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Legal aspects of responsible gaming pre-commitment and personal feedback initiatives

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1. Introduction

Responsible gambling and player protection have become increasingly researched topics in the gambling studies field. Information about important aspects of gambling has become a cornerstone of responsible gambling that operators regularly offer. Gambling operators regularly display information about such things as the probability of winning or where to get help if the player thinks they may have a problem. Other popular ‘information’ features include the use of self-diagnostic tests (in which players can assess whether they show any behavioral signs related to problematic gambling) and warning messages (highlighting potential dangers of gambling).

Warning signs have been researched in other areas such as smoking and drinking^{1,2} but have shown limited effect in enabling behavioral change. In the gambling studies field, Monaghan and Blaszczynski³ found that only 15.6% of participants were able to freely recall warning signs attached to land-based gambling machines immediately after play. In a study that compared the mode of display of informational content about the nature of games, Monaghan and Blaszczynski⁴ found that messages provided during a dynamic pop-up that forced a break in play were more effective in changing gambling-related thoughts compared to a static message attached to the land-based gambling machine.

The increasingly advanced technological environments of online gambling companies now allow for sophisticated ways of promoting responsible play among gamblers^{5,6}. For this reason it is not surprising that over the last few years a large number of online gambling sites have incorporated specific responsible gambling measures that are only possible to apply in gambling environments where players can be identified and/or tracked behaviorally. Such personalized gambling environments are characterized by the fact that all of a person’s gambling behavior can be recorded over time. This is not necessarily limited to online gambling but also holds true for land-based gambling in which the use of player cards is mandatory. However, the technical nature of online gambling naturally presumes personal identification, which is not the case for land-based gambling. To the authors’ knowledge (as of June 2015), the use of player cards in land-based machine gambling is currently only mandatory in Norway, Sweden, and parts of Austria. For this reason we predominantly focus in this paper on the area of online gambling and specific responsible gambling measures designed to assist players under such circumstances.

Within the context of the European Union increasing numbers of Member States are turning to local licensing regimes for online gambling. During the industry's nascent years, online gambling was either prohibited in some Member States because there was no legal basis in national law for online gambling licenses to be awarded, or exclusivity held by incumbent operators in the land-based sphere was replicated in the online. Nevertheless several jurisdictions in and around the EU, and also further afield, established regulatory and licensing regimes for online gambling. Operators established and licensed within the EU sought to rely upon the free movement of services, as one of the principles underpinning the internal market, to offer services licensed in Gibraltar and Malta to those residing in other Member States. Following preliminary references to the Court of Justice of the European Union ("CJEU"), case-law emerged which denied the application of the principle of mutual recognition to gambling services. Therefore, national prohibitions or monopolies could remain so long as the resulting restriction on the free movement of services was justifiable.

Member States could have then decided to maintain prohibitions on online gambling within their respective jurisdictions or likewise to uphold the exclusivity that an incumbent monopolist enjoyed in the land-based space. Without entering into detail, the case-law of the Court established particular requirements as to the regulatory regime applicable to, and the actual behavior of, a monopolist if the restriction to the free movement of services to which it gave rise was to be justifiable. Of course, the fact that a regulatory regime did not amount to a justifiable restriction to the free movement of services would not necessarily entail that the national market should be liberalized. On the contrary regulatory amendments could be introduced to bring the regulatory regime and behavior of the monopolist within the boundaries of behavior that would be a justifiable restriction.⁷

From the mid-2000s onwards an increasing number of Member States have sought to license online gambling and thereby replace absolute prohibitions or monopolies with an open licensing regime. Whilst such regulatory reform has opened various national markets to private operators established in other jurisdictions, such national markets have not been 'liberalized' in the sense that operators can operate free from the shackles of regulatory requirements. Conditions defining license eligibility and a whole swathe of licensing conditions are means by which Member States can express national regulatory preferences

in line with their ‘margin of discretion’ under EU law when regulating gambling. Such national licensing regimes must be compliant with the free movement case-law too, just as their more free movement restrictive predecessors (prohibitions and monopolies).

Through such national licensing regimes Member States are able to give effect to national policy preferences and the prevention of problem gambling and gambling addiction is one such field, alongside more general consumer protection measures designed to protect (potential) players. National licensing regimes thus enable Member States to impose responsible gambling and player protection requirements on licensed operators, on pain of enforcement measures. Thus whilst responsible gambling measures have emerged from within the industry itself, the emergence and development of national regulatory regimes has increased the plethora of responsible gambling measures found within the European gambling market. As will be discussed subsequently, this has given rise to initiatives at the European level despite the fact that no gambling-specific legislation will be proposed for the foreseeable future.

