

Fraud and Cheating Detection and Prevention, including Anti-Collusion

Best Practices - Internet Gambling Project

Dr. Alan Littler

alan.littler@vmwtaxand.nl

Gaming, Sports & Entertainment practice group

VMW Taxand, Amsterdam

Internet Gaming Regulation Symposium

UNLV William S. Boyd School of Law, Las Vegas

18 May 2012

0

Please note that this is a preliminary draft on which comments are welcome.

This manuscript is a draft only and subject to further review and comment by the author and other parties. It is not for publication. All intellectual property rights associated with the manuscript are reserved. Nothing in this manuscript constitutes legal advice or may be used or relied upon as legal advice. Use of or reliance upon this manuscript does not create an attorney-client relationship between the author or UNLV or any other party.

Fraud and Cheating Detection and Prevention, including Anti-Collusion

1. Introduction

Internet-borne challenges

Following the dawn of the internet era legal commentators discussed whether the internet should be seen as an area free from legal constraints as determined by the exertion of jurisdiction by national legal systems.¹ Or at least they questioned prevailing approaches to determining competence to exert jurisdiction in the land based world and opined that they would not fit comfortably with an internet based environment. Notably, for example Post opined that questions generated by acts in cyberspace "are indeed different, and more difficult, than the analogous questions realised [in] its realspace counterpart".² Concurrently Goldsmith viewed the issue in terms of functionality and noted that:

"Internet activities are functionally identical to these non-Internet activities. People in one jurisdiction do something - upload pornography, facilitate gambling, offer a fraudulent security, send spam, etc. - that is costly to stop at another jurisdiction's border and that produces effects within that jurisdiction deemed illegal there."³

Indeed, fraud and cheating in the provision and consumption of gambling services are surely equally morally reprehensible whether they occur in a high street bookmaker's office or via an online poker room. Negative consequences will arise for the party being de-frauded whether they were face to face with the party committing the fraud, or sat on the other side of the globe. In such a situation Goldsmith would likely maintain his claim that "[t]here is no general normative argument that supports the immunization of cyberspace activities from territorial regulation".⁴

¹ Rather aptly referred to as 'Visions of a Post-Territorial Order', by Goldsmith, J. & Wu, T., in their book *Who Controls the Internet? Illusions of a Borderless World* (Oxford; Oxford University Press, 2006). See also for example Geist, M., 'Cyberlaw 2.0', 44 *Boston College Law Review* (2002-2003) 323.

² Post, D.G., 'Against "Against Cyberanarchy"', *Berkeley Technology Law Journal*, 17(1) (2002), 1365-1387, p. 1387.

³ Goldsmith, J.L., 'The Internet and the Abiding Significance of Territorial Sovereignty', 5 *Indiana Journal of Global Legal Studies*, 475 (1998).

⁴ Goldsmith, J., 'Against Cyberanarchy'. *University of Chicago Law Review*, 65 (1998), 1199-1250, at 1250.

The provision of gambling services has readily taken to the internet,⁵ with both national and sub-national jurisdictions seeking to exert regulated control over online gambling activities.⁶ Whilst certain jurisdictions may seek to uphold a prohibition on the provision of online gambling, or to protect the monopoly based supply of (online) gambling, other jurisdictions have sought to regulate the activity. Within the internal market of the European Union in particular certain jurisdictions believed that the principle of mutual recognition for the free movement of services would permit their licensees to offer gambling services throughout the internal market. Through the evolution of the case-law of the Court of Justice of the European Union ('CJEU') it has become evident that this principle does not apply in an absolute fashion to gambling services.⁷ Equally, an increasing number of Member States have sought to establish national licensing regimes to regulate the supply of remote gambling services. Currently, without any degree of harmonisation or coordination of Member States' gambling regulations a patchwork of national requirements has emerged.

A Regulatory Patchwork

Within the European context alone, a patchwork exists in terms of whether the online market is reserved for the incumbent offline monopolist,⁸ a limited number of online operators⁹ or an unlimited number of operators subject to strict rules determining eligibility to enter the market.¹⁰ Variations prevail across (European) jurisdictions in terms of which forms of online

⁵ Monsieur Jean-François VILOTTE, 'PRESERVER L'INTEGRITE ET LA SINCERITE DES COMPETITIONS SPORTIVES FACE AU DEVELOPPEMENT DES PARIS SPORTIFS EN LIGNE. Prévention et lutte contre l'atteinte à l'intégrité et à la sincérité des compétitions sportives en relation avec le développement des paris sportifs'. Rapport à Madam Chantal JOUANNO, Ministre des Sports, le 17 mars 2011. Point 8 notes "Le développement de l'activité de paris sportifs à travers Internet est aujourd'hui une réalité économique et sociale don't les conséquences sur l'ordre public et sur le sport doivent être prises en compte et maîtrisées."

⁶ *Rousso v. State of Washington*, Supreme Court of Washington, 23 September 2010.

⁷ Case C-42/07

⁸ Such as in Portugal with the *Liga Portuguesa*

⁹ This is the case in Belgium where primary legislation caps the number of online licences in line with the numerous *caus* prevailing in the existing offline sector for casinos, amusement arcades and in a slightly different manner for sports-betting. Conditioning the online provision of gambling to an offline establishment is extremely contentious and highly likely to be an unjustifiable restriction on the free movement of services as enshrined in Article 56 of the Treaty on the Functioning of the European Union. See XXX.

¹⁰ A number of jurisdictions follow this approach such as Denmark, France and Italy. It also appears to be the direction which the Netherlands may very well take, following a letter of the current, albeit caretaker, State Secretary for Security and Justice to the parliament. TK 32264, nr. 25 *Wijziging van de Wet op de kansspelen in*

gambling are permitted with some seeking to regulate a wide a range as possible whilst others are restricted to sports-betting, horserace betting and skill-based casino games (i.e. poker) as in France. Not only are there differentiations between jurisdictions in terms of what casino gaming encompasses (pure chance based, live gaming) but particular jurisdictions permit a narrower range of sports-betting opportunities than others, as will be discussed later in relation to match-fixing. Suffice it to say at this juncture that whilst exchange betting and spread-betting are permitted in the United Kingdom only pari-mutuel betting is allowed in France. Divergence between jurisdictions also arises in terms of events within sporting competitions upon which bets can be taken; this could range from licensees being restricted to taking bets on the final outcome of a game or being permitted to take bets during the course of a competition on events such as which team scores the first goal or which player receives a red card.

