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Abstract: The internet, social media and online profiling have fundamentally changed advertising and the regulation of gambling advertising has not yet managed to address the challenges and opportunities arising from this technological shift. Furthermore, the regulation of gambling does not take into account sufficiently the needs of children and vulnerable persons. We review the empirical research on the impact of gambling advertising and show how regulatory standards firmly adhere to the transmission theory of communication that prioritises the communicative intent of the advertiser over how the advertising message is received by, or impacts on vulnerable people.

This article reviews the law on gambling advertising and argues that for gambling, the restrictions imposed by the largely co-regulatory system only have limited effect. We compare the regulation of gambling advertising, by way of analogy, to a sieve that *does* hold *only* a little water and make recommendations for legal reform.

1. Introduction

This article analyses the law of gambling advertising in Great Britain, highlighting the limits of co-regulation. It analyses the law against the third statutory objective¹ considering the empirical research literature on the impact of advertising on problem gambling², pointing to gaps in the protection of children and vulnerable persons and making recommendations. Our argument is that the risk assessment should not be made purely from the perspective of the population as a whole but from the viewpoint of those who are negatively affected by gambling. The article argues that there is a fundamental conflict between the objective of liberalising gambling advertising and the protection of children and other vulnerable persons and that more should be done to ensure their protection. The Department of Culture, Media and Sport (DCMS) is currently reviewing Social Responsibility Measures, including the impacts of gambling advertising and the protection of children, so we hope this article can make a timely and valuable contribution to the debate.³

¹ Section 1 (c) Gambling Act (GA) 2005 “protecting children and other vulnerable persons from being harmed or exploited”

² Problem gambling can be circumscribed as gambling addiction or compulsive gambling, which has long lasting negative impacts on the individual concerned and his social relationships. The precise definition of what constitutes problem gambling and the academic discussion of what constitutes problem gambling is outside the scope of this article, due to the limit of space.

³ This is a controversial current issue: see DCMS Call For Evidence Review of Gaming Machines and Social Responsibility Measures, Question 7 (24. October 2016) “Is there any evidence on whether existing rules on gambling advertising are appropriate to protect children and vulnerable people from the possible harmful impact of gambling advertising?” and DCMS Consultation on Proposals for Changes to Gaming Machines and Social Responsibility Measures (October 2017)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655969/Consultation_on_proposals_for_changes_to_Gaming_Machines_and_Social_Responsibility_Measures.pdf

In principle, regulators have three distinct policy choices for regulating advertising: The first option is to restrict exposure to advertising by *prohibiting* certain types of advertising, such as certain channels, venues and media or advertising for particular products. Before the Gambling Act 2005, advertising of gambling was restricted. It was embedded within the principle that some gambling advertising is necessary to steer those who wish to gamble from illegal gambling and its concomitant criminality but which should only respond to unstimulated demand.⁴ The liberalisation by the Gambling Act 2005 led to the removal of the prohibition of advertising for hardcore forms of gambling, the underlying policy being that gambling is part of the legitimate entertainment sector and that operators should be free to advertise within the boundaries of the licensing scheme and social responsibility. This approach means that the purpose of advertising regulation is no longer to limit demand but to reduce harm through marginal measures protecting the most vulnerable consumers. In order to achieve this objective, advertising largely relies on co-regulation.

The second option for regulating advertising are zoning measures to prevent gambling ads coming to the attention of minors and/or vulnerable persons. The co-regulatory regime discussed below contains such zoning measures, but as we show, zoning is not very effective since it only marginally reduces the actual exposure.

The third option are standards imposed on the advertising content to reduce any potential harmful effects of the *advertising message*. Co-regulatory standards try to prevent minors and vulnerable adults from being misled as to the nature of gambling and from being exploited through fostering behaviours and perceptions which contribute to problem gambling. As we argue below regulating the message is only marginally effective. Messages which induce irresponsible risk-taking behaviour, for example, by portraying gambling as a replacement for work or an activity that can facilitate sexual enhancement, are very close to, and impossible to distinguish from, the messages advertising legitimately conveys, such excitement, or glamour. We argue that the dividing line between the advertising messages communicating to consumers why gambling is attractive and messages which need to be suppressed because they invite undue risk taking, is too fine. Again as discussed below regulation largely focuses on what the advertiser intends to communicate, rather than what vulnerable members of the audience are likely to understand.

Since the second and third options are of limited effectiveness we raise the question whether the first option (restricting advertising of gambling) should be reconsidered. This article challenges the proposition that co-regulation in this area is sufficient and argues that the current increase in gambling advertising is likely to impact negatively on the vulnerable. The evaluation of gambling advertising is detached from the overall paradigm of the third licensing objective and focuses too much on the general population⁵ and not on those who are in need of protection. We are not arguing that we should return to the position before the Gambling Act 2005 was introduced. We conclude that careful consideration should be given to limiting advertising more and to carry out specific research.

⁴ J Orford, 'Disabling the Public Interest: Gambling Strategies and Policies for Britain' (2005) 100 *Addiction* 1219-1225

⁵ J. Orford "The Gambling Establishment and the Exercise of Power: a Commentary on Hancock and Smith" and L. Hancock, G Smith "Critiquing the Reno Model I-IV International Influence on Regulators and Governments (2004–2015)— the Distorted Reality of Responsible Gambling" in (2017) 15 (4) *International Journal of Mental Health Addiction* Online Pre-pub 22. June 2017

Liberalisation caused a significant increase in the overall volume of gambling ads with the Advertising Association figures⁶ showing that the overall amount spent annually has risen from £150 million in 2010 to £235 million in 2013. Although the spent on press gambling advertising has only increased slightly⁷, it has almost doubled for advertising on the internet⁸ and on television⁹. On the assumption that spent and exposure are correlated¹⁰, these 2013 figures show that consumers' exposure to such advertising is likely to have substantially increased over the last few years.

Gambling advertising is pervasive, ever-present and constitutes 'big' business, both in terms of money spent as well as in terms of its impact on the average viewer. The percentage of gambling spots in proportion to the total number of TV advertising increased from 0.5% in 2005 to 4.1% in 2012. Unsurprisingly¹¹, over-proportional growth occurred in the advertising for online casino games, online poker, sports – related gambling and bingo. During 2012 an average adult in the UK was exposed to around 630 gambling ads (between 1 and 2 a day), whereas children aged 4-15 would have seen about 211 of such ads in the same year¹².

Such a high level of exposure remains controversial not only from a regulatory perspective but also in the public eye: a high proportion of complaints to the Advertising Standards Authority (ASA) made by the public does not relate to the compatibility of specific ads with the rules but to complainants objecting to gambling ads as such¹³. The trend for gambling ads leading to complaints has been rising. For example, in 2011, 375 ads led to complaints and in 2013, 654 ads resulted in complaints, a rise of 174%.¹⁴

These figures indicate that the population, including the vulnerable are seeing much more gambling advertising than ever before. Hence the question arises what impact this exposure may have.

2. Existing Research on the Impact of Advertising on Problem Gambling

Planzer/Wardle in their Rapid Evidence Assessment of 2011, reviewing in depth 17 research articles on the impact of advertising suggest that the impact of gambling advertising on the population as a whole and on the prevalence of problem gambling is difficult to measure.¹⁵ The objectives of advertising are to (a) increase the purchase/consumption of a particular product or a range of products, (b) stimulate interest and generate leads, (c) change life behaviours, (d) increase brand value and to improve the 'image' of a product.¹⁶ Given that

⁶ Advertising Association / WARC Expenditure Report (2013) <http://expenditurereport.warc.com/Default.aspx>

⁷ £41 million (2010)- £45 million (2013)

⁸ £13 million (2010)- £24 million (2013)

⁹ £74 million (2010)- £141 million (2013)

¹⁰ Higher spent= more advertising (assuming the increase in spent is not just related to an increase in price)

¹¹ Most of these forms of gambling were illegal before 2007

¹² Ofcom Report, 'Trends in Advertising Activity – Gambling' (November 2013)

http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends_in_Advertisement_Activity_Gambling.pdf 3-4

¹³ ASA 'Gambling Advertising – Review of the ASA's Application of the UK Advertising Codes' (October 2014) p.12

¹⁴ ASA Review fn 13 p.11

¹⁵ S Planzer, H Wardle, 'The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling' Report (2011), Responsible Gambling Fund 49-50

¹⁶ S Rodgers, E Thorson 'What Does Theories of Advertising Mean?' in S Rodgers, E Thorson (eds) *Advertising Theory* (Taylor & Francis 2012) 3-17, 5

gambling had a predominantly negative image in 2007¹⁷, the last objective is important to gambling operators, individually, and as a sector. If the image of the product, and of gambling as a form of entertainment, is improved, this leads some users to approach risks less critically, which may in turn mean an increase in problem gambling.¹⁸

Advertising (1) stimulates the overall demand for a product and/or (2) achieves increased consumption of a particular brand at the expense of the competitors¹⁹. It is difficult to determine which of these two effects dominates, depending on factors such as the maturity of the market, the awareness of consumers and the nature of the advertising.²⁰ However, to the extent that consumption *is* increased²¹, this raises the question of whether increased consumption also increases the number of problem gamblers and the level of their problem gambling. Gambling ads stimulate consumption not only amongst those who seek out this leisure activity but also amongst those who would not participate without this stimulus, thus tempting persons to take up gambling from a young age.²²

The 2014 Review by ASA²³ included questions in the Gambling Commission's Omnibus Survey and concluded that on average about 10% of survey respondents who had gambled replied that they might have been prompted by advertising to do so, but interestingly that rate increases to 20% for the younger age groups of 18-34 and to 28% for regular gamblers engaging in a variety of gambling activities (32% if the ad was for a "free" bet).²⁴ For the 25-34 age group, 44% of respondents who placed bets on live sports events stated that a free bet offer had prompted them. Of the respondents who placed a bet on a broadcast live event, 20% said that they were prompted to do so because of an ad for a "free" bet.²⁵

The Total Consumption Model (TCM) is a theory widely accepted in relation to problematic alcohol consumption. It states that when the level of consumption of a particular product in a country increases, the harm effects are augmented concomitantly.²⁶ In other words, if the mean of consumption increases the number of excessive users is likewise augmented. *Per Binde* in his review of the research on the impact of gambling advertising in 2014 sets out the

¹⁷ British Gambling Prevalence Survey 2007 pp. 108-111

<http://www.gamblingcommission.gov.uk/PDF/British%20Gambling%20Prevalence%20Survey%202007%20-%20Sept%202007.pdf> Since 2010 the Health Surveys no longer assess attitudes towards gambling.