2. Mandatory (operator imposed) limit setting

Mandatory (i.e., operator imposed) limit setting initiatives can comprise time and/or money spending thresholds, and whilst the operator imposes limits upon players’ behavior in some jurisdictions this is often the result of licensing conditions to which the operator is bound. Such limits that operators impose on their players cannot be exceeded by players. Problematic and pathological gamblers who are increasingly losing control over time and money spent might not be susceptible to voluntary responsible gaming features. One way of trying to protect this vulnerable group of players is by operators’ employing mandatory time and/or money spending limits. We would like to clarify that what we are talking here are limits that apply to gambling activities other than single games or single game sessions. Maximum bet amounts on single games and maximum bet amounts or maximum wallet values on gambling sessions are used among some online operators as well as a few land-based operators. However, such tools do not track players’ behavior longitudinally and are not the subject of this paper as the only aim of such initiatives is to protect players within a single game and/or game session.

Mandatory money limit setting is found in government-owned or government-operated online gambling sites such as *Instaspill* (Norsk Tipping, Norway), *win2day* (Austrian

Lotteries, Austria), and *Svenska Spel's* gaming platforms (Sweden). Wood and Griffiths⁸ also noted mandatory deposit limits at the online gambling site *bwin*. Mandatory limits also can be found in other national markets where private operators operate. Although incumbent operators in the Netherlands are currently prohibited from offering true online gambling they are permitted to offer their land-based services via the internet, under the so-called 'e-commerce' exception. Spending limits then apply. For example, in the Netherlands, De Lotto is required to apply different weekly spending limits to those between the ages of 18-24 years (€100) than to those over 24 years (€1000) in relation to its sports-betting offer when provided via the internet.⁹ Private entities in Belgium can obtain a licence to offer online slot machine gaming, should they have a license to do so offline. However, the online offer must replicate spending limits applicable to the land-based supply,¹⁰ for example, the player should not lose on average more than €25 per hour.¹¹ Mandatory limits can apply to deposits, losses, wagers combined with different time periods (e.g., daily, weekly or monthly). The authors are not aware of any mandatory time limits that specify the maximum time players can spend other than operators that utilize a mandatory gambling session time (e.g., *Loterie Romande's* electronic lottery machines in Switzerland).

From a scientific point of view, the authors are unaware of any empirical studies that have focused on the effects of mandatory spending limits on gambling behavior. Given the fact that such limits are now being used by gaming operators, research on the effects is much needed. However, the derivation of valid results might be difficult as mandatory limits apply to all players (from very occasional gamblers through to problem gamblers) that can make comparisons and effectiveness difficult to interpret.

3. Voluntary (player choice) limit setting

Voluntary spending limits in which players can choose the maximum amount of time and/or money they want to spend within a specific period of time are now found on a growing number of online gambling sites.¹² In relation to monetary spending, Wood and Griffiths⁸ reported that players' can be restricted in terms of deposit limits, play limits, loss limits, and bet limits. More specifically:

- *Deposit limits* – This refers to the maximum amount of money that a player can deposit into their play account at any given time. Winnings can either be included or excluded from this figure.
- *Play limits* – This refers to the maximum amount of money that a player can actually play with at any given time. As with deposit limits, winnings can either be included or excluded from this figure.
- *Loss limits* – This refers to the maximum amount of money that a player is allowed to lose at any one session.
- *Bet limits* – This refers to the maximum amount of money that can be bet on a single game, or on concurrent games.

Apart from play limits, Lucar et al.¹³ found that all types of money limits were found across 50 online gambling sites that were subject to the analysis. However, deposit limits were most common. They also found that daily, weekly, and monthly limits could be chosen. When players want to increase their spending limits, most sites will only allow the changes after a certain period of time. However, if players want to decrease their spending limits, most sites allow the changes immediately. This asymmetric setting helps players who want to increase their spending limit in an emotional state not to overspend. In land-based gambling such voluntary limit setting (e.g., daily, weekly or monthly money spending limits) can only occur if the operator gives their customers player cards. To the authors' knowledge, this is the case in Austria, Norway and Sweden where the usage of player cards is mandatory. A trial of a voluntary player card in Nova Scotia was discontinued in 2014 and a voluntary player card system that also allows the setting of money limits was recently introduced in Victoria, Australia.¹⁴

Regulatory regimes in many EU Member States require licensed operators to provide players the opportunity to set limits as part of the player registration process for online gambling. Therefore it is a mandatory requirement, imposed by the regulatory regime on the operator, requiring the operator to provide the player the opportunity to set limits. A player must set a limit before being able to play, but the amount that the player can select is voluntary. In such situations, the setting of limits is a combination of both the involuntary and voluntary. Such licensing requirements on the operator are frequently accompanied by licensing conditions imposing mandatory cooling-off periods should a

player wish to increase a limit (e.g., 72 hours) whilst requiring operators to immediately give effect to a player's instruction to reduce a limit.