Divergence in regulatory standards between jurisdictions also prevails across a whole host of focus points for the regulation of online gambling. These include how licensing jurisdictions determine whether a potential operator is eligible for a licence (credit worthiness and background checks on those in managerial positions for example); the modalities of creating customer accounts and identity verification; measures designed to uphold national standards of consumer protection and responsible gambling measures such as deposit limits and approaches to (self-) exclusion; to infrastructural requirements by which national regulatory authorities supervise their licensees (from requiring the server to be located within their jurisdiction to remote access to a server located in another jurisdiction and the (quasi) real-time remote collection of data which is time and date stamped en route to a 'safe').

Cheating and Fraud: Lacking Attention?

However, what is notable is the lack of attention towards the detecting and preventing cheating and fraudulent activities. Across the prevailing jurisdictional quagmire which private licensed operators are required to navigate considerable attention is dedicated to protecting the consumer and preventing crime.¹¹ As will become evident in the following section

verband met de instelling van de kansspelautoriteit: Brief regering; Uitvoering van ingediende moties bij het wetsvoorstel inzake de instelling van de kansspelautoriteit, 4 mei 2012.

¹¹ On the distinction between protecting the consumer in general and responsible gambling measures more specifically see Littler, A., 'Protecting consumers of gambling services; some preliminary thoughts on the

consumers and society at large are widely perceived, at least in European discourse, as the victims of dishonest practices of operators. In contrast to this somewhat embedded position, this chapter will primarily concentrate on cheating and fraudulent activities by those who make use of gambling services. 'Make use' in this context encapsulates consumers of gambling services as those who enter into a contractual relationship with online gambling providers but also those who seek to use online gambling as a means to achieve dishonest ends. As such, and moreover given that the topic is dealt with elsewhere within this contribution, measures to prevent money-laundering through online gambling will not be dealt with. Rather attention will be focussed upon match-fixing in this regard as a means of making dishonest use of online gambling services. Preventing match-fixing and preserving the integrity of sports has received considerable attention of late within the European arena and considering approaches to preventing match-fixing, in as far as measures relate to online operators will illustrate how regulatory divisions hamper activity in this field. Europe is divided, between those jurisdictions with state backed monopolies and those permitting private operators. Both have their mechanisms, in addition to any licensing conditions to tackle the problem, yet they and their regulatory spheres operate in competition with each other rather than in a spirit of cooperation.

Equally however cheating and fraudulent activities also prevail solely within the gambling environment and measures which operators can take to reduce the likelihood of falling foul to attempts to defraud them, or their players, will also be considered. Regulatory regimes however pay little, if any, attention to measures or the need to implement measures to combat fraud against an operator other than any general provisions against fraud or cheating which may be in place. Examples of the types of fraudulent activity perpetrated against operators is revealed in the responses of licensed operators to questions posed by the European Commission's consultation exercise, the Green Paper on on-line gambling in the Internal Market.¹² For example one operator is notes that customers charge back on their credit cards in attempt to get back losses incurred whilst gambling with another danger being chip dumping. In this instance online poker players agree to intentionally lose chips to other

relationship with European consumer protection law', in Devenney, J. & Kenny, M., *European Consumer Protection: Theory and Practice*, (Cambridge; Cambridge University Press, 2012).

¹² European Commission, Green Paper on on-line gambling in the Internal Market, 24 March 2011, COM(2011) 128 final.

players and thereby pass funds between each other,¹³ whilst also disrupting the gaming experience.

Reflecting this a report by TÜV Rheinland Secure iT identifies collusion arising in tournament and player to player games, and particularly poker, where players meet at a table and "pretend to be opponents like all of the other players, but illicitly come to an arrangement and share the winning."¹⁴ Such an illicit arrangement is therefore likely to include a degree of deception and may amount to cheating.

Through taking the aforementioned approach methods, accompanying shortfalls and recommendations for best practices will be divided into two threads; those which operators can or are obliged to take in relation to their day-to-day operations and those which arise at a more macro or regulatory level. Given the globalised transnational nature of online gambling and the problems which reputable operators and regulators face, problems, and equally best practices, need to be considered at the operator level, the regulatory level and also at the transnational regulatory level. Although some parties consider online gambling to be a threat to the integrity of sports,¹⁵ attempts by sporting bodies to counter this threat also show how combating cheating and fraudulent necessitates the involvement of third parties and that reliance should not be placed upon reputable operators acting in isolation.

Structure

To this end the chapter will firstly consider what is meant by fraud and cheating for the purposes of this contribution, before secondly moving onto measures which can be taken at the regulatory level and thirdly at the operational level.

¹³ See Betfair, *Responses to the Green Paper On on-line gambling in the Internal Market*

¹⁴ TÜV Rheinland Secure iT GmbH, *Opinion: "What can the Internet do?"*, Cologne, June 2009, prepared on behalf of bwin.

¹⁵ J. S. Blatter, FIFA President stated in *Drawing the line*, in May 2008:

"Modern technology, and especially the opportunities for sports betting via the internet, represents an insidious danger to the integrity of the game."

See <http://www.fifa.com/aboutfifa/organisation/president/presidentcolumn/newsid=757996/index.html> (accessed 13th May 2012).

2. Defining Fraud & Cheating, and the Relationship with Sports

Rather than attempting to provide conclusive and all encompassing definitions of 'fraud' and 'cheating' suited to all possible, and potentially unimaginable circumstances, this section merely attempts to give a flavour of their meaning and understanding. It then proceeds to consider how such ideas manifest themselves in EU gambling regulation discourse and in relation to match-fixing as a challenge to the integrity of sporting competitions.