¹⁸ S Planzer, H Wardle, fn 15 5-6: "Several studies showed that adolescents are particularly receptive to (positive and negative) messages and images transported in advertising and counter-advertising. These authors argued that this can lead to unbalanced views between the positive aspects and the risks of gambling as well as reinforcement of erroneous perceptions of gambling (e.g., the more I gamble the better my chances); see also Per Binde "Gambling Advertising A Critical Research Review" Report (2014) Responsible Gambling Trust 21

¹⁹ Cross-substitution without increasing overall consumption

²⁰ S Planzer, H Wardle fn 15 50

²¹ L Cohen *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (Vintage Books 2004 New York) 293-294

²² K Friend, G Ladd "Youth Gambling Advertising: A Review of Some of the Lessons Learned from Tobacco Control" (2009) 16 (4) *Drug, Education, Prevention and Policy* 283-297; S Monaghan, J Derevensky, A Sklar "Impact of Gambling Advertising and Marketing to Children: Policy Recommendations to Minimize Harm" (2008) 22 *Journal of Gambling Issues* 252-274- reviewing the literature on tobacco, alcohol and junk food advertising in the light of current marketing strategies

²³ Discussed below

²⁴ ASA Review fn 13 pp. 18-19

²⁵ ASA Review fn 13 pp. 18-19

²⁶ P Binde fn 18, 14

arguments made in the literature and supported by the research²⁷. On the one hand, a number of studies have indicated that the TCM equally applies to gambling, in other words an increase in consumption leads to a concomitant increase in problem gambling.²⁸ We argue that there is at least a good likelihood that advertising stimulates demand and leads to increased levels of problem gambling. On the other hand, it has been argued that greater availability of gambling leads to a process of adaptation, stimulated by education campaigns, greater awareness of the risks, social responsibility measures of operators, public health measures, and regulation, which counterbalances the expected increase in problem gambling.²⁹

Currently, there is no evidence that problem gambling prevalence is increasing. In the 2007 British Gambling Prevalence Survey the problem gambling rates (in relation to the total population) were 1.0% for men and 0.2% for women, 0.6% in total (based on scoring 3 or more in the DSM IV).³⁰ In total 71% of men and 68% of women aged 16 and over had engaged in one or more form(s) of gambling in the past year in 2007. By contrast in 2012 the Health Survey³¹ identified the problem gambling rates (in relation to the total population) as 0.8% for men and 0.2% for women. 68% of men and 61% of women had participated in one of the listed gambling activities in 2012. Thus the overall rates of participation and prevalence have stabilized from 2007 to 2012. Thus the increase in advertising does not seem to have led to either increased participation or problem gambling rates overall (for the short time span 2007-2012). However the Health Survey used different methodology and the figures are not completely comparable.

Based on the evidence it would be difficult to argue that the regulatory framework in the Gambling Act should return to the no stimulation of demand model. However, persons who have suffered from problem gambling are particularly in danger by regular exposure to gambling ads, especially if targeted online. The reason for this is that ads, whose aim is to stimulate gambling, may affect their impulse control or lure them back into gambling.³²

²⁷ P Binde fn 18, 14-15

²⁸ HM Bang, IM Rossow, 'Does a reduction in the overall amount of gambling imply a reduction at all levels of gambling?' (2012) 20 (2) *Addiction Research & Theory* 145-152 (machine gambling in Norway school surveys of 20,000-21,000 students indicated that tighter regulation led to reduction of gambling at all levels (light, moderate, frequent, excessive gambling); M Hansen, IM Rossow, 'Adolescent Gambling and Problem Gambling: Does the Total Consumption Model Apply?' (2008) 24(2) *Journal of Gambling Studies* 135-149 (Norwegian teenager sample of 11,637; the higher the overall amount of gambling, the higher the amount of problem gambling); I Lund, 'The population mean and the proportion of frequent gamblers: Is the theory of total consumption valid for gambling?' (2008) 24 (2) *Journal of Gambling Studies* 247-256

²⁹ M Abbott A 'Disabling public interest: Gambling strategies and policies for Britain: A comment on Orford' (2005) 100 (9) *Addiction* 1233-1235; M Abbott 'Gambling and Problem Gambling in Sweden: Changes between 1998 and 2009' (2014) 30 (4) *Journal of Gambling Studies* 985-999, 996: "The findings of this study suggest that just as populations are adapting and changing, so too is the gambling market as new forms of gambling are introduced" (p.999)

³⁰ H Wardle et al 'British Gambling Prevalence Survey' (Nat Cen 2007) p.75
<http://www.gamblingcommission.gov.uk/pdf/British%20Gambling%20Prevalence%20Survey%202007%20-%20Sept%202007.pdf>

³¹ Health Survey England 2012: VOL 1, Chapter 7: Gambling Behaviour, published 18. December 2013

³² Further discussed below in the context of exclusion, see text fn 133 and research cited there.

Likewise research indicates that problem gambling prevalence is much higher in minors who gamble and persons who started gambling while still minors.³³ A recent literature overview based on previous studies comes to the conclusion that 77-83% of adolescents were involved in gambling, 10-15% of adolescents are potentially at risk of developing serious gambling problems and 4-8% had serious gambling problems.³⁴

Therefore regulation should focus on the protection of children and other vulnerable persons, and not the population as a whole. The possible effect of gambling advertising contributing to a positive attitude in society towards gambling is likely to particularly affect minors. The perception perpetrated by advertising that gambling is a normal, everyday mainstream activity may undermine attempts by responsible adults to discourage children's interest in gambling and prevent or at least delay eventual engagement.³⁵

3. The Current Laws on Gambling Advertising and Key Definitions

The law on gambling advertising is complex, layered and multi-faceted, as it relies on a sophisticated interplay between statutory framework legislation (the Gambling Act and the Communications Act) and co-regulatory Codes of Practice (the CAP³⁶/BCAP³⁷ Codes, "the Advertising Codes" and the Gambling Industry Code for Socially Responsible Advertising³⁸) as well as further Codes issued by the two independent regulators to implement the statutory framework, namely the Gambling Commission's Licensing Conditions and Code of Practice, and the Ofcom Broadcasting Code. Furthermore, the EU adopted a Recommendation³⁹ in 2014, which contains some non-binding minimum standards for player protection, including advertising.

There are no fewer than four types of regulators, the Gambling Commission ("the Commission") with responsibility for the licensing conditions and their implementation, the Advertising Standards Authority adjudicating on compliance with the Advertising Codes, Local Authorities and the Office of Communications (Ofcom) who is responsible for broadcasting and communications regulation under the Communications Act⁴⁰.

The distinction between broadcast and non-broadcast advertising regulation is both structural and due to the history of advertising regulation. The Advertising Standards

³³ L Blinn-Pyke, SL Worthy, JN Jonkman, 'Adolescent Gambling: A Review of an Emerging Field of Research' (2010) 47 *Journal of Adolescent Health* 223-236, 230; R Gupta, JL Derevensky, 'Adolescents with gambling problems: From research to treatment' (2000) 16 *Journal of Gambling Studies* 315-42; HR Lesieur, RJ Rosenthal 'Pathological Gambling: A Review of the Literature' (1991) 7 *Journal of Gambling Studies* 5-39; G Barnes (and others) 'Gambling and Alcohol Abuse Among Youth' (1999) 24 *Addictive Behaviors* 749-767; D King, P Delfabbro, M Griffiths 'The Convergence of Gambling and Digital Media: Implications for Gambling in Young People' (2010) 26 *Journal of Gambling Studies* 175-187; R Volberg, R Gupta, M Griffiths, D Olason, P Delfabbro, 'An international perspective on youth gambling prevalence studies' (2010) 22 *International Journal of Adolescent Medicine and Health*, 3-38; S Monaghan, J Derevensky, A Sklar fn 22, 253

³⁴ L Blinn-Pyke, SL Worthy, JN Jonkman fn 33

³⁵ S Monaghan, J Derevensky, A Sklar fn 22, 254

³⁶ UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing, (12th Edition 2010)

<http://www.cap.org.uk/Advertising-Codes.aspx>

³⁷ UK Code of Broadcast Advertising, (1st Edition 2010) <http://www.cap.org.uk/Advertising-Codes.aspx>

³⁸ "The Industry Code"

³⁹ Recommendation 2014/478/EU on Principles for the Protection of Consumers and Players of Online Gambling Services, 14. July 2014, OJ L214/40

⁴⁰ s.1 and Schedule 1

Authority (ASA) and its sister body, the Committee of Advertising Practice (CAP) were set up already in 1961/2 as purely self-regulatory bodies without legislative framework legislation.⁴¹ With the introduction of backstop consumer protection legislation against misleading advertising⁴² and closer co-operation⁴³ with the (then) Office of Fair Trading (OFT) since 1988⁴⁴, arguably the regulation of advertising is now more akin to a co-regulatory system of advertising⁴⁵. By contrast, broadcast advertising regulation has been clearly underpinned by framework legislation, and can therefore clearly be described as co-regulatory. Broadcast regulation has been reformed by the Communications Act 2003, which created a new regulator, Ofcom. Ofcom is responsible under s.319 of the Communication Act 2003 for standards in broadcast advertising but Ofcom has largely delegated these duties to the ASA (but does retain a supervisory function). The ASA maintains the separation of non-broadcast and broadcast advertising and has two committees respectively, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP). ASA adjudicates on complaints made against ads in both sectors.

Thus, for both non-broadcast and broadcast advertising, the primary form of regulation is the delegated, co-regulatory system with the rules contained in the two Advertising Codes⁴⁶. These advertising specific Codes are in turn supplemented by the self-imposed, purely self-regulatory Industry Code made by the gambling industry⁴⁷. The latter is not binding, but in practice the gambling industry does obey its provisions, since the Gambling Commission takes into account compliance in deciding on the grant of a new or revocation of an existing licence⁴⁸. Moreover, its Licensing Conditions and Code of Practice states that licensees should follow the Code.⁴⁹ The Gambling Act provides the *specific* framework of regulation for gambling, but its provisions related to the topic of advertising are brief, defining the meaning of ads⁵⁰, determining their territorial application⁵¹, and creating the offence of advertising unlawful gambling⁵² and creating offences in relation to advertising gambling to minors⁵³. The Act envisages that protection of the vulnerable is achieved through the detailed social responsibility obligations imposed on operators in the Licence

⁴¹ <https://www.asa.org.uk/about-asa-and-cap/our-history.html#1961%20onwards>

⁴² Control of Misleading Advertisements Regulations 1988; replaced (in respect of consumers) by the Consumer Protection from Unfair Trading Regulations SI 2008/1277

⁴³ In the sense that the ASA/CAP system of self-regulation is seen as the primary enforcement mechanism which is then supplemented by legal regulation and referrals

⁴⁴ As acknowledged for example in the Enterprise Act 2002, Explanatory Memorandum, Para 526

⁴⁵ See also the case of *R v Advertising Standards Authority Ltd* [2001] EMLR 22 where the Administrative Court held that the advertising regulation set up by CAP/ASA system satisfies the “prescribed by law” requirement of Art. 10 ECHR and that the decisions are subject to judicial review.