For example, secondary legislation in France obligates operators to require that players set a cumulative limit on amounts bet based on a seven-day period before permitting the player to participate in the online games offered. Whilst any subsequent reduction in the limit must take effect immediately, two days must elapse before an increase to the limit set results in a material change.¹⁵ Danish legislation requires that operators must provide players with the opportunity to set daily, weekly, and monthly deposit limits. Requests to set a limit must be dealt with immediately, whilst any increase to an existing limit can only take effect 24 hours after the request was made.¹⁶

Regulatory reform is currently underway in the Netherlands and parliamentary discussion to date has directed some attention to the use of limits. Notwithstanding the fact that secondary legislation, which will detail operational requirements, has not been published in any format at the time of writing, it is clear that there will be no mandatory limits. However, operators will be obliged to require players to complete a 'player profile' upon registration and as a condition of the player accessing the online gambling offer. In the absence of any upper limit, this is a clear example of the combination of involuntary (i.e., the player must complete the profile) with the voluntary (i.e., the player could set a weekly deposit limit of €5 or €5000). Should a player exceed the limits set, then this will be one ground on which the operator will be required to intervene as part of the 'active duty of care' which will require that operators monitor and analyze player behavior, and take measures once play is potentially indicative of problem gambling. Intervention could be in the form of an 'interview' with the player (via means of remote communication) and, perhaps at a later stage, suggesting to the player that they voluntarily exclude from all nationally licensed remote gaming offers.

As for the effectiveness of voluntary limit setting, very few studies have been conducted. Despite an increasing number of gaming operators utilizing social responsibility tools and practices, there has been very little empirical research. To date, there is no empirical evidence showing that either higher mandatory spend limits or voluntary spend limits are associated with increased levels of problem gambling in either online or offline settings. Broda et al.¹⁷ examined the effects of player deposit limits on Internet sports betting by

customers of *bwin Interactive Entertainment*. Overall, the study found that less than 1% of the players (0.3%) attempted to exceed their deposit limit. However, Wood and Griffiths⁸ argued that the large mandatory limit may be the main reason for this finding as Broda et al. (2008) noted that the majority of online gamblers never reached the maximum deposit limit. A Canadian study by Focal Research¹⁸ among Nova Scotian video lottery players with player cards found that responsible gaming (RG) features (including player set spend limits) generally reduced the overall levels of player expenditure. However, as Wood and Griffiths⁸ note, the specific impact of the player set spend limit was not separated from the impact of the other RG features.

A study of 10,865 online gamblers from 96 different countries by the International Gaming Research Unit¹⁹ reported that over two-thirds of players (70%) thought that voluntary spending limits would be a useful RG feature. Further focus group work from the same study found that the majority of players were opposed to mandatory spend limits. Bernhard, Lucas and Jang²⁰ reported similar findings in their focus groups of Las Vegas gamblers. In their study, mandatory spend limits were strongly opposed, whereas voluntary limits were more widely regarded as useful. However, problematic and pathological gamblers who increasingly lose control of their time and money spending may be unlikely to utilize voluntary responsible gaming features.

Griffiths et al.⁶ carried out a study among *Svenska Spel* clientele in Sweden examining players' attitudes and behavior towards using social responsibility tools among 2,348 online gamblers who completed an online survey. The most useful feature was the setting of spending limits with over two-thirds of respondents (70%) reporting the feature to be 'quite useful' or 'very useful'. Respondents were also asked which social responsibility features (if any) they had used. Over half (56%) had used spending limits. To date, only one study by Auer and Griffiths⁵ has investigated voluntary time limits. The study found that both money and time limits were effective among highly involved players. Whereas money limits were most effective among casino players, time limits were most effective among poker players. As poker is partly a game of skill, time limits are important as poker players can spend long periods of time without losing any money.