Defining 'cheating' and 'fraud'

Cheating can be defined as acting "dishonestly or unfairly in order to gain an advantage" and the Gaming Act 1845 which has since been repealed by the 2005 Act was quite specific in its definition of cheating. Notably:

"... every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wages, or adventures, or in betting on the sides of hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing..."¹⁶

Interestingly in the equivalent provision in the current Gambling Act cheating is not defined by the Explanatory Notes state that term nevertheless "has its normal, everyday meaning". Today one could replicate the dice and tables for computer software and random number generators whilst in essence an ill-gotten gain would still have been made through the use of deception or fraud. Yet, what is fraud? For the purposes of the current chapter is questionable whether it is necessary provide an exhaustive definition of fraud, but rather draw upon the defining elements provided by Stephen, namely:

"... there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occurring the definition of a crime two elements are essential to the commission of the crime: namely, firstly, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or to a risk of possible injury of that deceit or secrecy."¹⁷

¹⁶ s. 17 Gaming Act 1845, as amended by the Theft Act 1968.

¹⁷ Stephen, J.F., *A History of the Criminal Law of England*, vols. I-III 1883 (reprinted by William S. Hein & Co., Buffalo, NY).

This suggests that fraud relates to gaining or attempting to gain something through deceitful dishonest practices which may or may not result in injury but nevertheless gives rise to the possibility of injury to another party. Thus both concepts evolve around dishonesty, deception and otherwise getting something to which one is not entitled whilst not constituting theft.¹⁸

Perception in EU Regulatory Discourse

During the course of the Court of Justice of the European Union's (hereinafter "CJEU") career in dealing with preliminary references focussing upon gambling issues its appreciation of 'crime' and 'fraud' undoubtedly has undoubtedly been flavoured by the cases it has received. As such, this will section will provide an illustration of some findings of the CJEU's case law where it has considered the nature of crime and fraud in relation to gambling.

A prime illustration is the case of *Sjöberg & Gerdin* concerning Swedish legislation which prohibited the advertisement of unlawful gambling in Sweden was enforced pursuant to criminal law which permitted higher penalties to be awarded for the advertising of unlawful gambling originating outside of Sweden compared to unlawful gambling of domestic origin. In his Opinion to the Court Advocate General Bot stated:

"... internet gaming organised by a company established in another Member State does not necessarily or in general pose greater risks of fraud and crime to the detriment of consumers than gaming organised clandestinely by a company established within the national territory."¹⁹

This is a potentially dangerous assumption to make. Undoubtedly clandestine and unregulated operations exist, some of them operating within the borders of a particular jurisdiction such as Sweden and others in a transnational cross-border context and images of internet surfing pirates based on tropical islands readily comes to mind. Yet equally there are operators who are regulated in jurisdictions and supply their services to residents in other jurisdictions where

¹⁸ For the sake of completeness the Theft Act of 1968 provides a basic definition of 'theft' as:

"(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly. .

(2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit."

According to the 1968 dishonest appropriation focuses upon taking something without the believe that a the person taking the property has the in law the right to deprive the other of it or if the appropriation of the property of another is without the other's consent (s.2).

¹⁹ Joined Cases C-447/08 and C-448/08, *Sjöberg and Gerdin*, delivered on 23 February 2010.

they lack a licence to do so. Strictly speaking the offering of their services is illegal if they do so in breach of a local law requiring a local licence or a complete prohibition on the said activity.²⁰ However, the licence conditions applicable to an operator in the jurisdiction of its establishment will carry through their operations to all players accessing the licensed website. It is highly unlikely that a reputable operator will operate one set of servers which complies with the licence requirements of the jurisdiction within which it is regulated whilst operating a separate IT infrastructural operation via which it supplies other markets in which it lacks a licence. Provisions upholding measures to counter criminal and fraudulent activity will encompass all players accessing the licensed site. Therefore it is inaccurate to suggest that players in a jurisdiction are at an equal risk of crime and fraud with domestically unregulated unlawful operators as they are with operators regulated elsewhere but who offer their services locally (actively or passively) without a local licence. Through taking this stance the argument is not being made that operators should be able to supply numerous markets on the basis of an 'export licence'²¹ and indeed numerous European jurisdictions are inching towards national licensing models. Rather than blindly equating regulated operators licensed in other jurisdictions with wholly unregulated outfits overstates the case and has the potential to disrupt necessary cooperation and coordination at the transnational level through placing regulated operators in the same camp as those which are wholly unregulated.²²

Against the backdrop of similar cross-border supply, into a jurisdiction with a monopoly in place, Portugal, the CJEU illustrates the approach taken to fraud. Ostensibly the Portuguese monopolist was in place to protect consumers against fraud conducted by operators, which was found to constitute an overriding reason in the public interest and thereby justify a measure (namely the monopoly) which restricted the cross-border movement of

²⁰ Although within European discourse questions will arise as to whether they were unlawfully excluded from the market and therefore cannot be sanctioned in relation to the market from which they were unlawfully excluded.

²¹ Such as that of Gibraltar which discussed in the context of EU free movement law in Case C-46/08, *Carmen Media*.

²² Against the backdrop of the European debate the following offers a working definition of illegal supply which is conditional upon the national licensing regime in place not being incompatible with EU law:

"illegal gambling may be defined as gambling in which operators do not comply with the national laws of the country where they offer services provided those national laws are in compliance with EU Treaty principles."

Legal framework for gambling and betting in the Member States of the European Union, Presidency Progress Report, Council of the European Union, 11th May 2010.

services into Portugal from elsewhere within the EU. The CJEU attributed a "high risk of crime or fraud" to the "scale of the earnings and the potential winnings on offer to gamblers."²³ Indeed, the whole online environment supposedly held more risks than the offline world with the CJEU proceeding to conclude:

"The lack of direct contact between the consumer and the on-line gambling operator gives rise to different and more substantial risks of fraud by operators against consumers compared to the traditional gambling market."²⁴

For those familiar with European case law on gambling this is nothing new, the CJEU in the 1990s held that lotteries have a 'peculiar nature' due to their associated risk of crime or fraud "given the size of the amounts which can be staked and of the winnings which they can hold out to the players" and the incitement to spend which they generate and the accompanying possibility of damage consequences to the individual and society.²⁵

Subsequently, having found the monopoly in question to be a suitable means to achieve the objectives behind the Portuguese legislation and thus the monopoly itself, the CJEU went on to find that regulation of private operators in their Member State of establishment:

"cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of crime and fraud, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators."²⁶

Considering that the Portuguese authorities had cited difficulties arising in them assessing the probity of operators established in other Member States the CJEU touches upon a different element notably the ability of national authorities to assess whether their licensees are fit for purpose. This is all the more remarkable given that neither was an argument made to this effect or evidence to suggest such difficulties prevailed.²⁷

Nevertheless it furthers the notion, without an evidential base, that private operations are liable to be sources of crime and fraud whereas the case-law has concentrated upon unlawfulness in terms of lacking a local licence rather than reasoning based upon findings of

²³ *Santa Casa*, para. 76.