⁴⁶ Fns **Error! Bookmark not defined.** and **Error! Bookmark not defined.**

⁴⁷ IGRG ‘Gambling Industry Code for Socially Responsible Advertising’ (2nd Edition August 2015) <http://www.gamblingcommission.gov.uk/pdf/Industry-code-of-practice.pdf>

⁴⁸ *Reed Smith* Advertising Compliance Client Alert June 2010, <http://www.advertisingcompliancelaw.com/uploads/file/Gambling.pdf>

⁴⁹ LCCP (2015) OCP 5.1.6 and 5.1.9

⁵⁰ GA 2005, ss 327, 252

⁵¹ GA 2005, ss 332, 333 as amended by Gambling (Licensing and Advertising) Act 2014, ss 4, 5

⁵² GA 2005, ss 330

⁵³ Discussed below

Conditions and Code of Practice (LCCP) issued by the Gambling Commission.⁵⁴ Detailed regulations on advertising standards could be made under the reserve power in s.328 with the objective of protecting vulnerable persons from being harmed or exploited, but no such Regulations currently exist. When the Gambling Act 2005 was enacted the advertising co-regulatory system had already been well-established, so the Gambling Act could defer to this system, but included backstop powers in case the co-regulatory system was not considered to be no longer adequate to mitigate the specific harms of gambling advertising. The general co-regulatory system under the Advertising Codes, the Industry Code, the supervision by OFCOM (for broadcasting only) and the backstop powers for misleading advertising (non-broadcast) have been deemed sufficient.

The statutory definition of advertising in the Gambling Act for the purposes of the statutory offences in the Act includes (a) doing anything to encourage one or more persons to take advantage of facilities for gambling⁵⁵; (b) bringing information about gambling facilities to the attention of one or more persons with a view to increasing their use⁵⁶ or (c) participating in or facilitating an activity that is designed to do (a) or (b)⁵⁷. Sponsorship agreements are included in the definition of advertising⁵⁸ as are sales promotion that indirectly advertise facilities⁵⁹.

This definition is narrowly tailored towards advertising that aims to stimulate demand. It does not include advertising merely promoting the image of gambling or a brand not focused on encouraging use of a facility or increasing use of a product. It does not include pure information, so that operators of a blog or feedback/rating sites are unlikely to be caught. Because of this narrow definition, the criminal offences discussed below, have a narrow scope.

By contrast the regulation under the Advertising Codes (BCAP/CAP Codes) is naturally wider: they make a basic distinction between editorial content (in the broadcast context, programme content) and advertising. The Advertising Codes essentially apply to non-editorial content⁶⁰. Under the BCAP Code, advertising means '*publicity by advertisers including spot advertisements and broadcaster promotions with advertisers (outside programme time) that is broadcast in return for payment (...) or that seeks to sell products*'⁶¹. Thus, both brand enhancement and campaigning advertising (not promoting a particular product) are covered if it is paid for content. The meaning of advertising is accordingly much wider than that the one adopted for the criminal provisions in the Act, as the Codes are not limited to the activity of promoting a product or facility.⁶² The world-wide-web is governed by the CAP Code,

⁵⁴ Commission, latest version (February/April 2015) <http://www.gamblingcommission.gov.uk/pdf/Latest-LCCP-and-Extracts/Licence-conditions-and-codes-of-practice.pdf>

⁵⁵ GA 2005, s.327

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ *ibid*; Commission 'Sponsorship of British Sports Clubs by Gambling Operators' (November 2014)

<http://www.gamblingcommission.gov.uk/pdf/sponsorship-of-British-sporting-clubs-by-gambling-operators.pdf>

⁵⁹ GA 2005, s.327 (c)

⁶⁰ CAP Code II (K) and (P); BCAP (Code 2.1) maintaining separation between editorial and programme content

⁶¹ BCAP Code: Introduction

⁶² However as to sponsorship credits in broadcasting these are regulated as content in the Broadcasting Code, see Ofcom Broadcasting Code, April 2017, Section 9 Commercial References in TV Programming https://www.ofcom.org.uk/data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf

regulating ads hosted on third party websites and other intermediaries as well as (since 2010) ads on the company's own business websites.⁶³

The gambling specific rules in the Advertising Codes apply to gambling ads regardless of whether the player plays for money or whether they play for free as long as the play offers the chance to win a prize or consumers are directed to 'play for money' products, satisfying the advice issued by the European Commission in their Recommendation on Consumer Protection⁶⁴.

Children are defined by the Gambling Act and the Advertising Codes as being 15 years old and under in distinction to Young Persons being 16 and 17 years old.⁶⁵ Who is a vulnerable person has not been defined in the Act. It includes those who have had a current or past episode of problem gambling or who are at risk of developing problem gambling.⁶⁶ ASA by contrast takes a broad perspective and treats someone as vulnerable if they have 'mental, social or emotional immaturity, impaired judgment, for example because of alcohol or drug addiction, or those who are at risk of gambling more than they can afford to or want to'.⁶⁷ This wide definition of vulnerability is correct in view of the significant evidence of co-morbidity between problem-gambling and excessive alcohol, cigarette or drug consumption⁶⁸.

4. Zoning: Minimising Exposure of Advertising to Minors

As stated in the Introduction, one option for regulating advertising are zoning measures to prevent gambling ads coming to the attention of minors and/or vulnerable persons. The idea behind the concept of zoning is to minimise the exposure of minors and/or vulnerable persons to gambling advertising by restricting its reach, thus minimising potential harms, but still allowing advertising to non-vulnerable adults with the aim of stimulating demand on their part. Zoning as a concept has been used in the context of town planning as well as balancing free speech and protection of children on the internet.⁶⁹ There are several ways of how zoning can be implemented in the context of gambling advertising, discussed in this section. Most

⁶³CAP Code Intro I (h)

⁶⁴ Recommendation 2014/478/EU fn **Error! Bookmark not defined.**

⁶⁵ s. 45

⁶⁶ Recommendation 2014/478/EU on Principles for the Protection of Consumers and Players of Online Gambling Services, 14. July 2014, OJ L214/40, Recital 11

⁶⁷ CAP/BCAP Help Note Guidance on the Rules for Gambling Advertising 4

⁶⁸ G Barnes fn 33; J Wareham, M Potenza 'Pathological Gambling and Substance Use Disorders' (2010) 36 (5) *American Journal of Drug and Alcohol Abuse* 242-247; JE Grant, SE Chamberlain, 'Gambling disorder and its relationship with substance use disorders: implications for nosological revisions and treatment' (2015) *American Journal of Drug and Alcohol Abuse* 24 (2) 126-131; R Abdollahnejad, P Delfabbro, L Denson 'Psychiatric co-morbidity in problem and pathological gamblers: Investigating the confounding influence of alcohol use disorder' (2014) 39 *Addictive Behaviors* 566-572; MA Abbott, RA Volberg (1992) 'Frequent Gamblers and Problem Gamblers in New Zealand: Report on Phase 2 of the National Survey' *Research Series No. 14, Wellington: Department of Internal Affairs*; DN Crockford, N el-Guebaly 'Psychiatric comorbidity in pathological gambling: A critical review' (1998) *Canadian Journal of Psychiatry* 43-50; W Feigelman, LS Wallisch, HR Lesieur, 'Problem gamblers, Problem substance users, and dual-problem individuals: An epidemiological study' (1998) 88 *American Journal of Public Health* 467-470

⁶⁹ For early conceptual articles see for example R Heverley "Zoning in the Internet Age" (2003) 26 *Zoning and Planning Law Report* 1 and L Lessig, P Resnick "Zoning Speech On The Internet: A Legal And Technical Model" (1999) 98 *Michigan Law Review* 395-431, 395-6

zoning restrictions apply to the protection of minors, but the rules on self-exclusion are a form of zoning of vulnerable people.

4.1 Zoning: Minors

The Gambling Act contains specific criminal law prohibitions on advertising to minors, s.46 (1) makes it a criminal offence to “invite, cause or permit” a child or young person to gamble (subject to exceptions⁷⁰).⁷¹

The reference to “inviting” includes advertising, and the Act makes clear that “inviting” includes the *sending of a document* which advertises gambling or bringing to the attention of minors information about gambling with a view to *encouraging* them to gamble.⁷²

The Act does not expressly state who commits the criminal offence. This raises the question of who is responsible for an ad, which particularly on the internet can be a complex question with a contractual chain between the advertiser, the advertising intermediaries and the host of the actual ad. In terms of who may be liable, s. 327 of the Gambling Act has a wide reach covering anyone involved: “doing anything”, “participating in or facilitating an activity”. Depending on individual circumstances this may include the gambling operator/advertiser, advertising intermediaries, media owners, affiliates, website hosting ads and search engines, as long as they have sufficient *control* over the advertising content⁷³.

The Act makes a basic distinction between two types of prohibited activities with intent: (i) the sending of a document (with information about gambling opportunities) and (ii) bringing information about gambling opportunities to the attention of a minor .

In relation to the first activity “the sending of a document” the Act provides for only *one* type of defence, which is that the document was sent without authority/consent of the advertiser.⁷⁴ Arguably, according to the Act, the advertiser has no defence to argue that the ad was sent to a mixed audience, i.e., the advertiser has to ensure that the target database is ‘clean’ to ensure no minors are targeted. This, however, is not certain because the Act only presumes intention for advertising that contains contact details of the advertiser and the presumption does not extend to blanket or generic marketing displayed or sent to within a specific location. This means, that there is no clarity within section 46 as to whether an advertiser who recklessly does not check that their marketing database excludes minors could be liable. However, exclusion of such reckless conduct from s.46 substantially limits its operation as no licence would ever admit that they targeted minors directly.

As we discuss below the ASA has not upheld a claim against a gambling operator who had sent a direct marketing communication to a minor who had registered on a website, stating a false age.⁷⁵ ASA applied the rules in the Advertising Code and in particular Rule 16.3.13 and applied a ‘no fault’ standard in the sense that the advertiser only directs its direct marketing at a minor if it has actual knowledge or intention that a minor is on its marketing list.⁷⁶ But if

⁷⁰ s. 46 (2)

⁷¹ Lotteries, see s.56

⁷² s. 46 (3)

⁷³ GA 2005, s.330 (6)

⁷⁴ s. 46 (4)

⁷⁵ Fn 124

⁷⁶ Only a criminal case before the courts could bring clarity as to the *mens rea* and defences contained in the Act. Wording of Rule 16.3.13 and that of s.46 are different

gambling companies are not required to carry out age verification upon registration but only when a financial transaction takes place, they should not be permitted to include details of such potential customers within their database for marketing purposes. If they choose to do so, they should ensure that age verification is completed as otherwise, this creates a substantial loophole in light of the many attempts of children and young people to register for a gambling account with a false date of birth.

In the online context it is difficult to ascertain the meaning of the phrase “sending of a document. While this wording may cover direct marketing by email it is less clear whether it would apply for example to banner advertising on a social networking site which has been targeted on the basis of cookies or other profiling mechanisms. Given its wording (“document”), it is unlikely that the criminal provisions apply to targeted ads on social networking sites. This is a gap which needs to be addressed, in particular if online profiles could be made to contain information about the viewer’s age⁷⁷. Arguably s.46 should apply to *all targeted forms of advertising* and the onus should be on the advertiser to age-verify the recipient of targeted ads.

