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Reproducing Responsible Gambling through Codes of Conduct: The Role of Trade Associations and Codes of Conduct in Shaping Risk Regulation

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Abstract

Online gambling emerged in the 1990s in the midst of a process of market liberalisation. Here, scholars have argued that the gambling industry actively seeks state regulation to authorise and legitimate its activities. Why then, since the emergence of the online gambling industry, have trade associations continually sought to develop responsible gambling codes of conduct? In this paper, I address this puzzle by documenting and tracing the development and deployment of responsible gambling codes of conduct by trade associations from the emergence of the online gambling industry in the early 1990s and through processes of increased market liberalisation at the national level and market integration at the European Union level. I argue that online gambling trade associations deploy responsible gambling codes of conduct at particular moments of opportunity to shape their members' external legal and regulatory environment and to reproduce and embed a particular understanding of how gambling-related risks should be regulated.

Keywords: Gambling; online gambling; responsible gambling; risk; self-regulation; trade associations

1. Introduction

Risk is central to the consumption experience of gambling whilst at the same time gambling produces risks of individual and societal harm.¹ As Reynolds notes, “[r]isk has always been an inherent component of gambling”.² Online gambling emerged in the early 1990s in the midst of a process of market liberalisation that began in the 1980s.³ This process of market liberalisation was tied closely to a growing belief in neoliberal ideals of deregulation, competitive markets and a shrinking role of the state, along with

¹ JF Cosgrave, “Governing the Gambling Citizen: The State, Consumption and Risk” in JF Cosgrave and TR Klassen (eds), *Casino State: Legalized Gambling in Canada* (Toronto, University of Toronto Press 2009) p 46; G Reith, “Techno Economic Systems and Excessive Consumption: A Political Economy of ‘Pathological’ Gambling” (2013) 64 *The British Journal of Sociology* 717, 725; JP Villeneuve, “Gambling Regulation and Risk” (2010) 4 *European Journal of Risk Regulation* 415, 418; S Planzer and A Alemanno, “Lifestyle Risks: Conceptualising an Emerging Category of Research” (2010) 4 *European Journal of Risk Regulation* 335; D Casey, “Risk, Charity, and Boundary Disputes: The Liberalization and Commercialization of Online Bingo in the European Union” (2018) 30 *Journal of Law and Social Policy* 36.

² J Reynolds, “Gambling on Big Data: Designing Risk in Social Casino Games” (2019) 10 *European Journal of Risk Regulation* 116, 129.

³ SF Kingma, “The Liberalization and (Re)regulation of Dutch Gambling Markets: National Consequences of the Changing European Context” (2008) 2 *Regulation & Governance* 445; Reith, *supra*, note 1.

the valorisation of individual choice and responsibility.⁴ Here, concerns with individual- and societal-level harm and questions of how risk is perceived and regulated are central to the process of gambling market liberalisation.

Despite the virtual and transboundary nature of online gambling, there is a crucial material aspect to the online gambling industry in the sense that gambling operators must be physically located in individual states and jurisdictions.⁵ As Wilson explains, “far from being divorced from place, online gambling is a product of the unique institutional conditions created by governments through policy and the legal system, and as such is very much the product of specific locations”.⁶ Consequently, the regulatory environments of states and jurisdictions are central to understanding the activities of the online gambling industry. We must recognise that the regulatory environment in which organisations operate not only constrains but also empowers certain organisational forms and actions.⁷ Flowing from this, scholars have argued that the gambling industry actively seeks state regulation in order not only to authorise but also to legitimate its activities.⁸

Why then, since the emergence of the industry, have online gambling trade associations continually sought to develop responsible gambling codes of conduct? In this paper, I address this puzzle by documenting how and why online gambling trade associations have developed and used responsible gambling codes of conduct. I trace these activities from the emergence of the online gambling industry in the early 1990s and through processes of market liberalisation at the national level and market integration at the European Union (EU) level. I argue that online gambling trade associations deploy responsible gambling codes of conduct at particular moments of opportunity to shape their members’ external environment. Responsible gambling codes of conduct are used to construct, reproduce and embed a particular understanding of gambling-related risks and how these risks should be regulated. In making this argument, I draw upon and seek to contribute to the work of critical gambling scholars who spotlight how the gambling industry seeks to shape how we understand gambling and the regulation of gambling-related risks, along with socio-legal scholarship concerned with the relationship between mechanisms of self-regulation and legal rules.

The analysis in this paper draws upon research undertaken in the context of The Bingo Project.⁹ In addition to informal conversations, scoping chats and participant observation at industry events, forty semi-structured interviews with online gambling stakeholders were conducted.¹⁰ The interviews were recorded and transcribed, with final transcripts approved by the interviewees. The interviews were anonymous and confidential. Following data collection, I analysed and coded the data with NVIVO in order to draw out key themes.

The paper proceeds in four sections. Firstly, I lay some conceptual groundwork by unpacking and linking the concepts of trade associations, self-regulation and the regulatory environment of organisations. From here, I explore the history of the concept

⁴ F Markham and F Young, “‘Big Gambling’: The Rise of the Global Industry-State Gambling Complex” (2015) 23 *Addiction Research & Theory* 1, 2.

⁵ B Beem and J Mikler, “National Regulations for a Borderless Industry: US versus UK Approaches to Online Gambling” (2011) 30 *Policy and Society* 161, 163; N Zborowska et al, “Regulation and Reputation: The Gibraltar Approach” in R Williams et al (eds), *Routledge International Handbook of Internet Gambling* (Abingdon, Routledge 2012) p 104; C Scott, “Regulatory Innovation and the Online Consumer” (2004) 26 *Law & Policy* 477.

⁶ M Wilson, “Chips, Bits, and the Law: An Economic Geography of Internet Gambling” (2003) 35 *Environment and Planning A: Economy and Space* 1245, 1246.

⁷ MC Suchman and LB Edelman, “Legal Rational Myths: The New Institutionalism and the Law and Society Tradition” (1996) 21 *Law & Social Inquiry* 903, 923.

⁸ Beem and Mikler, *supra*, note 5, 163.

⁹ K Bedford et al, *The Bingo Project: Rethinking Gambling Regulation* (Canterbury, University of Kent 2016).

¹⁰ Interviewees included national regulators (13), online gambling operators (9), lottery operators (4), responsible gambling consultants (4), gambling software providers (4), gambling trade associations (2), charities (1), testing houses (1), lawyers (1) and affiliate marketers (1).

of responsible gambling, its use by the gambling industry and the importance of state regulation for the gambling industry. Building upon these two sections, the paper then traces how online gambling trade associations have developed and deployed responsible gambling codes of conduct from the emergence of the industry and through processes of market liberalisation and integration.

II. Trade associations and the regulatory environment

Trade associations are organisations that represent the interests of specific industries and mobilise firms to allow for collective industry-wide action that addresses common problems.¹¹ Trade associations tend to emerge during the early years of an industry, when collective action is required to gain legitimacy for novel organisations.¹² Collective action facilitates new industries in acquiring moral and regulatory acceptance whilst allowing industries to organise around common goals such as shaping regulation and markets.¹³ Certain industries, such as the alcohol industry, need trade associations as their activities produce risks that pose structural challenges and affect entire industries.¹⁴ A central feature of trade associations is that they are established and operate not only to create “a negotiated environment for members”, but also “to actively affect [the] environment beyond the boundaries” of the trade associations.¹⁵ Mechanisms of self-regulation are central to these functions.