²⁴ *Santa Casa*, para. 70.

²⁵ Case C-275/92, *Schindler*, [1994] ECR I-1039, para. 59.

²⁶ *Santa Casa*, para. 69.

²⁷ For a critique of this decision see Littler, A. 'Gambling Regulation in the European Union: Recent Developments', in Littler, A., Hoekx, N., Fijnaut, C. & Verbeke, A.-L. (eds), *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling* (Leiden; Martinus Nijhoff Publishers, 2011).

fraud and crime. Whilst it may be understandable that jurisdictions in the European context resist calls to mutually recognise export only gambling regulatory regimes (if this is not a contradiction in terms), and indeed Advocate General Mengozzi once asked in *Carmen Media* "[w]hy should Member States be obliged to accept a licence which is not valid for those who granted it?",²⁸ such an approach has two limitations. Firstly that where operators do not operate on the basis of a local licence they are deemed illegal, placed in the same category as wholly unlicensed operations which can have consequences in terms of combating fraud and cheating. Secondly, the notion is evidentially perpetrated that only consumers are the victims of crime and fraud rather than operators being vulnerable cheating and fraudulent activities or being the conduit for such activities.

The Relationship with Sports and Sports Integrity

Over recent years there have been numerous allegations that online sports-betting activities pose a serious threat to sport whilst linking operators of such services with match-fixing with relatively little attention to the distinction between regulated and unregulated operators. As an alternative explanation there may be a path dependent preference amongst some parties for state monopolies as evinced by the European Non-Governmental Sports Organisation's position aim to "protect the national lotteries and gambling systems" and to maintain "contributions from state-run lotteries and state-licensed gambling bodies".²⁹

Nevertheless it is necessary to consider the sport betting in detail given the attention which such threats to integrity receive so as further understand another area of potentially deceitful behaviour in the gambling sphere. In relation to activities undermining the integrity of sporting competitions the definition according to corruption gives a good feel for the issues at stake and their closeness with cheating and fraud:

"Corruption in sport involves any illegal, immoral or unethical activity that attempts to deliberately distort the result of a sporting contest for the personal material gain of one or more parties involved in that activity."³⁰

Deliberate distortion can be equated to what the Council of Europe understands to be:

²⁸ Case C-46/08, *Carmen Media*, Opinion of Advocate General Mengozzi delivered on 4th March 2010, para. 43.

²⁹ ENGSO mid-term Strategy Overview (2007-2011), as referred to in the reports *Sport Betting: Legal, Commercial and Integrity Issues*.

³⁰ Gorse, S. & Chadwick, S., 'Conceptualising Corruption in Sport: Implications for Sponsorship Programmes', *The European Business Review*, July/August 2010: 40-45.

"an irregular alteration of the course or the result of a sporting competition or any of its particular events (such as matches, races) in order to obtain an advantage for oneself or for others and to remove all or part of the uncertainty normally associated with the results of a competition."³¹

Such an alteration could take shape in a variety of ways to 'throw' a sporting competition so that the outcome of the game or competition is not determined by merit.

Nevertheless it is necessary to appreciate that threats to the integrity of sports do not arise solely, nor even primarily from sports-betting. Indeed a report prepared for the French Ministry of Sport notes that "[l]es paris en ligne n'ont pas créé la corruption dans la sport".³² A report on *The Prevalence of Corruption in International Sport* that the largest danger to the integrity of sports arises from doping with 95.64% of the instances of corruption in sport covered by the Report arising from doping. 2.73% of the cases arose due to match-fixing.³³ The Report found that match-fixing is not necessarily due to sports-betting and indeed betting operators can be defrauded by such activities. A total of 57.89% of the proven match-fixing cases studied in the Report were due to match-fixing.

This notwithstanding the Report for the French Ministry of Sport notes that "[l]es paris en ligne ont multiplié le nombre de personnes ayant un intérêt économique personnel à la manipulation des résultats des compétitions sportives", thereby suggesting that online sports-betting expands the number of people with an economic interest in manipulating sporting competitions. Whilst the size of the online gambling market has undoubtedly expanded, from €16.4bn being bet in 2004 to an estimated €50.7bn in 2012, thereby reaching a wider audience, online gambling is not only carried out by those licensed in reputable jurisdictions but also via unregulated or under-regulated operators and by betting syndicates in Asia. Many of the match-fixing scandals over the past decade have been traced back to such syndicates,

³¹ Recommendation CM/Rec (2011) 10 of the Committee of Ministers to member states on promotion of the integrity of sport to fight against manipulation of results, notably match-fixing, as adopted on 28 September 2011.

³² Monsieur Jean-François VILOTTE, 'PRESERVER L'INTEGRITE ET LA SINCERITE DES COMPETITIONS SPORTIVES FACE AU DEVELOPPEMENT DES PARIS SPORTIFS EN LIGNE. Prévention et lutte contre l'atteinte à l'intégrité et à la sincérité des compétitions sportives en relation avec le développement des paris sportifs'. Rapport à Madam Chanal JOUANNO, Ministre des Sports, le 17 mars 2011.