For the second activity “bringing to the attention of a minor ” the Act provides for a second type of defence, namely that that the information was brought to the attention of the minor as an incident of the information being brought to the attention of adults, and without a view to encouraging *particularly* the minor to gamble.⁷⁸ Thus for untargeted advertising to a general audience the advertiser need not (and indeed may not be able to) take any steps to ensure that the ad does not reach minors.

One method for keeping minors away is to use a clear message on ads and gambling websites that gambling is not allowed for minors. The EU Recommendation⁷⁹ recommends this, stipulating that advertising carry a ‘no underage gambling’ logo. In response, the Industry Code now provides that TV and print ads should carry either a “18+” symbol or a ‘no under 18s (16s for lotteries)’ type message.⁸⁰ Unfortunately this requirement was not extended to internet advertising as it only applies to television and print advert

Furthermore, the Industry Code requires that operators do not include their branding (logos etc) on merchandise designed for minors and attracting VAT exclusion⁸¹. The EU Recommendation likewise provides that promotional materials of the sponsor must not be designed for or aimed at minors.⁸² This rule is *too* narrowly defined as most sports merchandise such as football shirts will be of equal appeal and size to both minors (especially teenagers) and adults. Those are branded with gambling logos and promotions which are worn by minors and adults alike. Therefore stricter rules should be introduced to ensure these items are not sold to minors.

In broadcast media, advertising has been zoned by (1) the 9pm watershed and (2) by the identification of programmes of particular appeal to minors. The 9pm watershed applies only to ads for some forms of gambling, with significant exceptions. This has caused

⁷⁷ See the discussion below

⁷⁸ s. 46 (5) (b)

⁷⁹ Recommendation 2014/478/EU, fn **Error! Bookmark not defined.**, Para 12

⁸⁰ Fn **Error! Bookmark not defined.** para 39

⁸¹ Fn **Error! Bookmark not defined.** para 41

⁸² Recommendation 2014/478/EU, fn **Error! Bookmark not defined.**, Para 12

controversy⁸³ because of the exposure of minors to daytime TV ads for (online) gambling.⁸⁴ During the House of Lords debate on the Gambling (Licensing and Advertising) Bill⁸⁵ an amendment was tabled, but not passed, applying the watershed to *all* forms of online gambling.⁸⁶

The watershed was included as an industry standard in the self-regulatory Industry Code, for some forms of gambling.⁸⁷ This Code provides that ads which were not allowed to be broadcast at all before the Act came into force (2007), should now only be broadcast after the watershed, including sponsorship arrangements.⁸⁸ However the watershed *does not* apply to betting ads around broadcasts of sports events, nor to bingo or lottery/scratchcard ads, the latter two already allowed before 2007⁸⁹. Arguably, less harm stems from these softer forms of gambling.

However recently arguments resurfaced against these exceptions on the basis that they may lead young persons to access the homepages of websites where harder, potentially more harmful, forms of gambling such as poker and online casino games can easily be found. The Second Edition of the Industry Code now contains a provision that pre-watershed TV ads must not refer to these hardcore gambling products⁹⁰ and a reference to the clearing practices of Clearcast that such hardcore gambling must be at least “two clicks away”, i.e., not directly accessible from the landing page mentioned in the TV ad.⁹¹ Arguably this is not much of a disincentive, as two clicks equal two seconds of browsing time. The Industry Code was changed in 2015 to provide that pre-watershed ads must not include any offers (such as free bets) to sign-up new customers.⁹² However this rule does not apply to the online sector or social media. Given the significance of the online sector and social media for minor’s media consumption this is a huge hole in the regulatory protection.

More generally, the debate on the value of the watershed centres on the question of whether contemporary viewing patterns by minors mean that the watershed is no longer an effective zoning tool. Minors *do* watch TV after 9pm, having a TV or internet enabled device in their own bedroom⁹³ and/or they access TV programmes streamed on demand through catch-up services, which, naturally, are not subject to the watershed⁹⁴. Another practical argument concerning the limited effectiveness of the watershed is that, if all gambling ads were restricted to late at night broadcasting, this would lead to a concentration of gambling

⁸³ <http://www.independent.co.uk/news/media/advertising/gambling-bill-threatened-by-concerns-over-surge-in-prewatershed-adverts-seen-by-children-9162398.html>

⁸⁴ See also DCMS Call For Evidence Review of Gaming Machines and Social Responsibility Measures, Question 7 (24. October 2016) and The Times (7. October 2016) “Gambling Adverts Face Ban From Daytime TV” pp. 1, 4

⁸⁵ In force 2014

⁸⁶ Amendment 3 moved by Baroness Jones of Whitchurch, Hansard, 4. March 2014, Vol 752

⁸⁷ Fn **Error! Bookmark not defined.**

⁸⁸ Para 31

⁸⁹ Para 31

⁹⁰ Para 33

⁹¹ Para 34

⁹² Para 33

⁹³ Sonia Livingstone et al, ‘Risks and Safety on the Internet: The Perspective of European Children’ Full findings’ (EU Kids Online, LSE 2011)

⁹⁴ See 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

ads at that time, which would have a negative impact on *those* children watching at *this* time and lead to very intensive exposure. For these reasons BCAP decided not to include the watershed in *their* rules.⁹⁵

According to a 2013 Ofcom Report, the largest segment of gambling advertising⁹⁶ is broadcast during night time (23.00-05.59: 41.5%), but in second place is the daytime TV slot (09:30-16:59: 32%) when just under one-third of gambling spots (bingo, sports betting) are broadcast, in the third place are gambling spots broadcast immediately after the watershed (21:00-22.59: 13.1%), in the fourth place is the expensive prime-time broadcasting (17:00-20:59), only 8.7% of spots are broadcast then and finally the fewest number of gambling spots appear in the early morning (06:00-09:29 4.8%).⁹⁷ These figures show that, overall, most gambling ads are broadcast during daytime (06:00-20:59), when minors are likely to watch.

The same Report shows that a high proportion (just under one-fifth 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 night⁹⁸. This indicates that a large proportion of minors watches TV after 9pm.

In summary, it is clear that minors are exposed to gambling advertising, as the watershed does not apply to advertising of certain forms of gambling and because of different viewing patterns, more minors watch content out of hours of the protection.

In addition to the watershed, broadcasting also relies on zoning based on the nature of the programming. But this has only a limited effect- minors aspire to and consume some of the same programming as adults. Content specifically targeted at minors forms only part of what they consume. Nevertheless, the UK regulation and the EU Recommendation⁹⁹ have adopted a minimal standard by focusing on content specifically and predominantly *targeted* to minors and not on content which *impacts* specifically on them. Again the focus here is on the communicative intent of the advertiser, not the impact on a vulnerable audience.

The approach under the BCAP Code is to list the types of ads, which must not be advertised during, preceding or following editorial content which is 1) *commissioned for* or 2) *principally directed at* or 3) *of particular appeal* to children.¹⁰⁰ The BCAP Guidance¹⁰¹ states that broadcasters should have no difficulty identifying the first two types of programming but explains the third category (*of particular appeal*).¹⁰² It explains that broadcasters should use *audience data* to predict¹⁰³ whether a programme is of *particular appeal* to children.¹⁰⁴

⁹⁵ Discussion with ASA and the authors in May 2014

⁹⁶ Excluding lottery and scratch cards but including actual gambling broadcast on night-time TV

⁹⁷ Ofcom, "Trends in Advertising Activity- Gambling" Report November 2013

http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends_in_Advertisement_Activity_Gambling.pdf p.13

⁹⁸ Ofcom Report

⁹⁹ Recommendation 2014/478/EU fn **Error! Bookmark not defined.**, Para 13

¹⁰⁰ Rules 32.2.2, 32.2.3 and Rules 32.4.1-32.4.5 BCAP Code

¹⁰¹ BCAP's Guidance on the Rules for Gambling Advertisements

¹⁰² Paras 1.5, 1.6

¹⁰³ For new or one-off programmes, Paras 14.1 and 14.2

¹⁰⁴ Paras 1.7, 4.2

In addition to audience data, broadcasters must consider factors such as a subjective analysis of the content; the channel profile and the time when the programme is broadcast.¹⁰⁵

The audience data is based on the viewing figures determined by the Broadcasters' Audience Research Board (BARB). BARB uses a self-selected, but representative panel of 5,200 homes whose viewing patterns are monitored. The Audience Index is calculated as a proportion of the percentage of children watching a particular programme in relation to the percentage of the total population watching a programme.¹⁰⁶ If the Audience Index equals 120 or greater, a programme is deemed to be of particular appeal to the age band.¹⁰⁷ For example, if 6% of children have watched a particular programme, but only 5% of the total population have viewed the same programme, this programme will be deemed to be of particular appeal to children. If the proportion is the same (or even slightly higher) for children as it is for the total population, the programme would not be considered of particular appeal to children, even if the percentage figures are very high (for example 40% of children and 34% of adults having seen the programme). Therefore the zoning rules do not protect children in relation to advertising where the programme's audience is mixed, even if a high percentage of all children view the programme. Audience Indexing is not required for special interest channels *unlikely to appeal to children*, for example a channel covering horse-racing.¹⁰⁸ Finally, the BARB age bands do not capture young persons (16-17 year olds) leaving that age-group unprotected.

On the internet, it is less likely that minors are *inadvertently* exposed to gambling advertising online, since much advertising on the world-wide-web is targeted to users' presumed interests based on behavioural tracking. For example, a banner ad for online gambling is triggered if the device's browsing history (recorded by cookies and other tracking tools) reveals access to relevant websites. Such targeted advertising would only be seen by minors if they have previously accessed online gambling websites or if the computer is shared and the browser is used by someone (such as a parent) who had previously accessed a gambling website or entered relevant search terms. In that latter scenario, it would be up to the parent to diligently delete the cookies created by the session and/or operate device level filtering. Keyword triggered advertising on search engine results pages (such as Google Adwords) likewise appears only after keywords have been entered.

Advertising triggered on social media raise further issues. In particular the use of third party affiliates has generated substantial controversy amid claims that affiliates target vulnerable people¹⁰⁹. The ASA has now made clear in its guidance that primary responsibility for observing the CAP Code remain with the gambling operator.¹¹⁰ The CAP Code applies and provides that gambling and lottery ads must not be directed at persons below the age of 18

¹⁰⁵ Para 4.3

¹⁰⁶ The equation is: percentage of the relevant age category watching the programme / percentage of the total population watching the programme x 100 *ibid*

¹⁰⁷ Para 2.3

¹⁰⁸ Para 6.1: small exception saving specialist, small channels the expense and burden of Audience Indexing

¹⁰⁹ <https://www.theguardian.com/society/2017/aug/31/gambling-industry-third-party-companies-online-casinos>

¹¹⁰ CAP News "Gambling on your Affiliates?" 21. July 2017 <https://www.asa.org.uk/news/gambling-on-your-affiliates.html>

through a selection of media or context in which they appear.¹¹¹ In the following we explain that Youtube seems to comply with this provision according to its own policy statements. Gambling ads being played, for example, before a YouTube video clip clearly directed at children (eg Peppa Pig) would be a breach of the provision. Google has a restrictive policy in respect of gambling ads and requires approval and certification of compliance with the local law of the country where the ad is displayed.¹¹² According to the Google policy, this allows the display of gambling ads only in countries where the advertising of gambling is allowed.¹¹³ Google distinguishes between approved 'family safe' and 'non-family safe' ads. Ads for offline gambling are considered 'family safe' whereas ads for online gambling are considered 'non-family safe'.¹¹⁴ Presumably this is because minors can directly access the online gambling website but not the offline gambling facility. As far as video and image ads are concerned, only family-safe ads may be shown on Youtube. Furthermore, a channel can choose only to show family safe ads and connections which have activated relevant filters may only view family safe ads.¹¹⁵

This means that Youtube, as a general policy rule does not allow the placement of online gambling video advertising spots or images before a video on Youtube. However, this does not apply to ads for offline gambling. However gambling ads do appear not only in spots before a video but also as the "main" video on Youtube. Here, cause for concern are funny, trendy viral spots for online gambling featuring as the 'main' video on video-sharing and social networking websites, as these are likely to be watched by minors.