4. Exclusions schemes (voluntary, forced, and third-party)

Long-term voluntary self-exclusion schemes provide problem gamblers (or those who think they might develop a problem) with an option to prevent further harm. Research has shown that most individuals do not seek help for problem gambling until they reach serious crisis.²¹ Given this finding, self-exclusion might be an important tool for players to control their spending. An important aspect for self-exclusion to be effective is the prevention of problem gamblers playing in environments where they have voluntarily self-excluded. Identification is much easier in online gambling environments where registration is only possible following a thorough identity check. Voluntary self-exclusion schemes are also offered by many land-based operators. However, preventing players from re-entering can remain difficult. In Europe, where identity checks in land-based casinos are common, patrons can also regularly self-exclude. In Austria, self-exclusion has been offered to casino-players since 1934.²² For voluntary self-exclusion programs to be effective, it is important that such schemes work across venues and operators.

Licensed operators in Denmark are required to provide players with the opportunity to request temporary or permanent exclusion from gambling. Temporary exclusion must be for a period of at least one month but players should also have the opportunity to opt for a short-break (24 hours) from gambling. During such periods the account is deactivated. Permanent exclusion entails closure of the player account and the individual cannot become a customer with the operator in question during a one-year period following account closure.²³ Alongside exclusion at the level of the operator, the Danish Gambling Authority maintains a register of players who want to be excluded from all Danish licences, on a temporary or permanent basis. Upon each and every player log-in, the operator must check this central register and decline play for individuals contained within the register, likewise when an individual is in the process of setting up a new player account the operator must refuse to open an account if, after having checked the central register, an individual would-be player is listed within it. After a year of being listed as permanently excluded an individual may request to be deleted from the central register.²⁴

Central exclusion systems are also on the horizon in Great Britain, which as of the start of 2015 has switched to regulation based on the point of consumption, as opposed to the location of the operator. At present, providers of online gambling must provide players with the opportunity to self-exclude, and this is at the level of each individual licensee. A period of not less than six months but no more than twelve months should be offered as

the minimum self-exclusion period, whilst providing players with the option of selecting a period of up to at least five years. Once the period selected by the individual has expired the individual will remain excluded from gambling for at least seven years unless the individual takes ‘positive action to gamble again’ (through contact with the operator via the telephone or in person, mere re-registration online will not suffice). From a date yet to be determined by the Gambling Commission, such operators will have to participate in the ‘national multi-operator self-exclusion scheme.’²⁵

In addition to giving players the possibility to exclude from gambling activities, several jurisdictions (in land-based rather than online gambling) also enforce exclusions. This means that operators can ban individuals from playing (mostly) for welfare-related reasons. Singapore is an example where players are excluded from the two existing casinos if they receive financial aid from the government or have been declared bankrupt. As with the case of mandatory spending limits, such an initiative aims to help problem gamblers from further harm if they are unable to stop gambling themselves. Exclusions initiated by operators are also found in land-based gambling environments where (like online gambling environments) players might not be allowed to register if credit checks fail. To the authors’ knowledge, mandatory exclusions of active players are not common in online gambling environments. In some land-based gambling environments, third-party exclusions can also be initiated by family members of problem gamblers. This is also used in Singapore. Applications for Family Exclusion Orders do not immediately take action but are reviewed by an official panel.

Approaches to nationwide exclusion registers in some European Member States go beyond mere voluntary exclusion. Belgian legislation enables an interested person to recommend to the Belgian Gaming Commission that an individual should be excluded from online gambling (and also some land-based venue types) because of gambling addiction.²⁶ The Gaming Commission takes a decision after having heard the individual concerned. Draft legislation in the Netherlands foresees the introduction of a central register of excluded players, covering online gambling, land-based casinos, and land-based slot machine arcades. Operators should recommend to players, whose situation so warrants such a recommendation, that they voluntarily self-exclude from gaming services. Should a player not abide by such advice it will be possible, according to draft primary legislation, for the operator to transfer the ‘file’ to the Gaming Authority that will

determine whether the player should be involuntarily included in the register. This will result in exclusion from all licensed online gambling, land-based casinos, and land-based slot machine arcades.

Research on the effectiveness of voluntary self-exclusion in online gambling is rare. Hayer and Meyer²² investigated a sample of 256 internet gamblers who self-excluded and also submitted follow-up surveys one month, six months and one year later. They found that self-exclusion had favorable psychosocial effects. Players showed a marked decrease in the willingness to play on the internet shortly after they self-excluded. Haefeli et al.²⁷ did not directly investigate the effects of self-exclusion but tried to predict future self-exclusion via analyzing player's email correspondence. Email content from self-excluders was compared to a control group and clustered according to what the emails were about (e.g., enquiries about changing limits, self-exclusion, etc.) and the tonality of emails (neutral, complaint, threats, etc.). Using these data, Haefeli et al.²⁷ were able to correctly predict 76.6% of future self-exclusions.