³³ Gorse, S. & Chadwick, S., *The Prevalence of Corruption in Sport: A Statistical Analysis*, Centre for the International Business of Sport, Coventry University Business School.

which even went as far as purchasing Belgian football clubs.³⁴ Whilst not condoning any under-estimation of the scale of the problem nor the seriousness of the issue in terms of potential damage to sport, it is worthy to note Forrest, McHale and McAuley who note that such scandals "provoke speculation that they are the tip of a much bigger iceberg and that many other cases of 'fixing' remain undetected".³⁵

Research has been conducted which seeks to establish the conditions under which sports betting is likely to constitute a threat to the integrity of sport. Forrest, McHale and McAuley identify relevant factors as;

- Liquidity; the greater the volume of betting the greater the incentive to fix an outcome. They consider that "[p]otentially the greatest absolute rewards to a successful fix will be found in the most liquid markets and here the risks of detection will also be lower since high bets will be commonplace."
- Increased competition; to remain competitive operators will offer bets which are more vulnerable to fixing, such as single bets in football.
- Modes of betting; the development of exchange betting whereby bettors can back a proposition (i.e. that team X will win) as well as lay (i.e. bet that team Y will lose). Therefore individuals perform the function traditionally exercised by the bookmaker.
- In-play betting; whereby bets can be placed during a particular event. The concerns raised by the authors focus on parts of a match being fixed rather than the final outcome. A player, especially in a one-on-one game such as tennis, could underperform, lose a set as agreed prior to the game, and still win the match. The authors note that underperformance is not caused by in-play betting as this practice has prevailed longer than in-play betting has prevailed but the availability of such bets may raise suspicions of fixing where they would not have arisen previously.

These considerations have to be balanced against the need for an attractive product range. Should permitted forms of bets and events on which they can be taken entail that licence holders are unable to satisfy consumer demand than in the absence of watertight range of

³⁴

³⁵ Forrest, D., McHale, I. & McAuley, K., *Risks to the Integrity of Sport from Betting Corruption*, A Report for the Central Council for Physical Recreation by the Centre for the Study of Gambling, University of Salford, February 2008, p. 2,

measures including financial payment blocking and ISP blocking players will flock to unregulated sites in unacceptably large numbers. Unregulated operators are unlikely to heed cooperative measures with sport governing bodies and thereby continue to provide a threat to the integrity of the sports betting industry and sporting competitions. Nevertheless, this appears to indicate that threats to the integrity of sport and the danger of match-fixing can arise through sports betting, where sports betting is used as a vehicle for third parties or unregulated operators to achieve criminal ends.

Operational and regulatory practices will be discussed subsequently, in particular to highlight the differences in approach between France and the United Kingdom.

3. Regulatory Responses

Without delving into operational and technical requirements which regulatory regimes and their licensing condition have the potential to contribute to avoiding cheating and fraud there are a number approaches which regulators can take. One approach is to take deter parties from engaging in cheating and fraudulent practices through the imposition of criminal penalties should they be detected and subsequently brought to justice (United Kingdom). Another is for the regulator to require that an operator report any suspicious betting activity to it and the relevant sporting body (United Kingdom), or the regulatory environment can restrict operators in terms of the sporting competitions on which they can take bets and the type of bets which can be offered (France). Each of these approaches will be reviewed in turn.

The Threat of Criminal Penalties

For this example attention is turned to the regulatory regime currently applicable in Great Britain where an explicit offence of "cheating at gambling" is established by the Gambling Act 2005.³⁶ An offence is committed when an individual cheats 'directly' or does something which assists or enables another person to cheat. Mens rea is required; should A do something without intent but enables B to cheat, then A will not have committed an offence. Therefore there must be a degree of intent to cheat or enable another to cheat, unwittingly obtaining undeserved gains falls outwith the scope of this provision.

³⁶ Section 42.

In accordance with s. 42(2) it is not necessary for a gain to have been made as a result of cheating nor for the action to have actually increased the cheat's chances of winning. Therefore it would seem that disrupting the gambling process but ultimately failing to gain in the manner hoped for, or in any other manner, will not serve as a defence. Furthermore s.42(3), without providing for an exhaustive definition of cheating establishes that actual or attempted deception or interference with the process by which gambling is conducted or any other real or virtual game, race or event or process to which the gambling relates is covered by the prohibition on cheating. By making reference to 'real', 'race' and 'event' it appears to include cheating in relation to sports-betting. Therefore this wide definition encapsulates cheating in relation to gambling services provided via an operator as well as using gambling services as a conduit for other activities such as match-fixing.

An important factor determining the effectiveness of a deterrent is the likelihood of criminal proceedings commencing. Potentially increasing the likelihood of this in Great Britain is the competence of the Gambling Commission,³⁷ the national regulatory body for the sector, to actually prosecute criminal offences under the Gambling Act,³⁸ in line with its *Licensing, compliance and enforcement statement*.³⁹ In describing the relationship between the Commission's regulatory powers and criminal investigation powers it states that it in "most cases" matters under investigation will be dealt with by exercising its regulatory powers. However, the document notes that circumstances dictate that there may be situations in which criminal investigations are merited, such as "if a licensee were suspected of cheating under section 42 of the Act" or if a licensee knowingly provided false information to the Gambling Commission. Where the Commission uncovers that "serious criminal offence may have been committed" then the case may be passed onto the police or other body.⁴⁰ In common with all public institutions the Gambling Commission is functions on the basis of limited means but the ability to investigate suspected criminal offences itself means that it does not have to rely upon the police with its set of priorities. Furthermore, the Gambling Commission is empowered to issue cautions as an alternative to prosecution.

³⁷ www.gamblingcommission.gov.uk

³⁸ Section 346, Gambling Act 2005.

³⁹ Gambling Commission, *Licensing, compliance and enforcement policy statement*, September 2009.

⁴⁰ *Ibid.*, para. 6.7.

The potential for such a mark to be held against a licensee's name with threats as to the likelihood of future license renewals could certainly act as a deterrent. However, for those acting wholly outside of the regulatory regime the deterrent effect will likely be reduced.

Reporting Duties

All licensees of the Gambling Commission are bound to *Licence Conditions and Codes of Practice* as a condition of their licence⁴¹ and in this manner Great Britain will be used as an example of the duty to report information to the Gambling Commission as one prong in ensuing effective enforcement. Generally speaking, and in this sense holders of licences for all types of gambling, remote and land-based, except for any betting related licences, are bound to provide the Gambling Commission with

"any information that they know relates to or suspect may relate to the commission of an offence under the Act, including an offence resulting from a breach of a condition or a code provision having the effect of a licence condition."⁴²

Many of these conditions do not relate to preventing cheating and fraud, but rather other matters pertinent to the regulation of gambling. Yet it does not exclude that the holder of a licence, say for casino gambling would be obliged to inform the Gambling Commission if they had reason to suspect that an offence was being committed under the Act. Given that cheating as defined in section 42 does not only cover licence holders but also participants and other parties, then it would appear that a casino operator would be obliged to inform the Gambling Commission about the activities of a cheating customer.