In the context of social media more generally an additional problem arises from the lack of proper age verification of social media accounts. Children are being bombarded on Twitter and other social media sites with gambling ads, including free bets, for example if they follow a particular football related Twitter account.¹¹⁶ ASA have stated that "when using social media accounts that attract a wide array of followers, marketers (and/or their affiliates) must be able to demonstrate that the overall demographic of followers does not indicate that a gambling ad would be directed at those under the age of 18 in that space".¹¹⁷ This ignores the problem however that such accounts usually are followed by minors *and* adults and are not targeted to either group (which is precisely the problem).

In an ASA adjudication concerning an ad for bingo on the X Factor Facebook page, the complainant argued that this ad was of particular appeal to children given their high Facebook use. However, the complaint was not upheld on the grounds of the assertion that the ad was only targeted at Facebook users who had registered as over 18.¹¹⁸ This ruling does not take into account that the registered age on Facebook is self-declared, hence children register as adults. For example, although according to Facebook policy¹¹⁹, users have to be at least 13

¹¹¹ CAP Code 16.3.13, 17.14 (under 16 for lotteries; football pools, equal chance gaming, prize gaming or Category D gaming machines)

¹¹² <https://support.google.com/adwordspolicy/answer/6018017?hl=en#apply>

¹¹³ See <https://support.google.com/adwordspolicy/answer/6018017?hl=en#apply>

¹¹⁴ <https://support.google.com/adwordspolicy/answer/6018017?hl=en#apply>

¹¹⁵ <https://support.google.com/adwords/answer/116446>

¹¹⁶ The Times (7. October 2016) "Gambling Adverts Face Ban From Daytime TV" pp. 1, 4

¹¹⁷ CAP News "Gambling on your Affiliates?" 21. July 2017 <https://www.asa.org.uk/news/gambling-on-your-affiliates.html>

¹¹⁸ 5. March 2014: http://www.asa.org.uk/Rulings/Adjudications/2014/3/FremantleMedia-Ltd/SHP_ADJ_250656.aspx

¹¹⁹ <https://www.facebook.com/help/441374602560317/>

before they can register a profile, a study for example concluded that 20% of children (in some countries 40%) under the age of 13 have registered a Facebook account.¹²⁰ An ASA survey¹²¹ commissioned to find out what ads young people see and engage with on social media sites¹²², and whether those ads stick to the UK advertising rules, suggests that the majority of children¹²³ are registering on sites using false ages and are therefore exposed to advertising intended for an older audience. Thus, registration is accepted without any further verification of the applicant's age, exposing children to ads that they are not supposed to see.

Further problems arise when minors register with personal details on gambling websites and then receive direct marketing communications based on this registration. In a recent ruling the ASA rejected a complaint against a direct mailing from Casino Rewards sent to a 14 year old child.¹²⁴ The complaint was not upheld as the minor successfully registered with the site by *providing a false date of birth* but as he did not attempt any gambling, age verification was never carried out. The ASA accepted Casino Rewards' statement that they had acted in good faith, but it is at least questionable whether good faith should be sufficient here. This decision shows that age-verification should be carried out not just when a person starts to gamble, but *already when* he or she registers on a gambling site *and* direct marketing is sent.¹²⁵ The LCCP should be changed to include such an obligation. This is even more important, since minors access gambling websites in order to play 'demo' games¹²⁶ that are free to play and typically do not invoke any age verification processes. If these demo games are used by operators to "harvest" personal data (such as an email address) for marketing purposes, then there should be an obligation to carry out age-verification. This would mean introducing higher co-regulatory standards either in the CAP Code or the LCCP. It would mean that operators cannot simply turn a blind eye to the question whether the person registering their details online is a minor or an adult. As a step in the right direction the ASA has stated in a news article on their website that their policy guidance is that if advertising is freely accessible to and of particular appeal to minors, this may be a breach of the CAP Code- however it still requires that the ads are more appealing to minors than to adults and therefore leaves open the question of untargeted advertising on gambling websites and affiliate advertising on social media.¹²⁷

¹²⁰S Livingstone, K Olafsson, E Staksrud 'Social Networking Age and Privacy' LSE Research Online May 2011 p.1 <http://eprints.lse.ac.uk/35849/1/Social%20networking%2C%20age%20and%20privacy%20%28LSERO.pdf>

¹²¹ ASA Compliance Survey 'Children and Advertising on Social Media Websites' [July 2013] 9 https://www.asa.org.uk/News-resources/~media/Files/ASA/Reports/ASA%20Compliance%20Survey_Children%20and%20advertising%20on%20social%20media%20websites.ashx

¹²² Facebook, Stardoll, Twitter, Spotify and Youtube

¹²³ In this small scale study 42% of children (10 out of 24) registered as 18 or over and consequently received advertising for age-inappropriate products, including gambling (17 gambling ads). 83% of children had registered a false age (20 out of 24).

¹²⁴ ASA Ruling, https://www.asa.org.uk/Rulings/Adjudications/2015/9/Apollo-Entertainment-Ltd/SHP_ADJ_307308.aspx#.Vm2tmEMrGUk of 23 September 2015

¹²⁵ Children should be protected even when they pose as adults; self-certification should never be recognised as age-verification.

¹²⁶ 11% played free practice games in 2015, 9% (of those who have played an online gambling style game) played demo games on gambling websites (78 minors-past 7 days): Ipsos The Prevalence of Underage Gambling, November 2015 ,13

¹²⁷ CAP News "Particularly Appealing Guidance for Gambling Operators, not Children", 27. October 2017 <https://www.asa.org.uk/news/particularly-appealing-guidance-for-gambling-operators-not-children.html>

In conclusion, this section has shown the challenges of zoning advertising both for broadcast and online. We recommend that the warnings that underage gambling is illegal should be extended to the online space. We have also shown that zoning online is not effective for two reasons, namely (1) that it is based on the self-declared age of users and (2) many teenagers will be interested in emulating adult behaviour and interest and are tempted to register a false age.

One possible response to the zoning issue is the use of profiling technology. The question here is whether online profiling technologies used on the world-wide-web can be honed to aid the zoning of advertising. To the extent that advertising intermediaries and data brokers compile complex profiles on the basis of which advertising is targeted, these profiles could be used to keep gambling advertising away from minors. An example of this emerged in a recent ASA adjudication which was not upheld precisely because the advertiser could show evidence that 80% of Youtube listeners to the music used in the ad were in the 25-44 age bracket.¹²⁸

This raises the wider question of whether the law should impose an obligation on advertisers using targeting mechanisms online to include in their profile age-verification elements in order to prevent underage individuals being targeted by gambling ads. Our recommendations are also reflected in the concerns expressed in an open letter sent to the gambling industry by the regulators.¹²⁹ For the effectiveness of the “zoning” protection on the internet, it will be crucial whether profiles assembled through cookies and other technologies can be used for age-verification purposes and whether regulation should enable, encourage and/or impose such use. Future research should address this question, including the data protection and privacy implications of including a person’s adult/minor status in profiles.

4.2 Zoning and Vulnerable Persons: Self-exclusion

Self-exclusion is based on players voluntarily choosing to be blocked from gambling activities and advertising.¹³⁰

Self-exclusion and the zoning of advertising¹³¹ may offer vulnerable persons a reprieve from returning to gambling activities.¹³² There is some evidence that advertising may exacerbate

¹²⁸ Although this was only one factor:

https://www.asa.org.uk/Rulings/Adjudications/2016/3/FanBet/SHP_ADJ_329591.aspx#.VzBtK0aYGDM

¹²⁹ <https://www.theguardian.com/society/2017/oct/22/child-gambling-remove-unacceptable-online-ads-regulators-demand> and <http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Warning-over-adverts-likely-to-appeal-particularly-to-under-18s.aspx>

This warning letter has been sent by the Gambling Commission, the ASA, CAP, and the Remote Gambling Association on 20. October 2017.

¹³⁰ J Parke, J Rigbye “Self-Exclusion as a Gambling Harm Minimisation Measure in Great Britain”, Report for the Responsible Gambling Trust, July 2014, p.17

¹³¹ In a 2014 qualitative, indicative and small-scale survey of treatment providers, treatment providers mentioned marketing and advertising as a problem for self-excluded gamblers and the effectiveness of self-exclusion, this survey also indicates that self-exclusion should be better enforced and stretch across multi-operators; see Table 2 in J Parke, J Rigbye fn 130

¹³² The Gambling Commission has fined a gambling operator, 888, a record fine of £7.8 million after it failed to protect vulnerable consumers, including letting self-excluded customers play- this reflects the importance of self-exclusion in the eye of the regulator, see <https://www.theguardian.com/society/2017/aug/31/gambling-industry-third-party-companies-online-casinos>

the conditions of those with a gambling problem and may prevent a successful recovery¹³³. Accordingly, the prevention of advertising to problem gamblers has been recognised as an important factor as it allows them to seek treatment without being lured back. Self-exclusion has been recognized as a beneficial tool for decreasing the problematic aspects of gambling in a review of recent studies on self-exclusion.¹³⁴

Self-excluded gamblers can protect themselves by installing filters blocking online gambling content. However, these filters can be reversed at any point and they are not 100% effective in filtering out gambling advertising.

The Gambling Act contains no criminal penalty for advertising to self-excluded gamblers. But Paragraph 3.5.8 of the legally binding Social Responsibility Part of the LCCP provides that all licensed providers must put into effect procedures for self-exclusion¹³⁵ and must '*as soon as practicable, take all reasonable steps to prevent any marketing material being sent to the self-excluded customer*'¹³⁶, including removing the details of self-excluded customers from the database within two days.¹³⁷

This obligation applies to targeted advertising such as that by email and SMS. More interesting is the question whether it could apply to online, behavioural advertising, such as banner advertising, pop-up advertising, social media advertising, which is based on a profile. This is targeted, but it is not necessarily feasible to link the information on the self-exclusion register with the information used for targeting advertising. The LCCP states at the moment that the self-exclusion register must contain "appropriate details".¹³⁸ This is not sufficient to prevent all forms of targeted marketing. For the future, it should include details identifying an excluded customer online (device specific ids and digital fingerprinting). This would have to be achieved in a privacy-friendly way and in particular avoiding the sharing of information that a person has self-excluded.