5. Personalized feedback

Personalized feedback describes information to players that incorporates the players' individual behavior. One example is player spending summary reports that are commonly offered by online gambling operators. Players have the possibility to retrieve a summary of their spending over long periods of time (e.g., weekly, monthly, annually). Other feedback interventions include dynamic 'pop-up' messages that are triggered by aspects of behavioral play (e.g., after a player has played for an hour or played 1000 consecutive games). Providing specific information in the form of messages to players while gambling (within session pop-ups) is one way of intervening and helping gamblers who play excessively. It is believed that information that is given to people to enable behavioral change should encourage reflection as research has shown that self-monitoring can enable behavioral change in the desired direction.²⁸⁻³⁰

At present, several responsible gambling accreditation organizations (e.g., *GamCare* based in the UK) mandatorily require pop-ups for gaming operators to receive gambling social responsibility certification. Within-session pop-ups are used in both online and offline gaming environments that utilize gaming screens (e.g., slot machines, games played via laptops and tablets). Experimental studies on gamblers playing slot

machines^{4,31} have shown that giving players messages that encourage self-appraisal (e.g., *“Do you know how long you have been playing? Do you need to think about a break?”*) result in a significantly greater effect on self-reported thoughts during playing sessions and subsequent playing behavior compared to purely informative messages.

Pop-up messaging has also been used to help gamblers set limits while gambling. Stewart and Wohl³² demonstrated that adherence to monetary limits was significantly more likely among participants that received a monetary limit pop-up message compared to participants who did not receive a pop-up message. Studies have also investigated the optimum time at which pop-up messaging should occur within a gambling session. Cloutier et al.³³ reported the most effective social responsibility feature was a pop-up message after 60 minutes of gambling (compared to 15, 30, and 45 minutes) and resulted in an overall decrease in the length of time spent gambling among players.

A study by Auer, Malischnig and Griffiths³⁴ investigated the effects of a slot machine pop-up message in a real online-gambling environment. The results indicated that, following the viewing of a pop-up message after 1000 consecutive gambles on an online slot machine game (i.e., *“You have now played 1,000 slot games. Do you want to continue? [YES/NO]”*), nine times more gamblers (n=45) ceased their gambling session than did those gamblers who had not viewed the message (n=5). The authors concluded that pop-up messages influence a very small number of gamblers (less than 1%) to cease their playing session. A follow up study by Auer and Griffiths³⁵ (2015) showed that the pop-up could be improved through adding normative and self-appraisal information. The number of players who stopped after receiving the enhanced pop-up message doubled (although still less than 1.5% gamblers).

Just like with other consumption patterns (e.g., drinking alcohol, smoking cigarettes), gamblers may hold the normative belief that others spend as much as (or even more than) they do themselves. Normative feedback is designed to correct such misconceptions. Normative beliefs have significantly influenced the behavioral outcome in studies of getting individuals to quit smoking,³⁶ use condoms,³⁷ and reduce marijuana consumption.³⁸ In a study of American college student gambling, Celio and Lisman³⁹ demonstrated that personalized normative feedback decreased other students' perceptions of gambling and lowered risk-taking performance on two analogue measures of gambling.

They concluded that a standalone personalized normative feedback intervention may modify gambling behavior among college students.

With the use of motivational interviewing, Miller and Rollnick⁴⁰ have also emphasized normative feedback as an important aspect in facilitating behavioral change. In a study investigating personalized feedback interventions, Cunningham et al.⁴¹ found that participants who received a personalized feedback summary along with other Canadians of the same gender showed a reduction in the amount of money they spent in a three-month follow-up survey. Very few online gambling operators appear to offer their players normative feedback. However, the responsible gaming tool mentor (used by the online gambling websites *win2day*, *cashpoint.com* and *tipp3.de*) incorporates normative feedback on money as well as time spent by players. Current legislative proposals in the Netherlands, so as to introduce a licensing regime for remote gaming, point to the fact that secondary legislation (which has not been published at the time of writing) will require operators to provide feedback to their players on a case-by-case basis. Trained staff members are foreseen as providing feedback via email, pop-ups, online chat or via the telephone.⁴²