In light of concerns relating to match-fixing and potential harm to the integrity of sports licensees of betting services are placed under a more stringent duty to report the suspicion of an offence. Whilst they are subject to the generic duty to report the suspicion of an offence in terms of the Gambling Act and attached conditions they are also bound to do so where they suspect this "may lead the Commission to consider making an order to void a bet". Furthermore, those who accept bets, of facilitate the making or acceptance of bets between

⁴¹ Gambling Commission, *Licence Conditions and Codes of Practice (consolidated version)*, December 2011. For more information on this regulatory approach see Littler, A., *Member States versus the European Union: The Regulation of Gambling* (Leiden; Martinus Nijhoff Publishers, 2011) and Littler, A., 'Sports Betting in the United Kingdom', in Becker, T., (ed) *Zwischenbilanz zum Glückspielstaatsvertrag für Lotterien und Sportwetten. Beiträge zum Symposium 2010 der Forschungsstelle Glücksspiel*, (Frankfurt; Peter Lang GmbH, 2011).

⁴² *Ibid.*, clause 15.1.

others, on the events of horse races or other sporting events governed by a sport governing body listed in a schedule to the Act are also under a duty to provide information to the relevant sport governing body. This duty arises where the licensee suspects that information in their possession may lead to the Gambling Commission making an order to void a bet or where they suspect that a rule on betting applied by the relevant sport governing body has been breached. Consequently, Gambling Commission licensees are duty bound to be aware of the rules of a variety of UK orientated sports governing bodies which may or may not have different rules pertaining to sports betting.⁴³

British licensees are thus required only to report suspected breaches of sports governing bodies' rules in relation to competitions organised by such bodies which indicates a point of weakness. Namely, operators can take bets on competitions organised in other jurisdictions and therefore do not have to report suspected breaches of the rules of other sporting bodies. This illustrates the need for a degree of transnational understanding, which measures such as those upheld by ESSA⁴⁴ largely supported by private operators and SportAccord,⁴⁵ largely supported by public monopolists seek to achieve on their respective sides of the private operator - public monopolist divide.

What is more likely to be of value is the duty of operators to report any suspected activity which may cause the Commission to void a bet which is not conditional upon the rules and regulations of individual sporting bodies. Indeed, the list of governing bodies does not cover all the sports on which bets may be taken and therefore an overarching provision is necessary. Therefore sports for which the governing body is not listed will also benefit from the Commission's ability to void bets, dependent upon the contours of the Gambling Commission's competences in this regard.

⁴³ Part 3 of Schedule 6 of the Gambling Act 2005 refers to the England and Wales Cricket Board Limited, the Football Association Limited, the Football Association of Wales Limited, the Horseracing Regulatory Authority, the Lawn Tennis Association, the Irish Football Association Limited, the Jockey Club, the National Greyhound Racing Club Limited, the Professional Golfers' Association Limited, the Rugby Football League, the Rugby Football Union, the Scottish Rugby Union, the Scottish Football Association Limited, UK Athletics Limited and the Welsh Rugby Union Limited.

⁴⁴ European Sports Security Association, *Code of Conduct on Sports Betting for Athletes*, April 2010.

⁴⁵ SportAccord, *Model Rules on Sports Integrity in Relation to Sports Betting for all International Sports Federations and Organisations*, August 2011.

Within the Gambling Commission's *Licensing, compliance and enforcement policy statement*⁴⁶ details are set forth outlining the Commission's ability to void bets. The result of a bet being void is that any contract relating to the bet will be void and any money paid in relation to it must be paid back to the person who paid it, with such repayments being enforceable as debt. Yet the power to void a bet will only relate to parties to a bet in question and not bets placed by other parties on the same event. Bets will only be void where the Gambling Commission is "satisfied" that they were "substantially unfair" which is defined in relation to four factors:

1. One or both parties to the bet supplied information which was insufficient, false or misleading;
2. One or both parties believed, or out to have believed, that the race or event on which it was placed would contravene industry rules applicable to the event (although the Gambling Commission does not refer to whether these rules must be in relation to betting)
3. One or both of the parties believed, or ought to have believed, that cheating "had been, or was likely to be, committed in relation to the bet"; and
4. One or both parties to the bet have been convicted of cheating.⁴⁷

However, the Gambling Commission need not rely on information supplied by the market itself but also that arising through the "information and intelligence" collected by the Sports Betting Intelligence Unit which is active in relation to:

- Sporting events occurring in Great Britain, and/or
- Betting which involves parties based within Great Britain, and/or
- Gambling Commission licensees.⁴⁸

Seemingly this would suggest that the Gambling Commission will receive information regarding situations where the licensee is not based within the United Kingdom, or the event took place outside of the United Kingdom or a party placing the bet could also have been based outside the United Kingdom. Whilst, in the absence of cross-border cooperation with other national regulators, presuming that they have equivalent powers to void bets, the

⁴⁶ Gambling Commission, *Licensing, compliance and enforcement policy statement*, September 2009, section 5.41 onwards.

⁴⁷ *Ibid.*, clause 5.34.

⁴⁸ Gambling Commission, *Sports Betting Intelligence Unit terms of reference*, June 2010.

Gambling Commission nevertheless appears to have the ability to exert its influence over bets involving parties outside the United Kingdom. For example, bets taken by a British licensee could be void when taken regarding a football match involving a league of another country or involving a bettor residing outside the United Kingdom. However, it is hard to see how the Gambling Commission could void a bet between an operator licensed in another jurisdiction, on a game or event taking place in the UK.

Seemingly therefore this measure is buttressed by the jurisdictional reach of the Gambling Commission and may not cover all bets which have a connection to the United Kingdom. Nevertheless the ability to void bets on the basis of cheating and the duty of operators to report suspicion of events including those not primarily related to betting in theory should bring the Gambling Commission into close contact with the sector it regulates. Thereby, hopefully, reaching through to parties it does not regulate but whom its licensees for better or for worse have contact with. Ultimately however this approach is based on medicine, attempting to rectify a situation through voiding a bet which has already happened along with any possible detriment to the integrity of the sport in question. 'Possible' would seem apt given the fact that the Commission does not appear to need absolute proof in order to void a bet but further research is needed to establish the exact level of proof which it requires in practice. Voiding a bet and the possible consequences this may have in terms of licence renewal in terms of a licensee may have a deterrent effect but in essence this measure is reactive, addressing a situation once it has occurred. Whether the threat of a voided bet is an effective deterrent against cheating is unclear, but France has taken another approach whereby it attempts to regulate in detail a priori the nature of bets taken.