Finally, the advertising prohibition only applies to those gamblers who are *currently* on the registers and does not extend to those who had self-excluded in the past and remain vulnerable. Providers must not send targeted marketing materials to self-excluded

¹³³ P Binde (2014), fn 18, 17; P Binde 'Exploring the impact of gambling advertising: an interview study of problem gamblers' (2009) 7(4) *International Journal of Mental Health and Addiction* 541-554, 545-7 (qualitative study based on interview with 25 past or current problem gamblers in Sweden; just over 70% reported marginal or significant impact of gambling advertising, the self-reported negative impact was triggering impulses to gamble) and; G Valentine, K Hughes 'New forms of participation: Problem internet gambling and the role of the family' Leeds: University of Leeds 2010 (based on interviews with 26 self-identified problem internet gamblers, providing data as to why people gamble or continue to gamble); J Derevensky, A Sklar, R Gupta, C Messerlian 'An empirical study examining the impact of gambling ads on adolescent gambling attitudes and behaviors' (2010) 8 (1) *International Journal of Mental Health and Addiction* 21-34 (review of literature and marketing strategies); S Planzer, H Wardle, fn 15, 55-61

¹³⁴ On the one hand there are more opportunities to circumvent a self-exclusion agreement with an operator (e.g. playing online) on the other hand constantly changing technologies allow for more effective multi-operator, multi-jurisdictional self-exclusion and better enforcement and detection (e.g. Face Recognition Technologies), J Parke, J Rigby fn 130, 18

¹³⁵ A self-regulatory multi-operator self-exclusion scheme for online gambling is currently in discussion between the RGA and the Commission, planned to be implemented by December 2017, <http://www.gamblingcommission.gov.uk/Gambling-sectors/An-online-multi-operator-self-exclusion-scheme.aspx>

¹³⁶ LCCP SRP 3.5.3, Recommendation 2014/478/EU fn **Error! Bookmark not defined.**, Para 43

¹³⁷ LCCP SRC 3.5.3 (3) (remote) and SRC 3.5.1 (3) (non-remote)

¹³⁸ LCCP SRC 3.5.3 (6) (a) (remote)

customers at the end of the period of self-exclusion to invite them to gamble again. But marketing materials may be sent again, after a period of self-exclusion, if the customer has taken positive action to gamble again.¹³⁹ Arguably, even then customers should not be sent direct marketing. There have been recent reports in the news that affiliates have targeted vulnerable persons and in particular players who had stopped gambling to entice them back and people on low incomes.¹⁴⁰

Self-exclusion is one attempt to implement the zoning of vulnerable adults, but much more work needs to be done, including research as to what measures may be effective and on privacy implications. We recommend that the provision that direct marketing must not be sent to self-excluded persons should be extended to persons who had self-excluded in the past.

5. Regulating the Advertising Message: The Content of Advertising

As has been pointed out in the introduction, one way of regulating advertising is to prevent minors and vulnerable adults from being misled as to the nature of gambling and from being exploited through fostering behaviours and perceptions which contribute to problem gambling. The content of advertising is largely left to co-regulation with no statutory intervention, contained in the two Advertising Codes and the Industry Code.

One omission in the UK Codes (but contained in the EU Recommendation) is a prohibition of celebrity endorsement for online gambling¹⁴¹. This currently is not prohibited but in light of research showing that endorsement by various celebrities or professional gamblers increases a positive attitude in children¹⁴², this Recommendation should be introduced.¹⁴³ Some content regulation is contained in the OFCOM Broadcasting Code¹⁴⁴ for marketing methods considered to be part of the programme content, in particular product/prop placement, sponsorship, cross-promotions and premium rate services.¹⁴⁵ Product placement for gambling products is prohibited by the OFCOM Broadcasting Code.¹⁴⁶ However sponsorship by gambling providers (such as a betting provider) is allowed.¹⁴⁷

But most of the content rules are contained in the Advertising Codes' provisions, prohibiting three classes of gambling ads (our classification): (i) those that portray as acceptable unsafe gambling behaviours, thus normalising problem gambling, (ii) those that specifically address the inexperience and credulity of minors and (iii) those that appeal to specific irrational or ritualistic beliefs and exert undue pressure to gamble.¹⁴⁸ A search on the ASA adjudication site shows that in relation to published adjudication in respect of "gambling" complaints, 59

¹³⁹ LCCP OCP 3.5.4 (5) (g) (remote) and OCP 3.2.2 (7) (f) (non-remote)

¹⁴⁰ Mattha Busby "Revealed how gambling industry targets poor people and ex-gamblers", the Guardian 31. August 2017; <https://www.theguardian.com/society/2017/aug/31/gambling-industry-third-party-companies-online-casinos>

¹⁴¹ Recommendation 2014/478/EU fn 39 para 41(d)

¹⁴² S Monaghan, J Dervensky, A Sklar, fn 22, 258-259

¹⁴³ The Times (7. October 2016) "Gambling Adverts Face Ban From Daytime TV" pp. 1, 4

¹⁴⁴ The statutory basis for this is Schedule 11A Restrictions on Product Placement Para 6 (2) (f) to the Communications Act 2003 as amended

¹⁴⁵ Section 9 Commercial References in TV Programming

¹⁴⁶ 9.13 (c)

¹⁴⁷ 9.15-9.25

¹⁴⁸ Fn **Error! Bookmark not defined.**, p.3

complaints were adjudicated in the five-year period 2011-2016¹⁴⁹, of which 45 (76%) were upheld (or partly upheld) and only 14 were dismissed as being not in breach.¹⁵⁰ This shows that the review against the rules is stringent.

5.1 Unsafe Gambling Practices

This is the first category of advertising messages which are restricted by the Advertising Codes. In particular, ads must not:

- Portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm¹⁵¹
- Suggest that gambling can provide an escape from personal, professional or educational problems¹⁵²
- Suggest that gambling can be a solution to financial concerns, an alternative to employment or achieve financial security¹⁵³
- Portray gambling as indispensable or as taking priority in life, for example over family, friends or professional or educational commitments¹⁵⁴
- Suggest that gambling can enhance personal qualities, for example self-image or self-esteem, or is a way to gain control, superiority, recognition or admiration¹⁵⁵
- Suggest that solitary gambling is preferable¹⁵⁶
- Condone or encourage criminal or anti-social behaviour¹⁵⁷ and
- Condone or feature gambling in a work place/environment¹⁵⁸.

An example of a complaint which was not upheld is the one concerning a TV ad for an online casino, Betway in which a young professional couple is seen returning home in the evening and opening the fridge which turns into a fruit machine, running a tap pouring out casino chips and featuring a tablecloth that appears like a roulette table etc. The complaint was that this showed socially irresponsible gaming at home and gaming taking priority in life. The ASA Council did not agree, arguing that the online gambling was shown as an after-hours evening and leisure activity.¹⁵⁹ Similarly, in an ad for online poker which showed a man losing and subsequently walking away from the poker table with the voice over "Some nights you catch great cards. (...) And it's still not enough. *But there's always another hand.* We play at FullTiltPoker.com" was found not to be socially

¹⁴⁹ 11. May 2011- 16. April 2016 (search on 4/5/2016)

¹⁵⁰ <https://www.asa.org.uk/Rulings/Adjudications.aspx?SortBy=Decision&SearchTerms=gambling&Type=1#adj>

¹⁵¹ CAP Code 16.3.1 and 17.1; BCAP Code 17.3.1 and 18.2.1

¹⁵² CAP Code 16.3.3 and 17.2; BCAP Code 17.3.2 and 18.2.2; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 41 (e)

¹⁵³ CAP Code 16.3.4 and 17.3; BCAP Code 17.3.3 and 18.2.3; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 41 (f)

¹⁵⁴ CAP Code 16.3.5 and 17.4; BCAP Code 17.3.4 and 18.2.4

¹⁵⁵ CAP Code 16.3.6 and 17.6; BCAP Code 17.3.6 and 18.2.6; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 41 (d)

¹⁵⁶ CAP Code 16.3.11 and 17.10; BCAP Code 17.3.10 and 18.2.10

¹⁵⁷ CAP Code 16.3.16 and 17.18; BCAP Code 17.4.2 and 18.9

¹⁵⁸ CAP Code 16.3.17 and 17.19; BCAP Code 17.4.3 and 18.10

¹⁵⁹ 5. June 2013: http://www.asa.org.uk/Rulings/Adjudications/2013/6/Betway-Ltd/SHP_ADJ_224966.aspx - for a similar ad see <http://www.youtube.com/watch?v=K4Z-E5wJaGs>

irresponsible by ASA as the man was *not shown* to chase losses and walked away from the table *at that point*.¹⁶⁰

By contrast, a gambling ad must not suggest that any winnings may be used to pay off a mortgage, as this suggests that gambling may be a solution to financial concerns.¹⁶¹

Furthermore a website ad showing a silhouette of a hanged man with text advertising ways to “improve your betting” was held to be socially irresponsible.¹⁶²

5.2 Inexperience and Credulity of Children and Young Persons

This is the second category of advertising messages which are restricted by the Advertising Codes. In particular, ads must not:

- Be socially irresponsible with regard to the need to protect minors and vulnerable persons from being harmed or exploited¹⁶³
- Exploit the susceptibilities, aspirations, credulity, inexperience of minors or vulnerable persons¹⁶⁴
- Likely to be of particular appeal to minors, especially (...) by being associated with youth culture¹⁶⁵
- Include a minor. No-one under 25 years old may be featured gambling or behave in an adolescent, juvenile or loutish way¹⁶⁶.
- Suggest gambling is a rite of passage¹⁶⁷

The ASA Council upheld a complaint against a Betfair email ad for an online poker site showing a photograph of Annette Obrestad, a young poker champion, aged 20, with the following text "ONLINE EXPERIENCE IS MEASURED IN GAMES, NOT YEARS. JOIN THE NEW BREED. (...) -ANNETTE_15". The Council found that this breached the rule against ads being of particular appeal to minors and the rule that no-one featured gambling must be under 25. The ASA Council held that the ad breached the rules, as the context (Annette being famous for having started playing when she was 15) and the message encouraged underage playing.¹⁶⁸ The rule on not showing persons under 25 years in connection with a sports betting ad in a *newspaper* was also upheld against Paddy Power, featuring football player Luiz Suarez, then aged 24. Also upheld were complaints against the *advertisement tweet* for Petfre that included a photo of

¹⁶⁰ 18. November 2009: http://www.asa.org.uk/Rulings/Adjudications/2009/11/Filco-Ltd/TF_ADJ_47625.aspx

¹⁶¹ 19. December 2012: http://www.asa.org.uk/Rulings/Adjudications/2012/12/The-Health-Lottery-Ltd/SHP_ADJ_205595.aspx

