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INTRODUCTION

The passing of the Security and Accountability For Every Port Act (“the SAFE Port Act”) by the US Congress on 30 September 2006 was described by the Chief Executive Officer of a major internet gaming company as a ‘significant setback for our company, our customers and our industry’. The SAFE Port Act incorporated the provisions of the Unlawful Internet Gambling Enforcement Act of 2006 (“the Act”) making it unlawful for gaming companies to receive monies in connection with unlawful internet gambling.

The Act is the first piece of Federal legislation in the USA that specifically targets internet gambling and suggests a more determined approach by the US Government against internet gaming operators based in jurisdictions such as Gibraltar.

The effect of the Act was immediate; £3 billion was reported to have been wiped off the value of gaming companies listed on the London Stock Exchange on the first day of trading after the passing of the Act. Following the signing of the Act by the US President on 13 October 2006, several companies suspended gambling activities by persons based in the USA. A substantial proportion of the income those companies derived from internet gaming suddenly dried up.

Although undoubtedly a blow to the internet gaming industry, the Act will not prevent the continuing growth that e-gaming companies have experienced from players in jurisdictions other than the USA. The Act has set some companies back several years but most will recover by refocusing their efforts on those other markets.

In the long term, it is expected that most jurisdictions, including the USA, will go

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down the path of regulation rather than prohibition. Companies operating in well regulated jurisdictions will benefit from global expansion, consolidation and growth in the industry.

² Directive of the European Parliament and of the Council 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Electronic Commerce Directive) (2000) OJ L 178/1.

GIBRALTAR – A UNIQUE JURISDICTION

Gibraltar, as a jurisdiction that licences and regulates internet gaming companies, is well poised to capitalise on that growth. It is in many ways a unique jurisdiction. Over its 300 year history, a mixed cocktail of peoples and cultures have welded into a community distinct from Britain and Spain with a modern, vibrant and adaptable economy. The diversity of the Rock, as Gibraltar is popularly described, its fiscal and legislative independence and its skills base, has produced an extraordinary economic story. The latest and probably the fastest growing chapter in this unfolding tale has been the development of international gaming and betting activities.

Gibraltar is the only UK overseas territory that is part of the EU. By virtue of the UK’s Treaty of Accession to the EU, Gibraltar was excluded from certain parts of the Treaty of Rome 1957 (EC Treaty). Gibraltar does not form part of the customs territory of the EU, it is treated as a third

country for the purposes of the common agricultural policy, it is excluded from the common market in agriculture and trade in agricultural products and from EU rules on value added tax and other turnover taxes, and it makes no contribution to the EU budget. For all other purposes, including the freedom to provide services, Gibraltar forms part of the EU.

This was recently recognised in the UK's Gambling Act 2005 which confirms that Gibraltar is part of the European Economic Area (EEA) (effectively the EU and a few additional countries) for the purposes of the new UK gaming legislation.

An example of a services provision which applies to Gibraltar is the Electronic Commerce Directive² which has been transposed into Gibraltar law as the Electronic Commerce Ordinance 2001. The Directive does not apply to gaming. However, this exclusion has not been incorporated in the Electronic Commerce Ordinance 2001 resulting in gaming companies being able to take advantage of the provisions of the Ordinance. It also means that customers of internet gaming companies established in Gibraltar will have the rights and protection provided by the Ordinance. These include conditions relating to commercial communications and the right to certain information concerning the conclusion of electronic contracts.

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Gibraltar has competence in tax, company and trade related matters, including responsibility for gaming. The legal system is entirely common law and there is a wealth of professional and commercial expertise. Furthermore, not being an island, Gibraltar is able to work with the Spanish hinterland, thereby affording opportunities for economic interaction, which would not be open to a sea-locked territory. Not only, therefore, do millions of tourists cross from southern Spain every year, but thousands (including many engaged in the gaming sector) are employed in Gibraltar and live in the surrounding municipalities. This reciprocity also enhances the leisure and social appeal of Gibraltar. It is often an important factor when gaming, financial services or other international businesses are seeking to establish a base.