Trade associations produce self-regulation to facilitate interaction and collective action, to address risks and to influence the status, credibility and legitimacy of their members.¹⁶ More concretely, self-regulation is central to trade associations’ attempts to influence regulation, government policy, public opinion and members’ behaviour.¹⁷ By creating self-regulation, trade associations provide “cultural infrastructure” for their members, enabling them to connect with and shape meaning within their environment.¹⁸

Conceiving of self-regulation as “cultural infrastructure” resonates with findings from law and society scholarship. Socio-legal scholars have argued that trade associations play an important mediating role in markets.¹⁹ Here, trade associations and self-regulation are

¹¹ HE Aldrich and UH Staber, “Organizing Business Interests: Patterns of Trade Association Foundings, Transformations, and Deaths” in GR Carroll (ed.), *Ecological Models of Organization* (Cambridge, MA, Ballinger 1998) p 111.

¹² ML Barnett, “One Voice, but Whose Voice? Exploring What Drives Trade Association Activity” (2012) 52 *Business & Society* 213, 216.

¹³ HE Aldrich and MA Martinez, “Entrepreneurship as Social Construction: A Multilevel Evolutionary Approach” in ZJ Acs and DB Audretsch (eds), *Handbook of Entrepreneurship Research: An Interdisciplinary Survey and Introduction* (Berlin, Springer 2010) pp 405–06.

¹⁴ LH Christiansen and JJ Kroezen, “Institutional Maintenance through Business Collective Action: The Alcohol Industry’s Engagement with the Issue of Alcohol-Related Harm” in J Gehman et al (eds) *Research in the Sociology of Organizations: How Institutions Matter* (Bingley, Emerald 2016).

¹⁵ H Berkowitz and S Bor, “Why Meta-Organizations Matter: A Response to Lawton et al. and Spillman” (2018) 27 *Journal of Management Inquiry* 204, 207; S Cropper and S Bor, “(Un)bounding the Meta-Organization: Co-evolution and Compositional Dynamics of a Health Partnership” (2018) 8 *Administrative Sciences* 42.

¹⁶ G Ahrne and N Brunsson, “Organizations and Meta-Organizations” (2005) 21 *Scandinavian Journal of Management* 429, 442; Berkowitz and Bor, supra, note 15, 206.

¹⁷ T Rajwani et al, “The ‘Voice of Industry’: Why Management Researchers Should Pay More Attention to Trade Associations” (2015) 13 *Strategic Organization* 224, 225.

¹⁸ TC Lawton et al, “Why Trade Associations Matter: Exploring Function, Meaning, and Influence” (2018) 27 *Journal of Management Inquiry* 5; L Spillman, “Meta-Organization Matters” (2018) 27 *Journal of Management Inquiry* 16.

¹⁹ N Gunningham and J Rees, “Industry Self-Regulation: An Institutional Perspective” (1997) 19 *Law & Policy* 363; F Furger, “Accountability and Systems of Self-Governance: The Case of the Maritime Industry” (1997) 19 *Law & Policy* 445.

significant in the development of “an industry morality”.²⁰ An industry morality “defines right conduct”, “legitimizes aspirations other than profit as a good reason for action” and “provides a legitimate account of the industry’s activities to the public”.²¹ The development of an industry morality allows an industry to address “demands that it is responsible and responsive”.²²

An industry morality, articulated through forms of self-regulation, tends to arise “under conditions of uncertainty” caused by external pressures.²³ Self-regulation frequently emerges when an industry perceives of “the future prosperity and perhaps even the very survival of the industry as dependent upon some form of self-control”.²⁴ Industry self-regulation is often developed when states authorise an industry to regulate or threaten (more stringent) legal intervention or where states’ regulatory frameworks are “insufficient to protect the industry from itself”.²⁵ Therefore, there is a crucial connection between organisations’ legal and regulatory environment and the development of self-regulation.

While law may appear as a constraint on organisations, with the relationship between law and organisations characterised by confrontation and contestation, this is not always the case.²⁶ Rather than seeing law as constraining organisational freedom, law can construct, justify and authorise organisations and their activities, and organisations often “seek and exalt legal attention, as part of larger projects of structuration and legitimation”.²⁷ For example, organisations often use regulatory approval to signal their legitimacy.²⁸ Furthermore, regulatory regimes rarely emerge independently of the organisations they seek to govern, and organisations play a central role in debates about how they are regulated.²⁹ The key point here is that the legal and regulatory environment in which organisations operate both constrains and empowers, and organisations may seek out and attempt to shape this part of their environment.³⁰ In this respect, there is an important relationship between the state, law and industry self-regulation.

III. Responsible gambling and the regulation of risk

The concept of responsible gambling emerged from the gambling industry in the USA in the 1980s.³¹ However, it was not until the 1990s that the concept of responsible gambling came to prominence due to the work of land-based gambling trade associations in the USA

²⁰ Gunningham and Rees, *supra*, note 19.

²¹ *ibid*, 376.

²² P Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, CA, University of California Press 1992) p 237, cited in J Rees, “Development of Communitarian Regulation in the Chemical Industry” (1997) 19 *Law & Policy* 477, 484.

²³ Gunningham and Rees, *supra*, note 19, 391; J Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago, IL, University of Chicago Press 1994); C Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge, Cambridge University Press 2002) p 53.

²⁴ Gunningham and Rees, *supra*, note 19, 391.

²⁵ JL Campbell, “Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility” (2007) 32 *Academy of Management Review* 946, 955.

²⁶ LB Edelman and MC Suchman, “The Legal Environments of Organizations” (1997) 23 *Annual Review of Sociology* 479, 480.

²⁷ Suchman and Edelman, *supra*, note 7, 923; GC Shaffer, “How Business Shapes Law: A Socio-Legal Framework” (2009) 42 *Connecticut Law Review* 147, 153.

²⁸ R Suddaby et al, “Legitimacy” (2017) 11 *Academy of Management Annals* 451, 456.

²⁹ *ibid*, 488–89.

³⁰ Shaffer, *supra*, note 27, 153; J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press 2000) p 481.

³¹ HJ Shaffer et al, “Responsible Gambling and Its Stakeholders: An Overview” in HJ Shaffer et al (eds), *Responsible Gambling: Primary Stakeholder Perspectives* (Oxford, Oxford University Press 2019) p 6.

and Australia. In 1995, the US gambling industry formed the American Gaming Association. The American Gaming Association emerged in response to mounting governmental scrutiny of the industry through the National Gambling Impact Study Commission and increasing industry recognition that “problem gambling” could lead to the demise of the industry.³² Frank Fahrenkopf, the then president of the American Gaming Association, explained at the time that “the growth of the industry is certainly endangered by the issue” of “problem gambling”, and “it is not hyperbole to say that the industry’s very existence is at stake”.³³ Drawing parallels, Fahrenkopf outlined how the tobacco industry had previously paid the price for failing “to admit that there was a problem” and stalling “in their commitment to acting responsibly”.³⁴ The gambling industry, Fahrenkopf said, would have to respond appropriately and proactively to the issue of “problem gambling”.³⁵ More recently, Fahrenkopf made it clear “that owning, or at least influencing the narrative was going to be key to keeping gambling legal in the US”.³⁶

