city.ac.uk.

CONSENT FORM

I confirm that I understand what the project is about and I am happy to participate. I keep the form for my future reference. I understand that I can change my mind at any time.

I agree to take part in the above study and I am willing:

1. To participate in the focus group session.
2. To have the discussion recorded and transcribed in an anonymous basis.
3. For the findings of the focus groups and surveys to be quoted anonymously in academic reports.

I understand that my participation is voluntary and that I am free to change my mind at any time without giving any reasons without being penalised or disadvantaged in any way.

Name of pupil	Date	Signature
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Margaret Carran

Researcher	Date	Signature
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Information Sheet to Headmaster/ Headmistress / Teachers

Thank you for agreeing to consider participating in this research project. My name is Margaret Carran and I am undertaking PhD study under the supervision of Dr Julia Hornle (Queen Mary, University of London) and Professor Mark Griffiths (Nottingham Trent University). The PhD is funded by the Responsible Gambling Trust (previously known as Responsible Gambling Fund). The project has been ethically approved by the Ethical Committee of Nottingham Trent University.

The aim of the study is to find out the behaviour of 14 and 17 years old with regards to online gaming activities. In particular the study aims to find out how much the children know about the law relating to this area; whether this knowledge, if any, has any impact on their gaming behaviour; how they encounter the online gaming world and what they understand as social v. solitary activity. In order to find out the above I would like to run focus groups with your pupils during the Personal Social and Health Education classes (PSHE) and I would be happy to run those sessions either by myself or with the relevant teacher being present. I have undergone the enhanced CRB check and I am permitted to work with children. On a subsequent date I would like to ask your pupils to fill in a survey on the same topics. The participation in the project is entirely voluntary and you have a right to withdraw the school at any time without giving any reasons to do so.

If you would like to help with this project I would be grateful if you could select a group of 6 – 15 students in the relevant age-group who would be interested and willing to participate in the focus group and to let me know what date and time would be most suitable to run the session. Any pupil will be allowed to withdraw from the study at any point during its duration as well. All focus groups will be conducted by the research team and will be carried out on an anonymous basis. The pupils will be asked to choose nicknames to use during the session to avoid using real names and no reference to individual school will be made in any of the research output. It is intended for the session to be recorded. The recording will be destroyed upon anonymous transcription. Only the research team will have access to the recordings for transcription purposes and then to the transcribed data which will be held on a password protected computer. The findings of the focus groups will be used in the final report and for academic publication which are accessible to all.

For any further questions I can be contacted via email: Margaret.Carran.1@city.ac.uk

My supervisors can be contacted on: J.Hornle@qmul.ac.uk and mark.griffiths@ntu.ac.uk

CONSENT FORM

I confirm that I have read and understood the information sheet for the above project which I may keep for my records and have had the opportunity to ask any questions I may have.

I agree to take part in the above study and I am willing:

1. To allow for selected pupils in my school to participate in the focus groups and to complete the survey.
2. To have the focus groups recorded and transcribed in an anonymous basis.
3. For the findings of the focus groups and surveys to be quoted anonymously in academic reports.

I understand that my participation is voluntary and that I am free to withdraw my school at any time without giving any reasons without being penalised or disadvantaged in any way.

On behalf of [name of school]

_____	_____	_____
Name of Responsible Person	Date	Signature
_____	_____	_____
Researcher	Date	Signature

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E. Appendix E – semi-structured focus groups schedule

Semi-structured focus groups with children (school setting).

1. Pre-focus group session
 - a. Meet the relevant teacher to discuss what the children have already been told and answer any further questions s/he may have
 - b. Identify how many children are in fact attending;
 - c. Establish consent and collect students' consent forms.
 - d. Ensure that no parent opted out.
 - e. Thank for help.
2. At the focus group
 - a. Introduction
 - i. Welcome and thanks for participation.
 - ii. Introduce myself – my name is Margaret Carran, I am doing my doctorate study at a University and it is really nice to be able to meet with you to find out what you think about my research topic. As during this session it is me who wants to learn you can feel like the teacher, enjoy it. What this focus group is about – I would like to find out what sort of online gaming you participate in; what you do and don't enjoy about them and whether this is different for different games; who you play with and what you know about the law in this area. I will use your comments in my PhD writing and in other academic publications but I will never disclose your name to anyone and I will never say who said what during our session. But it's not only me; please ensure that you don't tell anyone who said what during the session either and please don't mention any names outside this focus group. This is to ensure that everything we say is completely confidential meaning that nobody can figure out what each of you really think about the topic so we can talk honestly. No right and wrong answers here and please talk to each other. Please note that the voice recorder is on; let's start.
 - b. Opening activity:
 - i. Can I please ask you to individually write on a card what sort of online games / games on social networks have you played at in the last one month? Give them 2-3 minutes to write it down; collect the cards; briefly see if there are any games that appear more than once.
 - c. Theme 1 – what do 14/17 years old actually play online?
 - i. Can you tell me more about the games that you have written on the cards?
 - ii. Where and when do you play them? Do you play them on the computer, game console, mobile – which of those games do you need to be online for while playing?
 - iii. What influences you to choose this particular game and not another? If you were to encourage your friend to play the same game that you like what would you say to them?
 - iv. Do you play subscription games, if so, who pays for it?
 - v. Of all the games that exist only online do you have any ways of classifying them into types or otherwise grouping them together? How do they differ for you?
 - vi. Do you think gaming is a social or solitary activity? Compare it to watching TV (do you think watching TV is a social or solitary activity?). What do you

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think is a social activity and what is solitary activity? How would you define it? Do you need someone physically present to consider playing with them?