The combination of British common law, EU membership, tax competitiveness and attractive lifestyle make Gibraltar a powerful proposition.

GAMING SECTOR FLOURISHES

The international gaming sector has developed over the last 7 or 8 years with careful nurturing. The initial interest (spurred by the increase in UK betting tax in the mid 1990s) mushroomed shortly thereafter into a veritable flood of applicants seeking to establish a presence. The great majority of these applications did not prosper due to the regulatory standards Gibraltar imposed and the avowed policy objective to allow in only the best-resourced and established operators.

The result of this stringent approach applied pragmatically by Gibraltar's regulator, has been to carve out a quality and first class gaming sector. The pioneering presence of Victor Chandler and Ladbrokes has now given way to a diversified and much larger gaming sector including the likes of Casino-on-Net, Stan James, PartyGaming and 888 Holdings. Gaming companies now employ approximately 10% of the workforce in Gibraltar. We are likely to witness a continued but controlled expansion of the sector, especially in e-gaming.

NEW LEGISLATION

Regulation and transparency are key to Gibraltar's drive to consolidate itself as important jurisdiction for e-gaming companies. This led to a recognition that Gibraltar needed a modern legislative framework to replace the Gaming Ordinance which was enacted on 6 June 1958 when the possibilities of the internet as a World Wide Web could only have been the subject of dreams.

After various months of consultation between the Government of Gibraltar and the industry, the Gibraltar House of Assembly passed in December 2005 the Gambling Ordinance 2005. This new

legislation is now in force and has replaced in its entirety 4 Journal of International trust and Corporate Planning Vol 13 No X 2006 the Gaming Ordinance.

The Gambling Ordinance 2005 builds on the pragmatic approach to regulation Gibraltar has adopted over the years. It provides a streamlined application, licensing and regulatory framework for Gibraltar's growing gaming business. In particular, it makes specific provision for the requirements of e-gaming, striking a balance between regulatory and reputational concerns and the need for the industry to respond rapidly to a highly competitive and fast moving environment.

E-gaming is described in the Gambling Ordinance 2005 as 'remote gambling'. Remote gambling in turn is described to mean:

'gambling in which persons participate by means of remote communication, that is to say, communication using—

- (a) the internet,
- (b) telephones,
- (c) television,
- (d) radio or,
- (e) any other kind of electronic or other technology for facilitating communication;'

Specific requirements are introduced in relation to remote gambling, distinguishing these from those applicable to non-remote, domestic gaming and betting activities.

Licensing and regulatory structure

The Gambling Ordinance 2005 provides for both a Licensing Authority and a Gambling Commissioner. The duties of the Licensing Authority are essentially to grant, on such terms as appear to be appropriate, licences to applicants. Licences are personal to licence holders and are not transferable. The responsibilities of the Licensing Authority also extend to renewal of licences and indeed suspension or revocation in appropriate circumstances.

The Gambling Commissioner (established under the auspices of the Gibraltar Regulatory Authority) is responsible for ensuring that the holders of licences conduct their undertakings:

- (1) in accordance with the terms of their licences;
- (2) in accordance with any other provisions made under the Gambling Ordinance 2005 or;
- (3) in such a manner as to maintain the good reputation of Gibraltar.

The Gambling Commissioner is empowered (with the consent of the Minister responsible for gaming and in consultation with the Licensing Authority and Vol 13 No X 2006 Gibraltar – E-Gaming Licensing 5

industry) to draw up and publish codes of practice for the conduct of gambling undertakings by licence holders.

Both the Licensing Authority and Gambling Commissioner have a variety of powers to ensure proper enforcement of their respective duties. These include the powers to investigate and seek information in appropriate circumstances from operators.

The intention throughout has been to ensure that the regulatory balance is appropriate, given the need to maintain the good reputation of Gibraltar whilst not imposing unduly onerous obligations on licence holders.