The American Gaming Association established the National Centre for Responsible Gaming in 1996, a charitable organisation, to fund research into “disordered gambling behaviour”, and it published the “Responsible Gaming Resource Guide” in the same year. In 2003, the American Gaming Association published “the American Code of Conduct for Responsible Gaming”. Indeed, Aldrich and Martinez discuss this episode in their analysis of the emergence of trade associations.³⁷ They draw attention to the emergence of the American Gaming Association as an example of the role that trade associations play in promoting collective action to gain socio-political legitimacy and regulatory approval and “to solicit their own regulation to ward off more drastic action by government”.³⁸

The Australian Gaming Association and the American Gaming Association were central to the development of the influential Reno Model for responsible gambling.³⁹ As Hancock and Smith explain, the Reno Model “emerged from collegial roundtables supported by government and commercial gambling interests”.⁴⁰ The Reno Model defines responsible gambling as “policies and practices designed to prevent and reduce potential harms associated with gambling”.⁴¹ Whilst the Reno Model sets out specific responsibilities for the state, industry and individual, it is telling that, “[o]nce informed about the attributes of an activity, gamblers assume the burden of gambling responsibly”.⁴² Thus, the Reno Model

³² ND Schüll, *Addiction by Design: Machine Gambling in Las Vegas* (Princeton, NJ, Princeton University Press 2012) p 260.

³³ *ibid*, 260.

³⁴ S Skolnik, *High Stakes: The Rising Cost of America’s Gambling Addiction* (Boston, MA, Beacon Press 2011) p 136.

³⁵ *ibid*, 137.

³⁶ BMM Testlabs, “The American Gaming Association: Past, Present and Future” (BMM, 2019) 3 <<http://bmm.com/wp-content/uploads/2019/01/BMM-White-Paper-The-AGA-Digital.pdf>> (last accessed 27 October 2022).

³⁷ Aldrich and Martinez, *supra*, note 13.

³⁸ *ibid*, 406.

³⁹ Shaffer et al, *supra*, note 31, 6–8; A Blaszczynski et al, “Responsible Gambling: General Principles and Minimal Requirements” (2011) 27 *Journal of Gambling Studies* 565; A Blaszczynski et al, “Informed Choice and Gambling: Principles for Consumer Protection” (2008) 2 *Journal of Gambling, Business and Economics* 103; A Blaszczynski et al, “A Science-Based Framework for Responsible Gambling: The Reno Model” (2004) 20 *Journal of Gambling Studies* 301; P Collin et al, “Responsible Gambling: Conceptual Considerations” (2015) 3 *Gaming Law Review and Economics* 594.

⁴⁰ L Hancock and G Smith, “Critiquing the Reno Model I–IV International Influence on Regulators and Governments (2004–2015) – the Distorted Reality of ‘Responsible Gambling’” (2017) 15 *International Journal of Mental Health and Addiction* 1151, 1155. In particular, see discussion at pp 1160–63 relating to the issue of gambling industry funding and links between the gambling industry and the main authors of the “Reno Model”. See also the “Reno Model” authors’ response to these criticisms: HJ Shaffer, A Blaszczynski and R Ladouceur, “Truth, Alternative Facts, Narrative, and Science: What Is Happening to Responsible Gambling and Gambling Disorder?” (2017) 15 *International Journal of Mental Health Addiction* 1197.

⁴¹ Blaszczynski et al, “A Science-Based Framework for Responsible Gambling”, *supra*, note 39, 301.

⁴² Blaszczynski et al, “Responsible Gambling”, *supra*, note 39, 567.

plays an important discursive role in terms of framing the individual as bearing the primary responsibility to regulate risk and minimise gambling-related harm. In this context, the gambling industry “generally embrace[s] Reno Model precepts because they do not unduly affect business as usual yet give the impression that reducing gambling-related harm is a high priority”.⁴³

The gambling industry’s promotion of responsible gambling and its emphasis on problem gambling have been focuses of attention by critical gambling scholars. Insightfully, Cassidy argues that the gambling industry seeks to shape how we understand gambling through the “maintenance” of the “tropes” of problem gambling and responsible gambling.⁴⁴ The concept of problem gambling, especially in situations where it is linked to a medical diagnosis that pathologises individuals, creates a dichotomy between the majority of responsible gamblers and the minority of “problem gamblers”. The concept of problem gambling also “deflect[s] attention away from the [gambling] product’s potentially problematic role in promoting that consumption, and onto the biological and psychological vulnerabilities of a small minority of its consumers”.⁴⁵ Furthermore, scholars have argued that the gambling industry and other stakeholders have “constructed and reproduced” the concept of responsible gambling around the values of individual freedom and informed choice.⁴⁶ This model of responsible gambling “emphasises education, minimal interventions and self-management” and de-emphasises “restrictions on the supply of gambling that might impact on the rights of the ‘normal’ majority to consume freely”.⁴⁷ Although there is evidence that responsible gambling initiatives, including the provision of information, messaging, voluntary self-exclusion and spend- and time limit-setting (pre-commitment strategies), have some benefit, this evidence is limited, and studies have shown low awareness, uptake and effectiveness of such tools in reducing gambling-related harm.⁴⁸ In challenging this dominant responsible gambling discourse, scholars and practitioners have increasingly advocated a public health approach to gambling regulation that seeks to advance the public good, recognise that gambling-related harm extends beyond the individual “problem gambler” and minimise and avoid harm by targeting gambling products and environments.⁴⁹

⁴³ L Hancock and G Smith, “Replacing the Reno Model with a Robust Public Health Approach to ‘Responsible Gambling’: Hancock and Smith’s Response to Commentaries on Our Original Reno Model Critique” (2017) 15 *International Journal of Mental Health Addiction* 1209.

⁴⁴ R Cassidy, “How Corporations Shape Our Understanding of Problems with Gambling and Their Solutions” in N Kenworthy et al (eds), *Case Studies on Corporations and Global Health Governance Impacts, Influence and Accountability* (Lanham, MD, Rowman & Littlefield 2016) p 90.

⁴⁵ Schüll, *supra*, note 32, 261.

⁴⁶ S Alexius, “Assigning Responsibility for Gambling-Related Harm: Scrutinizing Processes of Direct and Indirect Consumer Responsibilization of Gamblers in Sweden” (2017) 25 *Addiction Research & Theory* 462, 462; Cassidy, *supra*, note 44, 90.

⁴⁷ Alexius, *supra*, note 46, 462; Cassidy, *supra*, note 44, 90.

⁴⁸ See, for example, A Drawson et al, “The Use of Protective Behavioural Strategies in Gambling: A Systematic Review” (2017) 15 *International Journal of Mental Health and Addiction* 1302; R Ladouceur et al, “Responsible Gambling: A Synthesis of the Empirical Evidence” (2017) 25 *Addiction Research & Theory* 225; C Livingstone et al, *Identifying Effective Policy Interventions to Prevent Gambling-Related Harm* (Melbourne, Victorian Responsible Gambling Foundation 2017); Hancock and Smith, *supra*, note 40; Gambling Commission, *Gambling Participation in 2018: Behaviour, Awareness and Attitudes* (London, Gambling Commission 2019); S Gainsbury et al, “Use of Consumer Protection Tools on Internet Gambling Sites: Customer Perceptions, Motivators, and Barriers to Use” (2020) 36 *Journal of Gambling Studies* 259; P Delfabbro and D King, “The Value of Voluntary vs. Mandatory Responsible Gambling Limit-Setting Systems: A Review of the Evidence” (2021) 21 *International Gambling Studies* 255.