Some researchers argue that early warning signs of problem gambling can be detected in online gambling environments via analyzing player behavior²⁷ (e.g., Haefeli et al., 2011). In a real-world study of online gamblers, Braverman et al.⁴³ found several risk factors to be highly associated with future problem gambling. Among players who engaged in more than two different gambling activities in their first month of gambling, and who also demonstrated high variability in their casino wager amounts, the authors reported that these players were eight times more likely to exhibit gambling-related problems. The possibility of the detection of early signs related to future gambling related problems naturally raises the question of possible interventions such as appropriate player messages. Such messages could potentially address players who are predicted to develop gambling-related problems and provide helpful advice and assistance. Such messages act in a preventive way.

If future problem gambling can be predicted, then the question arises as to whether operators are obligated to take action beyond messaging (e.g., banning players as part of a ‘duty of care’). However, it must be noted that such predictive systems are statistical in nature and can never achieve 100% accuracy. Players who do not develop problems in the

future will always partly be predicted to do so and vice versa. Consequently such algorithms should not be used as the sole source in leading operators to actively ban or inhibit players from gambling.

Personalized messages have shown to change behavior in several areas such as smoking cessation,⁴⁴ diabetes management,^{45,46} and fitness activity.⁴⁷ Personalized messages that address players who exhibit playing patterns presumed to be indicative of future gambling-related problems are exceptionally rare among online gambling operators. This might be due to the fact that research in this area is limited and on the other hand sophisticated behavioral tracking systems have to be deployed (which can be very expensive). On the other hand, the same technologies are being used to entice players to gamble and increase profit. To the authors knowledge only two commercially available Responsible Gaming systems (i.e., *PlayScan* and *mentor*) provide such messages and are being used by several European gambling operators.

6. European Regulatory Perspectives

July 2014 saw the European Commission publish the *Recommendation on principles for the protection of consumers and players of online gambling services*.⁴⁸ European Commission output on this topic reflects the identification of the “*protection of consumers and citizens, minors and vulnerable groups*” as one of five priority areas for action in its October 2012 *Communication Towards a comprehensive European framework for online gambling*.⁴⁹ The Communication followed the *Green Paper on online gambling in the Internal Market*, through which the European Commission sought to “*canvass views from all interested parties in order to get a better understanding of the specific issues arising from the development of both legal and “unauthorised” offers of on-line gambling services directed at consumers located in the EU*”.⁵⁰ The Communication recognised that “[a]ll citizens should enjoy a high level of common protection throughout the internal market” and considered that “[a]ppropriate action in the EU” is required so as to meet a number of consumer protection related objectives, including that which most closely resonates with the topic of this paper; to “*prevent the development of gambling-related disorders*”.⁵¹ Elaboration of a common set of principles with the aim of “*ensuing a high level of consumer protection*” by way of the aforementioned Recommendation was advanced as a means to move forwards.⁵²

According to its preamble, the Recommendation “*aims to ensure that gambling remains a source of entertainment*” whilst establishing an environment for consumers which is “*safe*” and in which there are measures “*in place to counter the risk of financial or social harm*” as well as to prevent minors from accessing gambling online.⁵³ This is subsequently expanded upon by reference to the objective of safeguarding “*the health of consumers and players*” and thus to also “*minimise eventual economic harm that may result from compulsive or excessive gambling*”.⁵⁴ To achieve this the Recommendation draws upon “*good practices*” in the Member States when recommending “*principles for a high level of protection of consumers, players and minors*”.⁵⁴ This is reflected in the first article that sets forth the purpose of the Recommendation.⁵⁵

Various principles are thus advanced so as to achieve the ‘high standard’ in relation to matters such as information to be provided to the player, measures regarding minors and in particular regarding advertising, measures surrounding the process of player registration and player accounts, commercial communications, sponsorship and education and awareness. In terms of the content of this paper the most relevant two sets of principles are those put forward in relation to “*player activity and support*” and “*time out and self exclusion*”.⁵⁶

In terms of player activity and support functions discussed above, approaches to limit setting are reflected as measures identified as those that contribute a high level of protection. Naturally there are further measures too, which have fallen outside the scope of those that the authors have sought to discuss in the present paper, such as the prevention of deposits once the monetary deposit limit has been exceeded. However providing easy access on the gambling website to the player’s account balance⁵⁷ is a form of personalized feedback in which players receive objective information about their past spending.