¹⁶² 2. March 2016:

https://www.asa.org.uk/Rulings/Adjudications/2016/3/FanBet/SHP_ADJ_329591.aspx#.VzBtK0aYGDM

¹⁶³ CAP Code 16.1 and Section 17 Principles; BCAP Code Section 17 Principles and Section 18 Principles

¹⁶⁴ CAP Code 16.3.2 and 17.12; BCAP Code 17.4.4 and 18.4; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 14 (a)

¹⁶⁵ CAP Code 16.3.12 and 17.13; BCAP Code 17.4.5 and 18.5; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 14 (c)

¹⁶⁶ CAP Code 16.3.14 (with the exception of young (sports-) person promoting a bet on a website or another place where the bet can actually be placed) and 17.15; BCAP Code 17.4.6 and 18.6; The Licence Conditions and Code of Practice also make clear that this does not apply to *point of sale* advertising if the advertising depicts the sporting activity itself: see LCCP OCP 5.1.6 (3) see Recommendation 2014/478/EU fn **Error! Bookmark not defined.**, Para 14 (b)

¹⁶⁷ CAP Code 16.3.10 and 17.9; BCAP Code 17.3.9 and 18.2.9; Recommendation 2014/478/EU fn **Error!**

Bookmark not defined., Para 14 (d)

¹⁶⁸ 16. September 2009: http://www.asa.org.uk/Rulings/Adjudications/2009/9/Betfair-Ltd/TF_ADJ_46921.aspx

Jordan Spieth¹⁶⁹ or in an *email* showing Memphis Depay¹⁷⁰ for Ladbrokes (both under the age of 25). There is an exception that an ad may focus on a sports person under 25 at the place where the betting takes place (points of sale, such as an online betting website).¹⁷¹ This exception is a serious hole in the child protection provisions, as minors are likely to idolize prominent sports persons and will therefore be encouraged to place a bet on the basis of point of sale advertising.

The rule that gambling ads must not be of particular appeal to children was breached when an online casino used the image of Optimus Prime (from the Transformers animation) in its advertising in the financial section of a newspaper¹⁷² or in a regional newspaper (Metro)¹⁷³, similarly in relation to the use of “Spiderman” for an online casino game¹⁷⁴ or a pirate cartoon and his goat companion¹⁷⁵.

By contrast, featuring Robin Hood in a TV commercial was not a breach even though Robin Hood is a popular childhood character. This specific advert borrowed scenes from a movie filmed against 1938 background¹⁷⁶ that were deemed to be unfamiliar to children. This ignored the fact that children often watch and like historical movies where old style fashion and old use of language is often portrayed. This shows the subjective nature of the assessment.

Likewise the ASA did not uphold a complaint in respect of an advertising clip using arcade style animations, computer generated images and fast-paced action special effects on the basis that the retro-style nature of the clips and music was pro-actively targeted at the 25-44 age-group by the artist and advertiser.¹⁷⁷ The reasoning was that this ad mainly related to the youth culture of twenty years ago, but deliberately ignored the fact that the ad may *additionally* be attractive to minors of today because of its playful nature. This shows again how difficult it is to delineate adult and child spaces and again shows how regulation is focused on the communicative intent of the advertiser and not the impact on the vulnerable audience.

Furthermore, in a ruling concerning a bingo ad on Facebook which used furry cartoon characters and in its make-up was likely to appeal to children, the ASA Council did not uphold the claim, as it was found to be sufficient that the online bingo site which the ad

¹⁶⁹ ASA Ruling < [https://www.asa.org.uk/Rulings/Adjudications/2015/10/Hillside-\(UK-Sports\)-LP/SHP_ADJ_308894.aspx#.Vm2rnUMrGUk](https://www.asa.org.uk/Rulings/Adjudications/2015/10/Hillside-(UK-Sports)-LP/SHP_ADJ_308894.aspx#.Vm2rnUMrGUk) > 28 October 2015

¹⁷⁰ 11. November 2015: https://www.asa.org.uk/Rulings/Adjudications/2015/11/Ladbrokes-Betting-and-Gaming-Ltd/SHP_ADJ_313550.aspx#.VzB1l0aYGDM

¹⁷¹ 4. January 2012: http://www.asa.org.uk/Rulings/Adjudications/2012/1/Paddy-Power-plc/SHP_ADJ_174843.aspx, LCCP OCP 5.1.6 (3)

¹⁷² 7. November 2012: http://www.asa.org.uk/Rulings/Adjudications/2012/11/Trinity-Mirror-Plc/SHP_ADJ_207001.aspx

¹⁷³ 8. January 2014: http://www.asa.org.uk/Rulings/Adjudications/2014/1/Metro-Play-Ltd/SHP_ADJ_246212.aspx

¹⁷⁴ 10. July 2013: http://www.asa.org.uk/Rulings/Adjudications/2013/7/Cassava-Enterprises-Gibraltar-Ltd/SHP_ADJ_227765.aspx

¹⁷⁵ 9. December 2015: https://www.asa.org.uk/Rulings/Adjudications/2015/12/Geo24-UK-Ltd/SHP_ADJ_311328.aspx#.VzBzHUaYGDM see also CAP/BCAP Help Note fn **Error! Bookmark not defined.**, 5

¹⁷⁶ ASA Ruling http://www.asa.org.uk/Rulings/Adjudications/2012/8/Cassava-Enterprise-Gibraltar-Ltd/SHP_ADJ_198328.aspx

¹⁷⁷ 3. February 2016: https://www.asa.org.uk/Rulings/Adjudications/2016/3/FanBet/SHP_ADJ_329591.aspx#.VzBtK0aYGDM

linked to used stringent age verification checks.¹⁷⁸ This ruling ignores the child protection rules and its reasoning completely hollows out the child protection rules in the CAP Code, as the advertising provisions have the purpose of preventing to stimulate *demand* for minors. If restrictions at the point of supply were sufficient there would be no need to regulate advertising.

Taking into account this ASA ruling and the ruling concerning the X Factor Facebook site¹⁷⁹, it seems that ASA is less stringent in respect of ads on social networking sites, where arguably, greater protection is needed since a large number of users are minors. Social media sites create a false sense of security if the site relies on self-certification of the user's age when creating the profile, which may well mean that minors create accounts with a false age.

5.3 Irrational, Ritualistic Beliefs and Undue Pressure

This is the third category of advertising messages which are restricted by the Advertising Codes. In particular, ads must not:

- Suggest peer-pressure to gamble nor disparage abstention¹⁸⁰
- Link gambling to seduction, sexual success or enhanced attractiveness¹⁸¹
- Portray gambling in the context of toughness or link it to resilience or recklessness¹⁸²
- Exploit cultural beliefs or traditions about gambling or luck¹⁸³

The ASA Council upheld a complaint in relation to a TV ad for Supercasino.com which portrayed a man holding a casino chip and using it like an entry card to a club. ASA received complaints alleging that this breached the rule against linking gambling to seduction and enhanced attractiveness and the rule that gambling improves self-image and is a way to gain recognition and admiration, which it upheld. This ruling is interesting as the "message" in the ad depends on the viewer's perception- on the surface the ad merely shows friends meeting in a casino, but the ruling is not unconvincing, as the main character in the ad is forming a type of entourage, exchanging glances with various females who follow him, in step.¹⁸⁴

Similarly, in a complaint against an image of a woman pulling down her trousers with her underwear showing the message "IF YOU CAN READ THIS IT'S YOUR LUCKY DAY"¹⁸⁵ the ASA upheld the complaints on the same grounds. However, a complaint against an ad for Winner Bingo that portrayed a man progressively undressing himself each time the women

¹⁷⁸ 31. October 2011: http://www.asa.org.uk/Rulings/Adjudications/2012/10/Profitable-Play-Ltd/SHP_ADJ_205246.aspx

¹⁷⁹ Fn 118

¹⁸⁰ CAP Code 16.3.7 and 17.5; BCAP Code 17.3.5 and 18.2.5; Recommendation 2014/478/EU fn **Error! Bookmark not defined.**, Para 41 (c)

¹⁸¹ CAP Code 16.3.8 and 17.7; BCAP Code 17.3.7 and 18.2.7

¹⁸² CAP Code 16.3.9 and 17.8; BCAP Code 17.3.8 and 18.2.8

¹⁸³ CAP Code 16.3.16 and 17.17; BCAP Code 17.4.1 and 18.8

¹⁸⁴ 30. May 2012: http://www.asa.org.uk/Rulings/Adjudications/2012/5/Netplay-TV-Group-Ltd/SHP_ADJ_190783.aspx ; the clip is available at <http://www.youtube.com/watch?v=2h0J7GujwKg>

¹⁸⁵ 13. April 2016: https://www.asa.org.uk/Rulings/Adjudications/2016/4/bet_at_home-d-com-Internet-Ltd/SHP_ADJ_321776.aspx#.VzBmt0aYGDM

shouted ‘bingo’ was not upheld¹⁸⁶. The actual rationale behind the differentiating treatment is difficult to discern other than the subjective assessment of what constitute a sufficient reference to sexual seduction. These rulings show the subjective and difficult nature of the assessment.

In relation to the last rule that advertising must not exploit cultural beliefs or traditions about gambling or luck, the CAP/BCAP Help Notes state that “advertisements should avoid the use of cultural symbols and systems such as horoscopes if those symbols relate to an existing, strongly and communally held belief. These rules are not intended to prevent references to symbols or obsolete superstitions that are unlikely to be taken seriously, such as a clover leaf.”¹⁸⁷ This begs the question of when symbols and systems are seriously held beliefs and when they are obsolete superstitions. This again is highly subjective, culturally relative and unclear. In many respects, the more irrational and the more superstitious a belief is the more risky it is in terms of gambling conduct (for example a belief in number systems in roulette). It is also known that many problem gamblers suffer from gamblers’ fallacy significantly more than the general population¹⁸⁸. Accordingly, this rule should be assessed against beliefs held by those who may be vulnerable and not with reference to the general public.

The rulings examined show that ASA applies the provisions in the Codes rigorously. However, we argue that these examples illustrate that it is difficult to apply these rules consistently and effectively, since the assessment of what constitutes a breach is highly subjective (e.g. what appeals to children) and there is a fine dividing line between what constitutes a breach (risky behaviours/irrational beliefs) and what constitutes creative and attractive advertising (desirable attributes of gambling). Gambling by its very nature appeals to the part of human nature which is risk-taking, speculative, irrational and playful. Therefore, these elements are likely to play a role in advertising so that the industry legitimately pushes the boundaries. Furthermore, the self-regulatory approach is fault based and relies on the transmission theory of advertising in the sense that it assesses communication from the perspective of the sender. This does not facilitate a more in-depth look at the potential impact on the viewer and how it may affect those who are most in need of protection from gambling related harm. For these reasons, regulating the content of the message is desirable, but its effectiveness limited.