⁴⁹ See, for example, Hancock and Smith, *supra*, note 40; C Livingstone et al, *Identifying Effective Policy Interventions to Prevent Gambling-Related Harm* (Melbourne, Victorian Responsible Gambling Foundation 2017); M van Schalkwyk et al, “A Public Health Approach to Gambling Regulation: Countering Powerful Influences” (2021) 6 *Lancet Public Health* 614.

Following from the critiques of responsible gambling, and given the inherent conflict between the “industry’s responsibility rhetoric and the profits it reaps from irresponsibility”, scholars have argued that responsible gambling is but a mere public relations exercise and a means by which the industry seeks to manage its regulatory risk and legitimacy.⁵⁰ Indeed, the manner and way in which the gambling industry discursively frames and communicates its activities is a key aspect of how it manages risk and builds legitimacy.⁵¹

IV. Self-regulation, risk and industry survival

The first online gambling sites emerged during the middle of the 1990s. At the time, and to some extent still today, online gambling was an offshore industry. Remembering back, an interviewee with decades of experience working for online gambling operators explained:

[B]ack then [2000] it was very grey . . . The product was ahead of the legal system. So, back then it was only two or three places . . . that had actually proactively said: “yes, we will license online gaming”. The rest of the world hadn’t said: “no, you can’t” but at the same time hadn’t said: “yes, you can”.⁵²

The offshore jurisdictions favoured by the early online gambling operators, such as the Kahnawá:ke territory, Curaçao, Gibraltar and Malta, offered not only favourable taxation regimes, but also minimal regulation of the gambling products.⁵³ The first online gambling trade associations begin to appear in the early 2000s when the online gambling industry was still in its infancy.

I. Legitimizing the offshore industry

The emergence of online gambling trade associations during the founding years of the industry is to be expected. Not only are trade associations formed during this period, but they quickly get to work on the development of responsible gambling codes of conduct. In 2003, e-Commerce and Online Gaming Regulation and Assurance (eCOGRA) and was one of the first online gambling trade associations to develop an online gambling code of conduct. eCOGRA outlined that its members must share its vision “towards fair and responsible gambling”.⁵⁴ At the time, eCOGRA’s membership was open only to online gambling software providers. Its founding members were Virtual Holdings (which would later become 888 Holdings) and Microgaming Software Systems (the first online gambling software provider).⁵⁵ Both of these members operated out of Antigua and between them controlled over 70% of the online casino market. Later, online gambling providers that operated out of the Kahnawá:ke territory, such as Party Gaming and Playtech, joined eCOGRA.

⁵⁰ Cosgrave, *supra*, note 1, 60; J Orford, “The Gambling Establishment and the Exercise of Power: A Commentary on Hancock and Smith” (2017) 15 *International Journal of Mental Health and Addiction* 1193, 1195; Schüll, *supra*, note 32, 207.

⁵¹ Kingma, *supra*, note 3, 447.

⁵² Interview EU-27.

⁵³ Interview EU-20: Online gambling operator.

⁵⁴ eCOGRA, “eCOGRA Procedures” (eCOGRA, 2003) <<http://web.archive.org/web/20031026220249/http://www.ecogra.com/Procedures/DEFAULT.HTM>> (last accessed 27 October 2022).

⁵⁵ CR Janower, “Gambling on the Internet” (1996) 2 *Journal of Computer-Mediated Communication* 0; R Williams et al, “History, Current Worldwide Situation, and Concerns with Internet Gambling” in R Williams et al (eds), *Routledge International Handbook on Internet Gambling* (Abingdon, Routledge 2012).

The perceived need for collective action in order to address the lack of effective regulation in offshore jurisdictions was a key driver of the emergence of eCOGRA and its eCOGRA Generally Accepted Practices (eGAP) code of practice. Indeed, in outlining the benefits to operators, eCOGRA pointed towards the ability of the eGAP code of practice to address the “clear deficiencies in the appropriateness of most of the worldwide regulatory jurisdictions involved in online gaming”.⁵⁶ During the early 2000s, there was concern amongst large online gambling operators that the regulatory frameworks of the offshore jurisdictions from which they operated were insufficient to ensure credibility and trust in the industry. Speaking at this time, the CEO of Virtual Holdings noted:

In the absence of appropriate player protections being implemented by regulators on a global scale ... The [eCOGRA] seal will become an instant symbol to the players that they can trust the site to offer fair games and honest, timely payment transactions.⁵⁷

eCOGRA’s chief executive emphasised that the eCOGRA code of conduct was necessary for an industry that had been “trying to build credibility with consumers and regulators”.⁵⁸ eCOGRA’s director emphasised that the code of conduct “is about credibility”.⁵⁹

The emergence of eCOGRA is a clear example of trade associations forming in the early years of an industry to facilitate collective action aimed at gaining socio-political legitimacy for the industry. The eCOGRA code of conduct was the central mechanism used to achieve this objective. The eGAP code of practice also had an important discursive role as it reproduced a particular way of thinking about how gambling-related risks should be regulated. The code of practice speaks in term of an “underlying philosophy ... based on the achievement of the objectives of player protection ... and responsible conduct by operators”.⁶⁰ Nevertheless, this is tempered by the further objective of not disrupting or constraining the ability of software providers or operators to run their businesses. The eGAP code of practice maps clearly onto an idea of responsible gambling discussed above that emphasises the provision of information as a key means of protecting consumers, along with the responsibility placed upon individual gamblers to voluntarily set limits on spend/time and request to be self-excluded. Whilst eCOGRA was a creature of the offshore gambling industry, the emergence of online gambling trade associations and the deployment of responsible gambling codes of conduct became a key feature in states, such as the UK, that were considering the liberalisation of their online gambling markets.

2. Ensuring industry survival

The UK was the first EU Member State to move towards a liberalised online gambling market. The process of liberalisation proceeded the 2001 Budd Report.⁶¹ It was in this year

⁵⁶ eCOGRA, “eCOGRA Procedures” (eCOGRA, 2003) <<http://web.archive.org/web/20031026220249/http://www.ecogra.com/Procedures/DEFAULT.HTM>> (last accessed 27 October 2022).

⁵⁷ eCOGRA, “Press Release: eCOGRA Adopts ‘eGAP’, Principles for Fair and Honest Online Gaming, Offers Important Player Protection” (eCOGRA, 2003) <<http://web.archive.org/web/20031019113109/http://www.ecogra.com/Press/Release.asp?ReleaseID=7>> (last accessed 27 October 2022).

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ eCOGRA, “eCOGRA Generally Accepted Practices (eGAP)” (eCOGRA, 2004) <http://web.archive.org/web/20050911032851/http://www.ecogra.com/eGAP/eGap.pdf> (last accessed 27 October 2022).

⁶¹ Department for Culture, Media and Sport, *Gambling Review Report (CM 5206, 2001)* <http://webarchive.nationalarchives.gov.uk/20031221000434/http://www.culture.gov.uk/global/publications/archive_2001/gamb_rev_report.htm> (last accessed 27 October 2022).

– 2001 – that the first UK-based online gambling trade association formed: the Interactive Gaming, Gambling and Betting Association (IGGBA).