- vii. Who do you play the games with? – by yourself, with parents, siblings, friends, others.

d. Theme 2 – gaming v. gambling

- i. What do you think gambling is?
- ii. Do you think that betting and lottery is gambling?
- iii. What difference, if any at all, there is between gambling games and other games?
- iv. Have you ever tried to gamble online?
 - 1. For fun
 - 2. For money
 - 3. If yes, which sites and how did you choose them?
 - 4. Other than the financial aspects is there a difference between gambling for money and gambling for fun?
 - 5. Who do you play with?
- v. What do you think is good about gambling?
- vi. What do you think is bad about gambling?
- vii. Do you think that gambling carries any risks?
- viii. Do you do anything to prevent those risks from happening? What do you do?

e. Theme 3 – understanding of law

- i. What do you think law says about gaming and gambling?
- ii. How do you find out what law says about those areas?
- iii. Does the legal position influence in any ways how you choose to spend your free time? In other words, if law was completely silent on this issue, would you behave in any different way?
- iv. Do you know how the law treats different forms of gaming and different forms of gambling? Does it matter to you in any way?
- v. Imagine you were in charge and were able to make an unrestricted decision what would you make the law to be?

- f. Conclusion – thank everyone for participation. Go round to ask if anyone has anything else to add.

F. Appendix F – full list of games mentioned by the pupils during the focus groups.

Great Theft Auto (several variants), Taxi game, World of Warcraft, Fish-game; Fright Cry 3; Wii Dance; Wii Sing-Along; interactive sport games on Wii; Tracey Baker (subscription game bases on a popular British children TV character); Paris; Tekken, clip games; Sky Run, Farmville, Spiderman, dress up games; Rune Scape; Fun Fantasy; Wowville.com; Habbo Hotel, Stardoll; Battlefield; Football Manager; Dishonoured; Warzone; Run; League of Legend; Five; Age Verifiers; Candy Crush Saga; Simpson; Need for Speed; Crazy Taxi; barbie.com; Alien Abduction; Doctor Who; Halo; Noughts and Crosses; Bangar; G-11; Tap Tales; Prison Architect; Draw Something; Lord of the Rings; Fright Night; Burnout; Skyrup; Secret Fighter; Fable 2;

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Appendix G – Information sheet to gambling providers

Thank you for agreeing to consider participating in this research project. My name is Margaret Carran and I am undertaking PhD study under the supervision of Dr Julia Hornle (Queen Mary, University of London) and Professor Mark Griffiths (Nottingham Trent University). The PhD is funded by the Responsible Gambling Trust (previously known as Responsible Gambling Fund). Before you decide whether to grant me an interview I would like to give you enough information about the project. I would be grateful if you would take the time to read the following information carefully before deciding whether or not to take part.

The aim of the study is to assess the effectiveness of age-verification measures adopted by the online gambling providers and challenges faced by the Gambling Commission and the industry in preventing under-age access. It also aims to assess the effectiveness and usage of age-verification software and to ascertain the industry's attitudes towards age-verification requirements.

You are being asked to take part in an interview lasting approximately 45 minutes conducted by myself. During the interview I would like to discuss with you the following topics: (1) Demonstration / description of the software, (2) Cost effectiveness, (3) Software capabilities, (4) On-going account monitoring.

Before and/or during the interview please let me know if there are any questions that you would rather not answered. The participation in the interview is entirely voluntary and you have a right to withdraw at any time without giving any reasons to do so. If you wish to withdraw please contact me or my supervisors and ask for the data to be withdrawn from the study. Upon completion of the interview please feel free to ask any questions you may have about the interview or research in general.

Extracts from the interview may be used in the final report. Only the research team will have access to the recordings and transcribed data. All recordings will be transcribed and kept on password protected computers which are not accessible to any other university staff. Your personal views will be anonymised and the way report will be written will ensure that your identity is protected. However; the name, functions and capabilities of the software marketed by your organisation may be included in the final report

For any further questions I can be contacted via email: Margaret.Carran.1@city.ac.uk

My supervisors can be contacted on: J.Hornle@qmul.ac.uk and mark.griffiths@ntu.ac.uk

CONSENT FORM

I confirm that I have read and understood the information sheet for the above project which I may keep for my records and have had the opportunity to ask any questions I may have.