6. Marketing and Sales Promotions Free Bets and Sign-up Offers

The 2014 ASA Review¹⁸⁹ found that “free-bets” (getting people to register an account on the basis of which further marketing is undertaken) were highlighted as problematic by focus group participants and are the subject of a high proportion of complaints.¹⁹⁰ In order to protect children they cannot now be offered before the watershed on TV ads¹⁹¹ and gamblers must be provided with full terms and conditions¹⁹², although it is well known that

¹⁸⁶ 11. March 2015: https://www.asa.org.uk/Rulings/Adjudications/2015/3/PT-Entertainment-Services-Ltd/SHP_ADJ_290045.aspx#.Vm2q1EMrGUK

¹⁸⁷ Fn **Error! Bookmark not defined.**, p.8

¹⁸⁸ Jon Kelly, ‘Responsible Gambling Messaging’ (Harm Minimisation in Gambling: Progress and Prospects, London, December 2015)

¹⁸⁹ Section below, fn **Error! Bookmark not defined.**

¹⁹⁰ ASA Review fn 13 pp. 4-5

¹⁹¹ Fn **Error! Bookmark not defined.**, para 33

¹⁹² LCCP SRC 5.1.7

no-one ever reads them.¹⁹³ Free bets offers can also be used online on social media sites without restrictions. It should be criticized that these provisions do not address the fact that “free bet” incentives may be aggressive from the *viewpoint of vulnerable persons* and lead to loss of impulse control, one of the pre-conditions for developing problematic gambling behaviours.

Free demo games are likewise used to promote online gambling and there is a risk that demo games may mislead customers about the chances of winning thereby enticing irresponsible behaviour. Research studies have identified a clear correlation between participation in demo gambling games and real money gambling.¹⁹⁴ Thus, the Commission Remote Gambling and Software Technical Standards 6 (2015) now require all demo games to comply with the same technical specifications as real money gambling.¹⁹⁵

The LCCP provisions relating to marketing and sales promotions focus primarily on transparency and on ensuring that marketing is not misleading, thereby supplementing generic consumer protection law¹⁹⁶. They do not (but in our view should) specifically or sufficiently protect the vulnerable.¹⁹⁷

Consumer protection law¹⁹⁸ to an extent protect the vulnerable¹⁹⁹, as misleading marketing has a *greater* impact on them than on consumers generally.²⁰⁰ This raises the question of who should be considered to be the *average* consumer. For example, a communication may be judged to be aggressive or exerting undue influence *in relation to vulnerable persons*²⁰¹, even if it is not *in relation to the general population*. The test under the Unfair Commercial Practices Directive 2005/29/EC is first to ascertain whom a particular marketing practice reaches and, then in a second step to ascertain the average member of that audience.²⁰² However, this is not a statistical test involving percentages.²⁰³ The Directive²⁰⁴ and implementing Regulations²⁰⁵ state that (a) where a clearly identifiable group of consumers is particularly vulnerable (...) in a way which the trader could reasonably be expected to

¹⁹³ For example <http://metro.co.uk/2014/07/01/terms-and-conditions-may-apply-does-anybody-read-internet-tcs-4781976/>

¹⁹⁴ Hyoun S Kim et al, ‘Do Social Casino Gamers Migrate to Online Gambling? An assessment of Migration Rate and Potential Predictors’ (2014) *Journal of Gambling Studies* DOI 10.1007/s10899-014-9511-0

¹⁹⁵ Recommendation 2014/478/EU fn **Error! Bookmark not defined.**, Para 42

¹⁹⁶ Consumer Protection from Unfair Trading Regulations 2008/1277, implementing the Unfair Commercial Practices Directive 2005/29/EC

¹⁹⁷ It is, however, encouraging to see that the Gambling Commission is stepping up its efforts to enforce the provisions against misleading advertising and has issued its first fine of £350,000 under s.121 of the Act for misleading advertising online on BGO’s own website and affiliates’ websites in respect of “free bets” and bonuses <http://www.gamblingcommission.gov.uk/PDF/BGO-decision-notice.pdf>

¹⁹⁸ *ibid*

¹⁹⁹ See Competition & Markets Authority Investigation in Unfair Consumer Terms announced on 21. October 2016, focusing in particular on misleading promotions

²⁰⁰ WA Bogart *Permit But Discourage: Regulating Excessive Consumption* (2011 Oxford University Press) 300

²⁰¹ Regulation 7 (1) “A commercial practice is aggressive if (...) it (...) is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence and (b) it is likely to cause him to take a transactional decision he would not have taken otherwise.”

²⁰² Recital 18 and Article 5 (3); see also Para 54 C-428/11 *Purely Creative v OFT* Judgment of 18. October 2012 (CJEU)

²⁰³ Recital 18 and *Interflora v Marks & Spencers* [2015] ETMR 5 (CA) Paras 113-114, 128

²⁰⁴ Article 5 (3); Recital 19

²⁰⁵ Regulation 2 (2) –(6)

foresee, and (b) where the practice is likely to materially distort the economic behaviour only of *that* group, a reference to the average consumer shall be read as referring to the average member of *that particularly vulnerable* group. Therefore, the legislative standard is pinned at foreseeability, not targeting. Thus, *in theory*, if a marketer is able to foresee that problem gamblers are more likely to be affected by a particular marketing communication exerting undue influence, the marketing communication constitutes a prohibited unfair commercial practice²⁰⁶, which is a criminal offence under Regulation 11 (subject to the due diligence and innocent publication defences²⁰⁷).²⁰⁸ However, *in current practice* any prosecution would be difficult for two reasons: (1) the need to prove that a marketing communication in fact exerts foreseeable, undue influence on problem gamblers as a distinct group and (2) regulation is to a large extent left to co-regulation. Arguably this should be changed by imposing an obligation on advertisers to consider the needs of the vulnerable *a priori* and the establishment of clear standards in this respect (eg categorically no “free” bet offers).

9. Conclusion

This article has reviewed the regulation of gambling advertising by legal and self-regulatory measures, focusing on the protection of minors and vulnerable persons. We argue that current regulation is no more than a sieve which holds a little water.

Essentially, there is a fundamental conflict between the objective of liberalising gambling advertising and the protection of children and other vulnerable persons. We contend that more should be done to ensure the protection of these groups, in order to prevent the hollowing out of the third statutory objective. While the scope of the self-/co-regulatory measures is extensive in terms of gambling advertising, there are concerns about the clarity and complexity of regulation and its (in)effectiveness. Some minor changes have been made in reaction to the 2014/15 Review, but much higher protection standards should be achieved and therefore fundamental rethinking is required.

Zoning measures to keep advertising away from children and vulnerable persons are only somewhat effective in respect of minors and, hardly existing in respect of vulnerable persons. As far as measures to regulate the content of the advertising message are concerned it was shown that they have limited effectiveness since the assessment of what constitutes a breach is highly subjective (e.g. what appeals to children) and there is a fine dividing line between what constitutes a breach (e.g. risky behaviours/irrational beliefs) and what constitutes creative and attractive advertising for example showing the desirable attributes of gambling. Gambling by its very nature appeals to the part of human nature which is risk-taking, speculative, irrational and playful. Therefore these elements are likely to play a role in advertising so that the industry legitimately pushes the boundaries, hollowing out the restrictions imposed.

We draw two main conclusions: First, regulatory standards for offline are not consistently applied to the internet and a fundamental rethink and redesign of regulation is required for

²⁰⁶ Regulation 3 (4) (c)

²⁰⁷ Regulations 17 and 18

²⁰⁸ Enforced by local authority trading standards and the Competition and Markets Authority

advertising online. Secondly, regulation currently focuses too much on the impact on the general population and does not take into account sufficiently the needs of children and vulnerable persons and regulatory standards are based on the communicative intent of the advertiser and not on how the advertising message is received by and impacts vulnerable people. The assessment of risk should not be made purely from the perspective of the population as a whole but should include the viewpoint of those who are negatively affected by gambling.

Advertising regulation as it currently stands focuses mainly on traditional, offline media and therefore there is a lacuna in respect of most forms of online advertising. Therefore, we recommend that regulation urgently should be updated to cover online advertising, taking into account functional equivalence, technology assisting regulation and enforcement, consumer behaviour and jurisdictional issues. Further research in this area is required.

We argue that for internet advertising, the use of online profiling and targeting technology should be considered for the zoning of advertising- this would require careful examination of the data protection and privacy implications, but further research could indicate how to make such profiling data protection compliant.

Where advertising is directed or targeted, advertisers should always be under an obligation to age-verify before the ad is disseminated. So, for example where minors register on social media or a gambling website stating a false age, an additional process should verify their real age through appropriate age-verification technology before an advertising campaign is started. Minors on Twitter or Facebook who follow a football team's account should not be sent sign-up offers (eg "free bets"). Minors who register on an online gambling website and play demo games without monetary stake should not be included in a direct marketing campaign. Where gambling advertising is based on a person's profile (eg banner advertising), technologies should be developed to ensure that this profile contains an age-verification element. While sign up promotional offers have been removed from pre-watershed TV ads a similar move must be considered for social media accounts unless appropriate age-verification takes place.

Furthermore, the Gambling Act raises two specific issues: first it is difficult to ascertain the precise meaning "sending of a document". We argue that this should include the modern version of an online document. Arguably section 46 should apply to all targeted forms of advertising and the onus should be on the advertiser to use appropriate technology to age-verify the recipient of targeted ads.

As to the second conclusion, advertising to the general population should be restricted where it has a demonstrably high impact on minors or vulnerable people. This is particularly tricky where advertising is not directed to individuals. Currently the test for regulation (as explained in this Article) seems to be whether the advertising is of particular interest or appeal to minors. However, advertising can be made to appeal to a particular adult target group (for example by choice of music), but still be of high interest to children, so that the ad appeals to adults and children alike. We argue that there should be a positive obligation on advertisers to make their ads unattractive, or at least boring, to minors.

Moreover, there should be a strict rule against celebrity (especially young sports persons) endorsements in gambling advertising given their influence on minors. Such a rule should include point of sale advertising. Furthermore, the sponsorship rules should ensure that no equipment or clothing (including merchandising) which minors wear contain betting references. The “no under 18 gambling” logo/message should be extended to all internet advertising.

There are few measures to implement the zoning of vulnerable adults- self-exclusion is one important attempt, but much more work needs to be done including research as to what measures may be practicable and effective. It is suggested here that the provision that direct marketing must not be sent to self-excluded persons should be extended to persons who had self-excluded in the past (eg past ten years) and gambling ads should not be targeted to individuals who gambled in the past but have stopped.

We argue that the evaluation of gambling advertising is detached from the overall paradigm of the third licensing objectives and focuses too much on the general population not on those who are in need of protection. This article challenges the proposition that co-regulation in this area is sufficient, albeit that it makes a valuable contribution. A frank debate on the regulation of gambling advertising is required, taking into account the interests of all stakeholders and thinking creatively for solutions outside the traditional regulatory mechanisms (such as the watershed) as the media landscape and consumption habits are changing, in particular in respect of the online space. Any review of advertising should include a consideration of more restrictive forms of regulation founded on the precautionary principle, including clarifying and strengthening the enforcement of the criminal provisions in the Act.