IGGBA quickly sought the endorsement of GamCare, a charity working in the area of gambling harm prevention, and it cooperated with GamCare in the development of its responsible gambling code in 2003.⁶² On publishing its responsible gambling code of practice, IGGBA noted that it hoped “that the UK government and Gaming Board will consider this Code as the basis for their future regulations in this area”.⁶³ The IGGBA responsible gambling code of conduct, along with its connection to GamCare, was central to its representations about recognising “the responsibility of the industry” during the development of the 2005 Gambling Act.⁶⁴

The UK House of Lords and House of Commons Joint Committee published its report on the draft gambling Bill in April 2004.⁶⁵ In July 2004, the Association of Remote Gambling Operators (ARGO) formed. ARGO followed IGGBA in quickly collaborating with GamCare to establish a responsible gambling code of conduct, which was published in December 2004.⁶⁶ ARGO’s general secretary explained that the trade association “could have waited for the Gambling Commission to be established and for it to develop its own standards, but there was a genuine acceptance that this was something that [the online gambling industry] had to deal with now”.⁶⁷ In July 2005, IGGBA and ARGO merged to create the Remote Gambling Association (RGA), with the RGA responsible gambling code published shortly after in October 2005.⁶⁸

A trade association representative explained the rationale behind the introduction of industry codes of conduct in the following terms:

[I]t was partly we weren’t regulated. And so actually we were developing our own social responsibilities and anti-money laundering and all these sorts of things because nobody else was doing it. . . . It was all so weak. So, this was something we needed to do.⁶⁹

The interviewee expanded upon this explanation: “It is not purely altruistic reasons, it is just good business. Problem gambling is bad business. Underage gambling is a disastrous business for all sorts of reasons.”⁷⁰

The increased risk associated with online gambling, particularly in terms of increased access to gambling, created concern amongst the industry that evidence of increased harm

⁶² IGGBA, “Press Release: IGGBA and GAMCARE agree Code of Practice for Social Responsibility for Remote Gambling” (IGGBA, 2003) <<https://web.archive.org/web/20060602024434/http://www.gamcare.org.uk/pdfs/IGGBAGAMCARErelease.doc>> (last accessed 27 October 2022).

⁶³ *ibid.*

⁶⁴ IGGBA, “IGGBA Response to the UK Draft Gambling Bill Submitted to the Joint Committee on the Draft Gambling Bill: 10th December 2003” (IGGBA, 2003) <<https://publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-viii/uc139m02.htm>> (last accessed 10 July 2023); IGGBA, “IGGBA Response to the UK Draft Gambling Bill: 2nd February 2004” (IGGBA, 2004) <[https://web.archive.org/web/20050302022508/http://www.culture.gov.uk/draft_gambling_bill/Organisations/Interactive_Gaming_Gambling_and_Betting_Association\(The\).pdf](https://web.archive.org/web/20050302022508/http://www.culture.gov.uk/draft_gambling_bill/Organisations/Interactive_Gaming_Gambling_and_Betting_Association(The).pdf)> (last accessed 27 October 2022).

⁶⁵ Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (HL and HC 2003-04, 1) 149.

⁶⁶ ARGO, “ARGO Social Responsibility Code” (ARGO, 2004) <<https://web.archive.org/web/20050208143352/http://www.argo.org.uk/Social-Responsibility-Code.html>> (last accessed 27 October 2022).

⁶⁷ ARGO, “Press Release: ARGO Agrees Social Responsibility Code of Practice” (ARGO, 2004) <<http://web.archive.org/web/20050208155701/http://www.argo.org.uk/Social-Responsibility.html>> (last accessed 27 October 2022).

⁶⁸ RGA, “RGA Social Responsibility Code” (RGA, 2005) <<https://web.archive.org/web/20060224202935/http://www.argo.org.uk/shopping/images/RGA%20Final%20Social%20ResponsibilityCode%20-%2025%20Oct%202005.pdf>> (last accessed 27 October 2022).

⁶⁹ Interview EU-06.

⁷⁰ *ibid.*

caused by online gambling would lead to either stringent regulation or the prohibition of online gambling. “[I]f you saw an explosion of problem gambling rates”, an interviewee asked, “where does that lead you? It leads you to [be] shut down at some point.”⁷¹ “The regulation will come”, reminisced the interviewee:

There will be a huge public scandal. The next time a prevalence study comes out and we see that problem gambling has doubled or tripled and that is down to online, we won’t even licence it, we will ban the whole thing completely or we will licence it and regulate it so heavily that it doesn’t work. So that was the imperative back then . . .⁷²

The pre-emptive nature of the development of industry codes of conduct and concerns with the survival of the industry shine through in the statement by the interviewee: “So there was the long-term thinking which is, if we don’t deal with that ourselves, someone is going to force it on and that would be worse.”⁷³

Through the development of responsible gambling codes of conduct, online gambling trade associations sought not only to build socio-political legitimacy and regulatory approval, but also to influence how the UK Gambling Commission regulated risks produced by the industry. The “UK’s regulatory approach to gambling did not develop in a vacuum, but hand-in-glove with industry”.⁷⁴ The Joint Committee on the Draft Gambling Bill noted the IGGBA responsible gambling code of practice in its report and recommended that the Gambling Commission should deal with responsible gambling through codes of conduct negotiated with the gambling industry.⁷⁵ Importantly, the Joint Committee noted that “the [Gambling] Commission should use those codes that have been voluntarily adopted as a basis for the statutory codes”.⁷⁶

Both the ARGO and RGA social responsibility codes framed responsible gambling around the ideas of individual freedom, choice and responsibility and that consumers should be protected through information and empowered to manage risks themselves.⁷⁷ The RGA code outlined that:

Without compromising the principle that customers are responsible for their own gambling, the nature of the activity is such that information should be made available to empower them to gamble responsibly.

Gambling is a mainstream leisure activity for adults. For the vast majority of customers it is a harmless pursuit . . .

[O]perators should empower their customers to help them ensure that their gambling does not become a problem and that, if they fear it might be, there is information available for them about sources of support and advice.⁷⁸

The UK Gambling Commission’s Licence Conditions and Codes of Practice that emerged in 2006 largely mirrored those of the online gambling trade associations in its focus on the provision of information, voluntary limits and self-exclusion, and it saw operators as “best

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Beem and Mikler, *supra*, note 5, 170–71.

⁷⁵ Joint Committee on the Draft Gambling Bill, *supra*, note 65, 149.

⁷⁶ *ibid.*, 149.

⁷⁷ ARGO, “Fair, Honest and Safe: Cross border remote gambling within the European Union” (ARGO, 2005) <<https://web.archive.org/web/20051125071024/http://www.argo.org.uk/shopping/images/Fair%20Honest%20Safe.pdf>> (last accessed 10 July 2023).

⁷⁸ RGA, *supra*, note 68, 79.

placed to identify and to mitigate risks to the licensing objectives” by delegating to them the responsibility to develop social responsibility policies and procedures.⁷⁹

The first online gambling trade associations formed during the early years of the industry and used responsible gambling codes of conduct to build socio-political legitimacy and to influence how gambling and the regulation of gambling-related risk was understood by their external environment. Building upon this analysis, I now examine how online gambling trade associations sought to use responsible gambling codes of conduct to pry open gambling markets and further shape their regulatory environments at the national and EU level.