I agree to take part in the above study and I am willing to:

4. To be part of the interview
5. To have my interview voice recorded
6. To be quoted anonymously in reports

I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reasons without being penalised or disadvantaged in any way.

_____	_____	_____
Name of Participant	Date	Signature
_____	_____	_____
Researcher	Date	Signature

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Appendix H – Semi – structured interview schedule.

Thank you for agreeing to take part in the interview. Below are the questions that I would like to ask you with some follow up questions depending on your answers. Please answer as fully as possible but please feel free to skip any questions you would not wish to answer.

1. Could you please describe the predominant focus of your company (e.g. betting or casino games or lottery etc.); the size of your company, when it was established; approximately how many regular customers you have and whether you only offer gambling online or if you offer it online as well as in land based establishment?
2. What is your role in the company?
3. Could you please describe in details what age-verification procedures does your company adopt?
4. Can you please describe the technical aspects of this process?
5. What do you personally think about the requirements on age – verification imposed by law and the UK Gambling Commission (as applicable) or equivalent body within your jurisdiction?
 - a. Would you think they are too onerous or too basic?
6. Do you think that it is every possible to ensure the minors never play on your website?
7. What is your view about the financial costs of the age-verification process for your company?
8. How does your company train staff on age-verification issues?
 - a. How frequent is the training?
 - b. Is everyone trained or only designated people?
 - c. Do you do it internally or do you employ another company?
9. What do you think about the role and function and effectiveness of the Gambling Commission?
10. Please add anything that you may wish to add here.

Thank you very much for your time and for answering the questions. This research has been approved by the Ethical Committee of the Nottingham University and is funded by the Responsible Gambling Trusts. Your participation is voluntary and all information provided will be treated in strictest confidence and anonymised for publication purposes. No comments will ever be attributed to a specific individual and no details that could identify your specific company will be published. If you would like to withdraw you have a right to do so at any time by emailing m.a.carran@qmul.ac.uk .

Thank you.

Kind regards.

Margaret Carran.

VI. APPENDICES

Appendix I – Full text of larger section or articles referred to in the text:

S.327 of the Gambling Act 2005 “(1) For the purpose of this Act a person advertised gambling if – (a) he does anything to encourage one or more persons to take advantage (whether directly or through an agent) of facilities for gambling, (b) with a view to increasing the use of facilities of gambling, he brings them or information about them to the attention of one or more persons, or (c) he participates in or facilities an activity knowing or believing that it is designed to – (i) encourage one or more persons to take advantage (whether directly or through an agent of facilities for gambling, or (ii) increase the use of facilities for gambling by bringing them or information about them to the attention of one or more persons. (2) for the purpose of subsection (1) a person shall be treated as bringing facilities for gambling to the attention of one or more persons with a view of increasing the use of the facilities if – (a) he enters into arrangements (whether by way of sponsorship, brand-sharing or otherwise) under which a name is displayed in connection with an event or products, and (b) either – (i) the provision of facilities for gambling is the sole or main activity undertaken under that name, or (ii) the manner or context in which the name is displayed is designed to draw attention to the fact that facilities for gambling are provided under that name”.

S.252(2) of the Gambling Act “a person promotes a lottery if he – (a) makes arrangements for the printing of lottery tickets; (b) makes arrangements for the printing of promotional materials; (c) arranges for the distribution or publications of promotional materials, (d) possesses promotional materials with a view to its distribution or publication, (e) makes other arrangements to advertise lottery, d) invites a person to participate in a lottery, (g) sells or supplies a lottery ticket, (h) offers to sell or supply a lottery ticket, (i) possesses a lottery ticket with a view to its sale or supply, does or offers to do anything by virtue of which a person become a member of a class among whom prizes in a lottery are to be allocated, or (k) uses premises for the purpose of allocating prizes or for any other purpose connected with the administration of lottery”;

Art. 2(1) of the Consumer Protection from Unfair Trading Regulations 2008 specifies that “commercial practice means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or form consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product”;

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The National Lottery etc Act 1993

S.12(1)- “the Secretary of State may by regulation make such provision in relation to the promotion of the lotteries that form part of the National Lottery as he considers necessary or expedient”;

s.12(2)a - “such regulation may in particular impose requirement or restrictions as to the minimum age of persons to whom or by whom tickets or chance may be sold”.

S.13(1)a and b of the National Lottery etc. Act read as follows: “(1)If any requirement or restriction imposed by regulations made under section 12 is contravened in relation to the promotion of a lottery that forms part of the National Lottery—(a)the promoter of the lottery shall be guilty of an offence, except if the contravention occurred without the consent or connivance of the promoter and the promoter exercised all due diligence to prevent such a contravention and b) any director, manager, secretary or other similar officer of the promoter, or any person purporting to act in such a capacity, shall be guilty of an offence if he consented to or connived at the contravention or if the contravention was attributable to any neglect on his part”