Upon registration with an operator at the account opening stage, the Recommendation suggests that by default a player must have to set “*monetary deposit limits, as well as temporal limits*”⁵⁸ and that whilst a reduction to a deposit limit must take effect immediately any increase should only come into effect “*at least twenty-four hours after the player’s request*”.⁵⁹ It also provides that players should be able to take “time out” and

to self-exclude.⁶⁰ This reflects Danish provisions requiring that operators give players the possibility to exclude themselves from that operator's services for 24 hours.

In terms of information provided to the player, the Recommendation provides that information alerts should be provided "*by default*" about winnings, losses, and time spent playing, as well as providing players with the opportunity to continue or suspend play upon having received an alert.⁶¹ Here the Recommendation reflects the above discussion surrounding pop-ups and their effectiveness as well as personalized-feedback. Both initiatives are basically informing players about their behavior in different ways. Dutch legislative proposals concerning interaction with a player via online chat or another means of communication, following indications of problem gambling behavior, embody the principle found in the Recommendation that Member States should require operators to have "*policies and procedures in place which facilitate interaction with players whenever their gambling behaviour indicates a risk of the development of a gambling disorder*".⁶² This notion basically goes in line with the possibility of early detection of problematic gambling discussed above and subsequent personalized communication. Both aspects have been subject to research and are also applied by several online-gambling operators.

In terms of time out and self-exclusion measures, the Recommendation provides that on an operator's website the player should be able to time out or self-exclude "*from a specific online gambling service, or from all types of online gambling services*".⁶³ Regulatory requirements generally require exclusion at the level of an operator to apply to the entirety of an operator's suite of games rather than requiring operators give players the opportunity to exclude from only a single form of online gambling (e.g., online slot machines) by which play could continue via other online gambling offers available on the same website (e.g., online poker). Of course, an operator may elect to do this alongside applicable licensing requirements.

According to the Recommendation, a 'time out' should suspend gambling for at least 24 hours whilst self-exclusion with an operator should result in exclusion for at least six months, with such exclusion entailing closure of the player's account.⁶⁴ This latter time period reflects conditions that are likely to enter into force during the course of 2015 in Great Britain. The Recommendation also encourages that national registries are established and that operators must "*regularly consult*" such registries.⁶⁵ As detailed

above, consultation of such registries must take place upon a player logging in to a website in the case of Belgium, Denmark and the Netherlands under current proposals. Interestingly, the Recommendation only suggests that third party exclusion takes place at the level of the operator. Proposals for ‘involuntary’ exclusion in the Netherlands should result in the Gaming Authority determining whether an individual should be entered into the national central register of excluded players. Under Belgian legislation, a third party, such as a family member, can recommend to the national regulator that an individual is excluded from online gambling services. As described earlier, the Belgian legislation and that proposed in the Netherlands go further than the high level of protection embodied in the Recommendation in this regard.

Indeed, the Recommendation makes multiple references to a ‘high level of protection’ but upon no occasion does it seek to define or quantify this notion. Equally, the principles advanced are, by and large, open to interpretation and do not fix precise quantifiable measures. Where principles refer to quantities, Member States are free to implement measures providing a higher level of protection and this is reflected in the terminology used. For example, a time out results in the suspension of gambling “*for at least twenty four hours*”.⁶⁶

Anything greater than this would betray the legal context within which these principles, and thus the Recommendation as a whole, are positioned. Case-law of the CJEU has, as indicated above, sought to balance the freedom of establishment and the freedom to provide services with the competence of Member States to regulate gambling at the national level in the absence of any harmonization at the EU level on this topic. Member States enjoy a ‘margin of discretion’ within which they are able to restrict the cross-border movement of gambling services, through the imposition of a monopoly or licensing system, on condition that the restrictive measure in question is justifiable in terms of the narrowly interpreted grounds of exemption to the free movement of services which prevail in Article 52 Treaty on the Functioning of the European Union for measures which directly discriminate on the basis of nationality or establishment.⁶⁷ Restrictive measures that do not directly discriminate, so-called indistinctly applicable measures, are generally found in greater abundance and can be justified should they serve an objective justification in the public interest. Consumer protection and the prevention of addiction are recognized as

such a basis to justify restrictive measures, for example, the requirement to hold a license of the Member State in which gambling services are supplied.