V. Shaping national and EU regulation

The European Betting Association (EBA) was established in February 2004 to represent EU gambling operators, principally those licenced in Malta and Gibraltar.⁸⁰ Whilst EBA’s key objective was the liberalisation of EU gambling markets, it sought to use responsible gambling codes of conduct as a means to achieve this goal.⁸¹ In March 2007, EBA renamed itself the European Gaming and Betting Association (EGBA).⁸² A year later, in 2008, we see increased collective action within the EU between EBGA and the two key organisations discussed previously: RGA and eCOGRA.

I. Opening markets and shaping regulation

From 2006, the European Commission began a series of infringement proceedings against EU Member States’ restrictions on the provision of cross-border gambling services following complaints from the gambling industry.⁸³ During this period, EGBA used responsible gambling code of conduct in attempts to pry open Member States’ online gambling markets. It did so in two ways. Firstly, EGBA argued that national monopolies were not necessary to protect consumers. In so doing, EGBA used its responsible gambling code of conduct to counter arguments made by Member States that the only way in which they could ensure the objective of consumer protection was through a national monopoly.⁸⁴ Secondly, EGBA benchmarked their responsible gambling code of conduct against responsible gambling measures used by state monopoly operators.⁸⁵ In 2007, EGBA

⁷⁹ D Miers, “Regulation and the Management of Risk in Commercial Gambling in Great Britain” (2015) 15 *International Gambling Studies* 422, 429.

⁸⁰ EBA, “Press Release: Betting Companies in Europe unite to form EBA: The Betting Companies Compete Online but through the European Betting Association they now Speak with a Single Voice” (EBA, 2004) <https://web.archive.org/web/20040405180758if_/http://eu-ba.org/EBA_pressrelease.doc> (last accessed 27 October 2022).

⁸¹ EBA, “EBA Code of Conduct” (EBA, 2004) <<https://web.archive.org/web/20040526094806/http://www.eu-ba.org:80/>> (last accessed 27 October 2022); EBA, “Priorities for Changing the Landscape of the Betting Market” (EBA, 2007) <<https://web.archive.org/web/20070228144942/http://www.eu-ba.org:80/>> (last accessed 27 October 2022).

⁸² EGBA, “Press Release: Online Gaming and Betting Operators Expand Trade Association” (EGBA, 2007) <<https://web.archive.org/web/20070430211027/http://www.egba.eu:80/en/press/92>> (last accessed 27 October 2022).

⁸³ European Commission, “Free Movement of Services: Commission Inquires into Restrictions on Sports Betting Services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden” COM (2006) IP/06/436.

⁸⁴ EGBA, “Press Release: EGBA Welcomes Further Steps to Remove National Gambling Protectionism” (EGBA, 2007) <<https://web.archive.org/web/20070902172001/http://www.egba.eu/en/press/130>> (last accessed 27 October 2022).

⁸⁵ EGBA, “EGBA Standards Benchmark Study Overview” (EGBA, 2009) <http://web.archive.org/web/20090914072111/http://www.egba.eu/pdf/EGBA_standards_benchmark_study_summary_ENG.pdf> (last accessed 27 October 2022).

contracted eCOGRA to undertake this benchmarking study.⁸⁶ The study claimed that, in most cases, the EGBA responsible gambling standards met or exceeded those implemented by state monopoly operators. EGBA argued that the benchmark study:

[D]ismisses the argument that private sector companies are failing to provide consumers with similar levels of protection and responsible gaming practices. In fact the evidence shows that it is the private sector that is leading the field in this important area.⁸⁷

The EGBA codes were also used to try to shape the industry's regulatory environment by being put forward as templates for how EU Member States could deal with problem gambling and how to conceive of responsible gambling.

In this period, many EU Member States were moving towards the liberalisation of their online gambling markets.⁸⁸ eCOGRA's CEO explained that "self-regulation in the online gambling sector is an important tool and . . . [l]egislators should seek to draw upon the considerable and effective efforts made by the private sector".⁸⁹ This attempt to pre-empt state regulation and embed a particular idea of responsible gambling was recognised by regulators. One regulator explained:

[I]t's a . . . pre-emptive strike to avoid stricter binding government regulations. They are trying to anticipate the regulators who usually are really slow. If you look around Europe, the regulation is still quite behind the status of the market. So, they try to organise themselves to say, look, we [are] already doing stuff in a proper way, so don't impose [on] us additional rules. Or, if you want to impose rules, use ours.⁹⁰

As EU Member States' online gambling markets began to open, there was a sense amongst many stakeholders that the European Commission would challenge national monopolies and engage in harmonisation.⁹¹ As this process of market liberalisation at the national level and integration at the EU level began, online gambling trade associations engaged in cooperation and collective action in the development of industry-wide responsible gambling codes of conduct. This collective action sought to shape their shifting regulatory environment and embed a particular understanding of responsible gambling at the national and EU level.

2. Collective action to shape the national regulation of risk

In 2008, RGA, eCOGRA and EGBA developed the International Responsible Gambling Code of Practice in cooperation with GamCare. During their initial discussions, the Portman Group explained how the alcohol industry sought to address social concerns about alcohol through industry-wide collective action. The desire to collectively legitimate the industry

⁸⁶ Y Belanger, "Internet Gambling and the Kahnawà:ke First Nation" in R Williams et al (eds), *Routledge International Handbook of Internet Gambling* (Abingdon, Routledge 2012) p 326.

⁸⁷ EGBA, "Press Release: Online Gaming and Betting: EU Private Industry Leads First Ever Benchmark Study on Responsible Gaming Practices" (EGBA, 2008) <<http://web.archive.org/web/20081228143011/http://www.egba.eu/en/press/417>> (last accessed 27 October 2022).

⁸⁸ For a detailed account of changes in European and Member State regulation during this period, see C Fijnaut and A Littler (eds), *The Regulation of Gambling: European and National Perspectives* (Leiden, Brill 2006); J Hörnle and B Zammit, *Cross-Border Online Gambling Law and Policy* (Cheltenham, Edward Elgar 2010); A Littler, *Member States versus the European Union: The Regulation of Gambling* (Leiden, Martinus Nijhoff 2011).

⁸⁹ *ibid.*

⁹⁰ Interview EU-29.

⁹¹ JC Örnberg and T Tammi, "Gambling Problems as a Political Framing: Safeguarding the Monopolies in Finland and Sweden" (2011) 26 *Journal of Gambling Issues* 110; Villeneuve, *supra*, note 1, 417.

is one driver of this development. The CEO of eCOGRA, for example, spoke about the code “taking the industry into a more caring, player-sensitive and responsible future”.⁹²

However, market liberalisation was a more important driver of this collective action. RGA’s CEO explained that “[t]he promotion of responsible gambling and the adoption of appropriate safeguards are fundamental to the long-term success of the online gambling industry” and that the International Responsible Gambling Code of Practice was an important collective resource to shape regulation in jurisdictions that were opening and regulating their markets.⁹³

Whilst from 2008 there was momentum behind a harmonised approach to responsible gambling at the EU level, the trust in and credibility of industry codes of conduct were challenged by EU institutions.⁹⁴ In response, RGA, eCOGRA and EGBA developed the European Committee for Standardization (CEN) Workshop Agreement on Responsible Remote Gambling Measures in 2010.⁹⁵ CEN Workshop Agreements are not official CEN standards, but the development of a CEN Workshop Agreement reframes the standard as no longer just an industry standard but a multi-stakeholder standard.

Online gambling trade associations used the CEN Workshop Agreement to shape Member States’ regulation of gambling-related risk around the concept of responsible gambling. A trade association representative explained that, since 2011, the organisation had focused on the national level.