18

Focussing on Bets and the Types of Bet

Regulation of the gambling market in France is entrusted to 'ARJEL', the *Aurorité de regulation des jeux en ligne*⁴⁹ and pursuant to the 'regulated opening' of the market the land based monopolists for horserace and sports betting relinquished their online monopolies with

⁴⁹ www.arjel.fr

the establishment of a licensing regime to permit private operators to enter the online sphere. Online is also permitted in France pursuant to legislation introduced in May 2010.⁵⁰

Central to the regulatory regime is an attempt to uphold the integrity of sport, or at least attempt to ensure that providers regulated pursuant to ARJEL's licensing powers do not undermine such integrity. Article 13 of the law of May 2010 and Decree no. 2010-483⁵¹ bind licence holders to the forms of bets which they can take events upon which they can be taken.

Although competitions can be domestic or outside of France, whether sports-betting licensees can offer bets on an event depends upon it falls into the permitted category as determined by ARJEL. This depends, in accordance with Decree no. 2010-483 on:

- The quality of the organising body, be that a national or international one
- Rules applicable to the sporting event include provisions regarding the publication of the results;
- The age of participants in the sporting competition; and
- Whether the reputation of the event will ensure that there is sufficient betting.

Therefore for football the website of ARJEL lists many domestic, foreign and European competitions on which bets can be placed including premier and secondary leagues. Operators cannot take any form of bet on these listed competitions which they chose. Rather they are limited to those approved by ARJEL after the regulator has ascertained the opinion of the national sporting federation to understand the specificities of each sport and the risk of manipulation of certain result types.⁵² By doing so the objective is to prevent licensees being permitted to take bets on particular results which are vulnerable to manipulation.⁵³ Decree no. 2010-438 permits bets to be taken on the final results of a competition and results from phases within a competition however the results must be definable in an objective and quantifiable manner. Returning to football events include the final result of the match, the score at halftime, the next player to score and headed goals to name but a few of the long list.⁵⁴

⁵⁰ Loi no. 2010-476 du 12 mai 2010.

⁵¹ Décret no. 2010-483 du 12 mai 2010 relatif aux compétitions sportives et aux types de résultats sportifs définis par l'Autorité de régulation des jeux en ligne.

⁵² Report of Vilotte, para. 60.

⁵³ Ibid., para. 61 "Il s'agit de limiter des risques de fraude sportive, en refusant notamment l'organisation de paris sur des catégories de compétitions ou des types de résultats présentant un risque important de manipulation."

⁵⁴ Available at <http://www.arjel.fr/-Football-.html>.

French law also seeks to prevent conflicts of interest arising between betting operators and competition organisers pursuant to Article 32 of the Law of May 2010 by vesting ARJEL with the competence to review contracts between operators and organisers of sporting competitions. This measure is designed to ensure that operators do not take bets on a competition if they have direct or indirect control over the organiser or a stakeholder in the competition. Additionally participants within a competition are prohibited from disclosing inside information under the primary legislation, which the competition organiser must ensure under the Code on Sports.

The degree of effectiveness which this approach guarantees will become evident with practice and depends upon the ability of operators to detect fraudulent practices, information sharing practices between sporting bodies in France and the authorities as well as any deterrent effect. Nevertheless what has caused most controversy is the intellectual property right which French law vests in sports federations and organisers and with the Law of May 2010 uses to permit sporting competitions to charge a fee to operators taking bets on their competitions. Having determined which of the permitted sporting competitions an operator will take bets on, the operator then has to conclude an agreement with the relevant sporting body. Justifications for this measure are founded on the objective of preventing and detecting fraud to which supposedly sports and the organisers of such competitions are exposed to through the taking of bets on their events.

The Law of May 2010 has led to an amendment of the Sport Code which notes that the contract specifies the obligations of betting operators with regards to the detection and prevention of fraud and information exchange with the sports federation or competition organiser. It then establishes a basis for the federation or organiser to charge a fee for the costs incurred in detecting and preventing fraud.⁵⁵

Vilotte considers that this approach allows sports federations and competition organisers to place contractual obligations upon operators to be transparent in terms of the betting activities engaged in pursuant to that agreement, in terms of the liquidity bet upon events in question and any occurrences which are not present in the normal course of betting operations. As such this legalises the relationship between sports and operators, and thereby permits the regulatory regime to combat threats to the integrity of sporting competitions.

⁵⁵ Article L. 333-1-2- du code du sport.

However, Vilotte importantly notes that the objective of ARJEL is to protect the domestic market "that is to say French bettors".⁵⁶ Therefore he considers that ARJEL is only concerned with the protection of sporting events in France and its competence is restricted to bets offered by French licensees and therefore this does not exclude the threats to the integrity of competitions from operators based in other jurisdictions.

This illustrates the limitation of nationally focussed measures to respond to the threat of cheating, fraud, collusion and match-fixing as an example of such phenomena. How effective the French regime proves to be in relation to that embodied within the British regime remains to be seen. Ultimately the French regulator lacks the ability to void bets in a manner comparable to its British counterpart. Whilst British licence holders are duty bound to report suspicious behaviour to the Gambling Commission they are permitted greater economic freedom in terms of their being no limitation upon the type of bets they can take on sporting competitions. In contrast the freedom of French licensees to choose which events they will take bets and the type of bets is restricted by the regulator and forming a contract with the sporting body. It is unclear what happens with the information once it is exchanged within the French system. Technology underpinning operators' systems detecting cheating and fraudulent practices

France's approach however is not without its controversy and feeds into that surrounding the relationship between sport and gambling operators. Within a wider discourse the European Parliament's report on Integrity of Online Gambling noted that "sports bets are a form of commercial exploitation of sporting competition"⁵⁷ on the basis that sports betting operators obtain the input of their business model without paying anything to sporting competitions. The European Parliament then recommended that "Member States ... put in place arrangements to ensure fair financial returns for the benefit of all levels of professional sport and amateur sport [and] calls on the Commission to examine whether it is possible to give competition organisers an intellectual property right (some sort of *portrait right*) over their competitions." Indeed, this reflects the French model and is subject to criticism from the