Provisions related to remote gambling

It is an offence under the Gambling Ordinance 2005 for any person in or from within Gibraltar to provide facilities for remote gambling of any description, unless he is the holder of a remote gambling licence.

An application for a remote gambling licence is made to the Licensing Authority in the form provided for under the Gambling Ordinance 2005.

It is usual as a first step in the application process to prepare a synopsis of the proposal for the establishment of a presence in Gibraltar. A synopsis should include the following information:

- (1) general background to the company, its promoters and the nature of the business;
- (2) information on the nature of the activities that the company seeks to carry out from Gibraltar;
- (3) reasons why the company wishes to relocate to and operate from Gibraltar;
- (4) reasons why its relocation to Gibraltar would be of benefit to Gibraltar's economy;
- (5) details of the company's proposed presence in Gibraltar;
- (6) a general conclusion summing up the reasons for the application for a gaming licence.

A number of specific matters are required to be taken into account by the Licensing Authority in determining whether to grant or refuse a licence. The Licensing Authority is required to refuse a licence if:

- (1) it considers that it would be in the public interest to do so;
- (2) it is not satisfied that the applicant for the licence and, where applicable, each shareholder, director and each executive manager is a fit and proper person, or;
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- (3) it is not satisfied as to a number of various factors with regard to character, honesty, integrity, business reputation, financial business and the business plan of the proposed operators.

The Authority will also have regard to the experience of the operator or promoters, the actual or proposed ownership and structure of the business and its technical infrastructure.

Appropriate due diligence will be undertaken. This will include ensuring that the proposed licence holder has measures and procedures in place to identify money laundering and other suspicious transactions.

Responsible gambling

Gibraltar is sensitive to the need to ensure operators avoid the undesirable excesses of gambling to the greatest extent possible. Various provisions are therefore contained in the Gambling Ordinance 2005 to require a licence holder to provide some assistance to problem gamblers that may be attracted to Gibraltar sites.

A remote gambling website operated by or on behalf of a licence holder is required to contain on the home page a direct link to the websites of at least one organisation dedicated to assisting problem gamblers. Furthermore, a licence holder is required to have systems in place to enable a person to request to be self excluded from gambling, warn persons that they should not gamble beyond their means and to discourage them from so doing.

Licence holders are required to designate a person to be responsible for formulating responsible gambling policies and to provide training for staff on the implementation of those policies. They are also required to cooperate and work with the authorities in establishing and refining techniques to identify and discourage problem gambling.

Minimum ages for gambling

There is an obligation under the Gambling Ordinance 2005 for licence holders to take all reasonable steps to prevent any person from participating in gambling activities unless that

person is at least of the minimum permitted age. The minimum permitted age for remote gambling is 18 (for lotteries where there are no money prizes the minimum permitted age is 16).

A licence holder that fails to comply with this obligation commits an offence under the Gambling Ordinance 2005.

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Safeguarding and integrity of equipment

An important aspect of the Gambling Ordinance 2005 is the requirement with regard to the integrity of computer equipment. The legislation requires that a licence holder shall in the year following the grant of a licence, and thereafter at such intervals as are required by the Licensing Authority, produce a certificate as to the integrity of its computer equipment. It is envisaged that after the initial accreditation, subsequent requests for certification will be made on an adhoc and periodic basis.

CONCLUSION

It is vital that the e-gaming sector should increasingly adopt the highest standards of good governance within a well-structured regulatory framework. The new legislation in Gibraltar is designed to achieve precisely that and to encourage further developments in the industry.

Clearly, there are a number of international factors which will impinge significantly on the future of e-gaming. However, there is every reason to be optimistic for sustained future growth. The International Governmental Remote Gambling Summit organised by the UK's Department of Media, Culture and Sport which took place on 31 October 2006 and the Study of Gambling Services in the Internal Market of the European Union finalised in June 2006 and which is currently being considered by the EU highlight the importance which is being given to the issues connected with gambling generally and with remote gambling in particular. The prospect of more liberalised markets, better regulation and governance will ensure a competitive and dynamic environment in which many opportunities will arise.