[F]or a long time we were all thinking there might be some sort of harmonised regime in Europe, that the Commission would be the real guardian of the treaty and of course it’s never happened. So, we switched all our resources to Member States and just treated it as if there wasn’t a European market.⁹⁶

Upon publication of the CEN Workshop Agreement, EGBA’s Secretary General spoke about how it will “inform many Member States currently regulating the market”.⁹⁷ eCOGRA’s CEO explained to the European Parliament’s International Market and Consumer Protection Committee that the CEN Workshop Agreement was “a building block for pan-EU regulation” that was designed to inform “policy makers of the standards required to maintain a responsible, safe and secure remote gambling environment”.⁹⁸ Indeed, a trade association representative explained that the CEN Workshop Agreement was “mainly for new licenced jurisdictions, but again, that helps get everyone to look and say:

⁹² eCOGRA, “Press Release: eCOGRA Teams with Other Leading Industry Bodies in New Code of Conduct on Responsible Gaming” (eCOGRA, 2008) <<https://www.ecograapprovedcasinos.com/international-minimum-standards/>> (last accessed 27 October 2022).

⁹³ *ibid.*

⁹⁴ Council of the European Union, “Gambling and Betting: Legal Framework and Policies in the Member States of the European Union (Presidency Progress Report)” (2009) 16571/09, 25; European Parliament, “European Parliament Resolution of 10 March 2009 on the Integrity of Online Gambling” (2008) 2008/2215(INI); R Young et al, *Online Gambling: Focusing on Integrity and a Code of Conduct for Gambling* (European Parliament’s Committee on Internal Market and Consumer Protection 2008).

⁹⁵ CEN, “Draft Business Plan for a CEN Workshop on Responsible Remote Gambling Measures” (CEN 2010); CEN, “Responsible Remote Gambling Measures: CEN Workshop Agreement 16259:2011” (CEN 2011); J Banks, *Online Gambling and Crime: Causes, Controls and Controversies* (Abingdon, Routledge 2016) 134–35; Williams et al, *supra*, note 55, 20.

⁹⁶ Interview EU-06.

⁹⁷ EGBA, “Press Release: Industry Hails Groundbreaking Pan-European Agreement on Consumer Protection for Online Gambling” (EGBA, 2011). <<http://web.archive.org/web/20110617055837/http://www.egba.eu/en/press/564>> (last accessed 27 October 2022).

⁹⁸ A Beveridge, “Written Statement from Andrew Beveridge, Chairman of CEN Workshop Agreement 16259:2011 on ‘Responsible Remote Gambling Measures’ for the Internal Market and Consumer Protection Committee” (2011).

what do we want to do? What should the starting point be?”⁹⁹ The interviewee spoke about how, during the lobbying process at the national level, “we can go in and actually say, look, here’s the revenues . . . All the other issues concerning problem gambling . . . and all those sorts of things, this is how you deal with all of that.”¹⁰⁰

3. Collective action to shape the EU regulation of risk

Online gambling trade associations also deployed the CEN Workshop Agreement in order to shape an understanding of “responsible gambling” at the EU Level. The CEN Workshop Agreement was published shortly before the European Commissioner for Internal Market and Services announced the Online Gambling Green Paper, which was published in March 2011.¹⁰¹ The Green Paper provided a framework for debate on the development of online gambling in the EU.¹⁰² The CEN Workshop Agreement was central in many of the consultation responses submitted by trade associations and online gambling operators. As the Chair of the Workshop Agreement put it in a submission to the European Parliament:

Its publication is particularly timely in view of the green paper on online gambling that was announced by Commissioner Barnier . . . It will provide informed and fact-based input to the discussion on the improvement of the functioning of the Internal Market. Voluntary standardization activities are carried out in almost every field of economic activity. There is a tradition in the EU of voluntary standards complementing legislation . . .¹⁰³

In 2012, following Green Paper consultation, the European Commission published its online gambling action plan.¹⁰⁴

The Commission’s action plan noted that given the risks arising from online gambling, there was a need for measures to be taken at the EU level.¹⁰⁵ The European Commission engaged in “soft” harmonisation through a non-binding Recommendation on Consumer Protection in Online Gambling.¹⁰⁶ It is certain that the European Commission chose to use a Recommendation rather than other “harder” harmonising instruments, such as a Directive or Regulation, in order to sidestep both the European Parliament and the Council of the European Union. As the European Commission made clear, “a Commission Recommendation can be adopted immediately whereas proposals for legislation would have to be adopted by the EU’s Council of Ministers and the European Parliament which can take time”.¹⁰⁷ What is perhaps more significant is that any form of “hard” harmonisation would have proved impossible given that the majority of Member States have been steadfast in their objection to the harmonisation of gambling regulation at the EU level.¹⁰⁸

⁹⁹ Interview EU-06.

¹⁰⁰ *ibid.*

¹⁰¹ European Commission, “Green Paper on On-line Gambling in the Internal Market” SEC (2011) 321 final.

¹⁰² *ibid.*

¹⁰³ Beveridge, *supra*, note 98.

¹⁰⁴ European Commission, “Towards a Comprehensive European Framework for Online Gambling (Communication)” COM (2012) 0596 final.

¹⁰⁵ *ibid.*, 5.

¹⁰⁶ *ibid.*; Commission Recommendation 2014/4718/EU of the 14 July 2014 on principles for the protection of consumers and players of online gambling services and the prevention of minors from gambling online [2014] OJ L214/38.

¹⁰⁷ European Commission, “Commission Recommendation on online gambling” 11 MEMO/14/484 of 14 July 2014 <http://europa.eu/rapid/press-release_MEMO-14-484_en.htm> (last accessed 10 February 2023).

¹⁰⁸ The Belgium government unsuccessfully challenged the legality of the European Commission’s Recommendation: Case T-721/14 *Kingdom of Belgium v European Commission* [2015] EU:T:2015:829; Case C-16/16 P *Kingdom of Belgium v European Commission* [2018] EU:C:2018:79. For a detailed commentary, see A Arnall,

Online gambling trade associations used the CEN Workshop Agreement to try to shape the contents of the European Commission's Recommendation on Consumer Protection in Online Gambling. Cezanne explains how the CEN Workshop Agreement

carries with it considerable weight in the political discourse surrounding the gambling sector at EU level. . . . In light of several non-legislative online gambling initiatives, which had been launched by the EU institutions, the agreement was popping up left, right and in the centre. . . . [T]his tool is meant to stay and will be raised by operators seeking to open up the European market.¹⁰⁹

During an interview, a regulator explained that while the contents of the Commission's Recommendation draws from different sources, the industry and its responsible gambling codes of conduct had been one source of influence.¹¹⁰ What is clear is that online gambling trade associations pushed the CEN Workshop Agreement as a model of responsible gambling and viewed the Commission's Recommendation as an important means through which they could seek to frame the concept of responsible gambling at the EU level and, by virtue of this, also at the Member State level.