Through the evolution of the case-law the CJEU has, in common with more general free movement case-law, required that such indistinctly applicable measures are proportionate and that the public interest objective is pursued in a consistent and systematic manner in relation to the given objective.⁶⁸ Nevertheless, there is considerable academic literature highlighting the fact that the CJEU has taken a light touch and in doing so granted national authorities a greater margin of discretion than it has done in relation to other economic activities.⁶⁹⁻⁷³

Monopoly-based models of supplying (online) gambling services can be entirely compliant with EU law but reflecting the gravity of the restriction to free movement which such a regulatory approach inherently entails a monopoly can only be justified by a “*particularly high level of protection.*”⁷⁴ This must be combined with a legislative framework “*suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by a means of supply that is quantitatively measured and qualitatively planned by reference to the said objective.*”⁷⁵

Given the margin of discretion that Member States enjoy, which includes not only determining the forms of gambling permitted but also the means by which those forms are supplied (e.g., an open licensing regime or a monopoly⁷⁶) there is no scope for prescriptive measures setting out in detail what Member States should or should not do. Yet it would be wrong to interpret the Recommendation as a document lacking any relevance in a legal sense (see also Hambach and Littler⁷⁷). Whilst recommendations lack legal effect, indeed they do not require implementing measures at the national level, in a manner comparable with directives. For example, recommendations can be relied upon within the national judicial system of a Member State. The CJEU has established that national courts are “*bound to take recommendations into consideration*” and “*in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions*”.⁷⁸ Should a dispute arise before national courts which involves national responsible gambling measures then the Recommendation would very likely serve a role

in aiding the interpretation of such national measures, even in a regulatory system of which the monopoly-based supply of online gambling prevails. In this sense the potential impact of this Recommendation remains to be seen.

By drawing upon good practices from across the Member States when forming the Recommendation, the European Commission encapsulates existing practices, and this is reflected by the preceding narrative. Whilst the Recommendation may encourage some national authorities to review, and perhaps revise, prevailing responsible gambling measures the open nature of the principles leaves considerable room for interpretation and scope for convergence, or at least of a sense of convergence, between Member States. In clear cut cases it will be evident that a Member State lacks a particular measure which is indicative of a 'high level of protection' according to the Recommendation, but equally a Member State will be exercising its margin of discretion if operators are required to impose a time out period of only six hours, instead of twenty four. Furthermore, some may argue that a combination of some measures may be more effective than a particular measure that a Member State lacks.

7. Concluding Remarks

The passage of time will reveal the true impact of the Recommendation. Whether it is relied upon before one or more national courts also remains to be seen. Nevertheless, Member States are "invited" to report information to the European Commission during the course of 2016, in light of which the Commission "*should evaluate the implementation of the Recommendation by 19 January 2017*".⁷⁹ Should Member States decide to respond to the invitation, which information does the Recommendation seek to tease out of the national regulatory authorities?

Firstly, by 19 January 2016 Member States are invited to notify the Commission "*of any measures taken pursuant to this Recommendation*" so that the Commission can, notwithstanding the non-binding nature of the Recommendation, "*evaluate the implementation of this Recommendation*".⁸⁰ As can be clearly derived from the preceding narrative, some Member States will already have various measures embedded in existing regulatory regimes that mirror the responsible gambling measures advanced by the Recommendation. Despite the legal nature of the Recommendation it will be interesting to

discover whether the introduction of measures at the national level can be directly traced to the Recommendation.

Secondly, "*for the first time by 19 January 2017*", Member States are invited to communicate information acquired in response to the invitation "*to collect annual reliable data*" concerning:

"(a) the applicable protection measures in particular the number of player accounts (opened and closed), the number of self-excluded players, those experiencing a gambling disorder and complaints by players;

*(b) commercial communication by category and by type of breaches of the principles."*⁸¹

Reference to the "first time" raises the spectre of the European Commission, presumably at a point after its January 2017 evaluation exercise, undertaking subsequent attempts at cajoling Member States into giving information on responsible gambling measures. Undoubtedly the Recommendation will ensure that responsible gambling measures remain on the radar of the European Commission, but whether the Recommendation gains traction on the ground (or should that be in the cloud?) remains to be seen.

At the very least the authors hope that the Recommendation will sharpen the focus of various stakeholders on the responsible gambling measures contained therein, and the issue more generally. Ideally, and notwithstanding the fact that the Recommendation does not "interfere" with the right of Member States to regulate gambling services, the Recommendation will encourage critical review of measures at the national level; across both public and private operators. Should it encourage greater evidence gathering and scientific research in the field then it will also contribute to securing a better understanding of the specific issues surrounding online gambling services; information and insights which will hopefully find their way into rational policies at the national level.

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