

A SPORT BY ANY OTHER NAME

The rising popularity of eSports poses some interesting questions. Is it a sport, a game of chance, or a bit of both? **Melanie Ellis** from Harris Hagan examines existing European legislation for clues.

The **2015 League** of Legends finals were watched by 36 million viewers, a level on a par with major sporting events. No one can doubt the rising popularity of eSports but, from a gambling licensing perspective, they raise the vexing question of whether an eSports is, in fact, a sport.

This question is relevant to two issues: first, whether bets may be accepted on eSports and second, whether participating in eSports for a prize is gambling. The first issue occurs in jurisdictions such as France, where remote betting licences are restricted to sports betting. In Great Britain there is no such restriction on what events may be bet upon; however, the second issue is relevant in considering whether a licence is required in relation to participation in the games themselves for a prize. The key point here is that the Gambling Act 2005 requires a casino operating licence to be held by those offering the opportunity to ‘play a game of chance for a prize’, where a ‘game of chance’ specifically excludes sports.

This section of the 2005 Act has not yet been tested in court; however, the rising popularity of eSports means this may happen in the not-too-distant future. If an eSports is classified as a game of chance under UK law, the operator of a tournament with a prize could be liable to prosecution. The British Gambling Commission (the Commission) has shown its appetite for prosecuting unlicensed operators in the eSports area in its recent

action against two individuals operating a ‘skins betting’ website without holding an operating licence.

Attempts at a definition

Unfortunately, having made the distinction that a game of chance does not include a sport, the 2005 Act does not go on to include a definition of a sport. In its recent discussion paper on virtual currencies, eSports and social gaming the Commission noted this provision, but also

“eSports do tend to include an element of chance, for example, when a player’s character is killed they might ‘respawn’ in a random location”

did not attempt a definition. It may be that following further consideration the Commission publishes a discussion paper setting out its views on this point.

Various attempts have been made at defining a sport, from the tongue in cheek response in *The Guardian’s* Notes and queries column, “you can smoke while playing a game but not while playing a sport”, through to the European Council’s definition in the European Sports Charter:

“Sport’ means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.”

The High Court gave a ruling on the definition of a sport in 2015, in a case brought by the English Bridge Union against Sport England in an effort to enable bridge to benefit from VAT exemptions for sporting competitions (*R v The English Sports Council ex parte English Bridge Union Limited*). The judge ruled that the adoption of the definition of a sport in the European Sports Charter by Sport England was correct and that “mind sports” such as bridge fell outside that definition because they do not include a significant amount of physical activity.

Bridge involves the physical activity of dealing and playing cards but this was not

sufficient to bring it within the Charter’s definition. The definition could, perhaps, be improved by incorporating a statement that a sport does not just involve physical activity but is a *test* of physical skill, strength, speed or endurance.

Application to eSports

While a video game might not be expected to include a significant amount of physical activity for the average player, expert players tend to disagree. I recently had the opportunity to speak to some professional players of *Overwatch* (a team based shooter video game) at the EiG conference in Berlin and I asked whether they were playing a game or taking part in a sport. The answer

was “both”. This team spends four or five hours a day training together and an Overwatch tournament can involve playing for up to 12 hours at a time. Playing this game even for a shorter period of time at a high level clearly involves a challenging test of physical skill and endurance.

This will obviously vary with different games and, to take a different example, Hearthstone is an eSport which involves drawing and playing cards in a similar way to poker. While, again, physical endurance would be required to take part in a long tournament, it is harder to argue in this case that physical skill, strength and speed or endurance is what is being tested as the focus of this game is on mental skill and decision-making.

It is clear that, as with traditional sports and games, classification of each eSport should be done on a case-by-case basis rather than attempting to group all eSports together as a sport or a game.

Relevance of chance

It is worth noting that if an eSport does not include an element of chance, the question of whether it is a sport is irrelevant in terms of its requirement for licensing in Great Britain, because it would not be classified as gaming in any event.

The Commission has (in its discussion paper referenced above) indicated that a very small element of chance could be disregarded. In the case of *R v Kelly* (2008), the operator of the Gutshot Poker Club in London was found guilty of offering a game of chance, notwithstanding that chance plays a small role in poker. However, the judge did state in this case that there might be situations in which the element of chance “is so insignificant as not to matter”.

eSports do tend to include an element of chance, for example, when a player's character is killed they might ‘respawn’ in a random location, or a card-based game may involve a random draw. Regardless of the game style it is usually the case that chance may affect the outcome of

a particular in-game event but, over the course of a tournament, the more skilful player will always prevail. Of course, the same might be said of poker.

What are the consequences?

Returning to the gambling licensing context, let's consider the consequences of excluding eSports from the definition of a sport. First, in some jurisdictions, this will mean bets cannot be accepted on eSports at all. This view has been taken in France, where only sports betting is permitted, and draft legislation will confirm that bets may not be accepted on eSports (although players may compete in tournaments for prizes). In Italy the regulator makes decisions on a case-by-case basis and has approved betting on a limited number of eSports. In Germany, although the licensing process has stalled, as currently envisaged, these licences would only allow betting on sports so excluding eSports from the definition would close down operators in this market.

In Great Britain, as mentioned above, the classification of eSports as a sport is relevant only to the question whether a casino licence is required to allow participation in land-based tournaments for prizes. In all cases where there is more than a *de minimis* level of chance in the game, eSports tournaments with prizes can only be offered under a casino licence if they are not classified as a sport. The licence requirement can be overcome fairly easily in relation to online offerings, as remote casino licences are freely available (subject to the Commission's discretion whether to grant); however, the consequence for any premises wishing to host a physical eSports tournament would be problematic.

Only a limited number of casino premises licences are available in Great Britain in limited geographical areas so, effectively, eSports tournaments would be restricted to existing casino premises if they involve an element of chance. This

would be unworkable; not least because at present, eSports tournaments are hosted in numerous locations, including players' own homes.

Unless the Commission wishes to criminalise almost all hosts of eSports tournaments, it must be pragmatic and focus on cases where there is a risk to the licensing objectives. Where it does have a concern, the Commission's likely approach, based on previous experience, will be to individually contact and challenge those operating tournaments for a prize where it considers that the relevant eSport includes a more than insignificant element of chance, but falls outside what should properly be considered to be a sport.

Conclusion

Are we any closer to determining whether an eSport is a sport? Perhaps there is a reason why there is no definitive answer to what is and is not a sport, which is that new games will always come along which test the boundaries. The only sensible conclusion that can be reached is that playing some video games in some contexts appears to be equivalent to participating in a sport, but individual assessments of games will need to be made by operators and regulators alike.



Melanie Ellis is a senior associate in the gambling law team at Harris Hagan. After graduating from St Hilda's College, Oxford in 2003, Melanie trained as a barrister before joining Harris Hagan in 2005 and qualifying as a solicitor in 2008. Melanie has developed expertise in dealing with all aspects of gambling law advising major casino operators, online betting and gaming operators and start-up companies.