While Recommendations may be non-binding in the formal sense, they have significant normative and discursive effects that can pre-empt and frame legislative processes at both the EU and Member State level. In Belgium's unsuccessful challenge to the legality of the Commission's Recommendation, Advocate General Bobek forcefully argued that Recommendations have

the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral pre-emption of the legislative process. It is not disputed that a recommendation has the ambition to induce compliance on the part of its addressees. Now if it is even partially successful, *it will shape the range of conceivable (acceptable) normative solutions for the future*. If, based on a recommendation, a number of EU institutions or Member States already comply, those actors will, in the legislative process that may potentially follow, naturally promote the legislative solution that they had already embraced. In this way, *the soft law of today becomes the hard law of tomorrow*.¹¹¹

Given the potential normative and discursive force of a European Commission Recommendation, a regulator argued that, from their perspective, the Recommendation was an attempt by the European Commission to harmonise the online gambling market in the EU in a way that served only the interests of the online gambling industry.¹¹² The regulator went on to argue that, "[f]rom our point of view, it's not protecting the consumer at all".¹¹³

The inability of gambling regulation – that is underpinned by the concept of "responsible gambling" – to protect against individual and societal harms goes to the heart of what is at stake in this paper. Online gambling trade associations have deployed

"EU Recommendations and Judicial Review: ECJ 20 February 2018, Case C-16/16 P, *Kingdom of Belgium v European Commission*" (2018) 14 *European Constitutional Law Review* 609.

¹⁰⁹ G Cezanne, "Shaping Lobbying Impact: How Everything from Seating Arrangements to Natural Disasters Makes a Difference" in D Dialer and M Richter (eds), *Lobbying in the European Union: Strategies, Dynamics and Trends* (Berlin, Springer 2019) pp 418–19.

¹¹⁰ Interview EU-29.

¹¹¹ Case C-16/16 P *Kingdom of Belgium v European Commission* [2018] EU:C:2018:79, Opinion of AG Bobek, para 95 (emphasis added).

¹¹² Interview EU-25.

¹¹³ *ibid.*

responsible gambling codes of practice in an attempt to shape their regulatory environment and to reproduce and embed a particular way of regulating gambling-related risk within their environment. In turn, states that have sought to develop their gambling industries, either through state monopolies or market liberalisation, have “embraced the concept of ‘responsible gambling’” that aligns with the practices and discourses co-produced by online gambling trade associations.¹¹⁴ As Braithwaite notes, “[a] law that goes against the grain of business culture risks irrelevance; a law that crushes normative systems that naturally emerge in business can destroy virtue; a law that lets business norms take it over can destroy its own virtues”.¹¹⁵

VI. Conclusion

Why have online gambling trade associations sought to develop responsible gambling codes of practice despite the fact that the gambling industry actively seeks state regulation in order to authorise and legitimate its activities?¹¹⁶ In addressing this question, I traced how and why responsible gambling codes of conduct have been developed and used by online gambling trade associations against the backdrop of a changing legal and regulatory environment at both the national and EU level. While changes to the regulatory and legal environment create uncertainty, they also create moments of opportunity. I argued that online gambling trade associations have deployed responsible gambling codes of conduct at these particular moments of opportunity in attempts to shape their members’ external environment and to reproduce and embed a particular understanding of how gambling-related risks should be regulated.

Responsible gambling codes of conduct are a mechanism through which online gambling trade associations seek to develop an industry morality and cultural infrastructure for the gambling industry. Not only are responsible gambling codes of conduct used to coordinate and constrain the actions of the gambling industry, they also are deployed to enhance the socio-political legitimacy of the industry and to embed a particular discourse within the industry’s external environment that attempts to shape how we understand responsibility for gambling-related harm. As I noted in Section I, there is an important material element to the online gambling industry that means that we must take the regulatory environments of the states and jurisdictions seriously if we are to understand the activities of the online gambling industry.¹¹⁷ While the regulatory environment may limit what organisations can do, it can also authorise, justify, constitute and legitimise organisational forms and actions.¹¹⁸ Regulation constitutes gambling as “legal”, “fair” and a “safe risk” and gambling providers as “licenced”, “authorised” and “legal”.¹¹⁹

At the birth of the industry, organisations such as eCOGRA developed responsible gambling codes in an attempt to build credibility and trust, which their offshore jurisdictions could not provide. As markets began to open in the EU, we see a flurry of activity in terms of the establishment of trade associations and responsible gambling codes of conduct. In the UK, trade associations such as IGGBA, ARGO and RGA were quick to create responsible gambling codes of conduct and to put them to work in seeking to build

¹¹⁴ R Cassidy, *Vicious Games: Capitalism and Gambling* (London, Pluto Press 2020) p 91.

¹¹⁵ J Braithwaite, “Responsive Regulation and Developing Economies” (2006) 34 *World Development* 884, 885 (emphasis added).

¹¹⁶ Beem and Mikler, *supra*, note 5, 163.

¹¹⁷ *ibid.*, 163; Wilson, *supra*, note 6, 1246; Zborowska et al, *supra*, note 5.

¹¹⁸ Suchman and Edelman, *supra*, note 7, 923.

¹¹⁹ Cosgrave, *supra*, note 1, 47; RB Gephart, “Safe Risk in Las Vegas” (2001) 4 *Management* 141; Hancock and Smith, *supra*, note 40; Casey, *supra*, note 1.

legitimacy and to influence how the industry would be regulated. They were concerned not only with the survival of the industry, but also with the regulatory environment of their members. As processes of market liberalisation continued at the national level and integration advanced at the EU level, trade associations again sought to put responsible gambling codes of conduct to work. Furthermore, we also see an intensification of cooperation between these organisations as the previous efforts of trade associations were called into question.

In developing and putting codes of conduct to work in an attempt to build legitimacy and influence their members' regulatory environment, online gambling trade associations have sought to frame and reproduce responsible gambling in a particular way that affirms values of individual choice, freedom and responsibility.¹²⁰ This framing of responsible gambling “throws back” responsibility for managing risk onto the individual through its emphasis on “education, minimal interventions and self-management”.¹²¹ In so doing, the responsible gambling discourse seeks to defocus attention away from restrictions on the supply of gambling products or the harmful nature of the products themselves. As van Schalkwyk and colleagues explain:

Gambling discourses have long been dominated by individualised and often pathologised understandings that serve to maintain the status quo and that marginalise and conceal broader societal perspectives, such as the harmful effects of gambling products and gambling environments.¹²²

As such, this paper argues that codes of conduct are used by online gambling trade associations as a key resource in attempts to construct, reproduce and embed a particular understanding of gambling and how gambling-related risks should be regulated in the multilevel regulatory environment in which their members operate. Responsible gambling codes of conduct play a central discursive role used not only to legitimate a contested industry, but also to affect and shape the regulatory environment of the online gambling industry. Here, although there has been growing consensus over the past decade that gambling should be understood as a public health issue and that gambling-related harms should be prevented and minimised through a public health approach, “responsible gambling” remains the ethical underpinning for gambling regulation all over the world”.¹²³

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¹²⁰ Reith, *supra*, note 1.

¹²¹ Cassidy, *supra*, note 44, 94; P O'Malley, “Risk, Power and Crime Prevention” (1992) 21 *Economy and Society* 252.

¹²² van Schalkwyk et al, *supra*, note 49, 614.

¹²³ Cassidy, *supra*, note 114, 91; C Livingstone and A Rintoul, “Moving on from Responsible Gambling: A New Discourse is Needed to Prevent and Minimise Harm from Gambling” (2020) 184 *Public Health* 107; A Price et al, “Charting a Path Towards a Public Health Approach for Gambling Harm Prevention” (2021) 29 *Journal of Public Health* 37, 44.

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