⁵⁶ Report of Vilotte, para. 78

⁵⁷ European Parliament resolution of 10 March 2009 on the integrity of online gambling, 10 March 2009, (2008/2215(INI)).

industry that private operators do not free-ride on sports but contribute through sponsorship deals.⁵⁸

4. Operator Based Measures

Online gambling creates a considerable volume of data which is of interest to both regulators and operators alike to ensure that regulatory standards are met yet equally that an operator is not subject to fraudulent activities independent from regulatory concerns. However operational practice in terms account opening, identity verification, payment transfers (with anti-money laundering measures) will contribute to reducing the scope for fraudulent activity to occur.⁵⁹ Yet operators will be incentivised to combat fraudulent activity through the threat it poses to the generation of revenues. Therefore the considerable data trail online gambling generates offers a wealth of information with which operators can establish thresholds and build software continuously monitor for unwanted behaviour.

The following sections provide an idea of such measures. For example terms of collusion between players in tournament games operators should review data generated by gambling activities for the following types of behaviour:

- "two or more customers always sit down at the same virtual poker table,
- two or more customers have the same account or credit card data,
- two or more customers have similar user names, similar passwords, similar addresses."⁶⁰

Furthermore customers with multiple accounts or collaboration between customers may be characterised by similar customer details, user names and passwords, e-mail addresses along with identical bank accounts and the same log-in times and gaming interests.⁶¹ Only permitting a single account per customer should go some way to averting cheating and fraudulent activities through the use of multiple accounts by a single individual and for such purposes account opening and identity verification procedures are of significance. If they are insufficiently robust then an individual could play against herself. However robust the

⁵⁸ See *Sports Betting: Legal, Commercial and Integrity Issues*, p. 73-76.

⁵⁹ Expand in line with approach taken in other chapters.

⁶⁰ TÜV Rheinland Secure iT, p. 22.

⁶¹ *Ibid.*

account opening and verification procedures are should two or more account holders decide to collude then reliance has to be made upon data analysis. Regulatory requirements in some jurisdictions require that a single bank account is connected to the player account and that when a player cashes out money is can only be transferred to the account from which the stake or deposit was originally paid in from.⁶² However if two spouses were to open separate player accounts and yet nominate their joint bank account then this would be one situation in which an operator would end up with the same bank account connected to more than one player account.

Should an individual with fraudulent intent have managed to pass the account opening and verification checks, or should players who opened accounts in good faith and subsequently engaged, then an operator's best line of defence is to analyse gambling behaviour. Betfair notes how it has a fraud management system with 'neural learning capabilities' to profile behaviour by considering variables including "customer information, login data, player activity and deposit patterns in order to identify anomalous behaviour". Furthermore continuous analysis of trends and patterns in fraudulent behaviour are used to modify the thresholds used in the profile models.⁶³ Further information needs to be obtained from a broad range of operators as to what their practices and techniques are to the extent that they are prepared to reveal them publically.

In a similar manner monitoring player behaviour enables operators to be alert to possible manipulation of sports competitions or use of insider knowledge which they can then transfer to sports governing bodies or the national gambling regulatory authority should they be subject to a condition requiring them to report suspicious activities. However, any reporting agreements, memoranda or obligations are only effective if information comes to light. Betting behaviour indicative of play in response to a threat to the integrity of sports could derive from:

- Customers placing bets on sports which they do not normally bet on;
- Customers placing unusually high bets in relation to past play;
- Customers attempting to carry out transactions from a different country than that of their registration; and

⁶² This requirement being important in terms of anti-money laundering policies.

⁶³ Betfair response to Green Paper, answer to Question 29.

- Customers using a different deposit method than normal.⁶⁴

However, experience shows that operators also need to draw upon the overall betting patterns in relation to both pre-match and live betting with regard to whether the volume of bets placed is exceptionally high in relation to the level of the teams playing. Operators will build up over time knowledge as to what constitutes a normal degree of liquidity for betting on sports and at different levels within the sport, with lower levels of liquidity anticipated for lower league sports. Should levels bet be out of the normal range then this should be such a trigger. Secondly monitoring activities can pickup changes in odds. Indeed, the history of online sports betting is punctuated with moments where operators have highlighted movements in betting patterns which have indicated that fraudulent activity was under why and therefore all bets have been pulled.⁶⁵

Technical or more detailed information on how operators configure their systems is, unsurprisingly perhaps, not widely available and further research is needed to elaborate on how parameters are set and player behaviour reviewed.

24

5. Some Concluding Thoughts so Far

Cheating and fraud have widely been perceived as a danger to consumers and relatively little regulatory attention has been given as to how it may impact operators. Whilst France takes the approach of seeking to filter out what it considers to be higher risk activities the United Kingdom relies upon an approach of reporting, indeed operators are under a duty to do so. The triggering of criminal investigations, reporting to authorities and sports governing bodies is only as valuable as the information which is fed into this machinery. Best practices on how to identify events suspect events are broadly described by operators at best and do not appear to receive any regulatory attention in the jurisdictions reviewed. Further understanding needs to be ascertained to consider in detail, rather than in generic terms, what best practices could be in this regard. An answer to this will help establish how truly valuable reporting requirements are currently, and have the potential to be.

In the most part regulatory approaches and the competence of regulators are divided along jurisdictional lines which will only serve to weaken the response and the use made of information gathered where cheating and fraudulent activities take place in a cross-border

⁶⁴ TÜV Rheinland Secure iT, p. 23.

⁶⁵ See for example instances provided for in *The Prevalence of Corruption in International Sport*.

situation. Although this contribution has not delved into examples of match-fixing those detailed elsewhere illustrate that it frequently has a cross-border component.⁶⁶ Closer attention needs to be paid to the work of bodies such as ESSA as well as the establishment of Memoranda of Understanding between regulatory bodies as a means of bilateral strength building. How such measures feed into transnational cooperation must be a topic of discussion because best practices in this field do not appear to be relevant only for regulated operators. Rather they seemingly will have a role for regulators too.

⁶⁶ *The Prevalence of Corruption in International Sport.*