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The Reinforcement of Malta's Role as a Regulatory Hub for Remote Gaming

A consideration of the salient legal and political developments that have strengthened the foundations of Malta's remote gaming industry

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Remote Gaming in the EU

Whilst much has been said and written both for and against the removal of barriers to the free movement of gaming services within the European Union, anyone trying to get to grips with understanding how remote gaming is regulated within the EU is bound to have a tough time in digesting the variables involved - not to mention the legal "black-holes" created by the inter-jurisdictional structuring of operators' affairs, with different laws applying in each of these jurisdictions. Clearly, the explosion of the internet as a medium through which products and services of any kind or description can be marketed across the globe in real time has left lawmakers equally awe-struck and perplexed.

The perplexity is caused primarily from the difficulties encountered when attempting to regulate the virtual world using conventional enforcement methods, or, put another way, the obstacles that must be overcome by sovereign states when enforcing their laws and public policies against operators that are not affected in any manner by geographical distances and/or national boundaries. Indeed the only physical elements on which such operators depend is the physical infrastructure required to deliver their services through the virtual world of the internet to internet users in the physical world.

Thus, whilst sovereign states enjoy the freedom of regulating and controlling any activities taking place within their respective political or jurisdictional boundaries or any extensions to their boundaries (as would be case of sea-going vessels or aircraft), the enforcement of such laws becomes a veritable legal obstacle course which significantly weakens the enforcement methods applied by law-enforcement authorities. For this reason the internet has evolved into a veritable free-for-all virtual world, having a combination of everything imaginable in the physical world- the informative; the obscene; the regulated; the unregulated; the pious; the profane; the good; the bad and the ugly.

As a virtual reflection of the real world, the internet has also seen an incremental rise in the number of gaming operators, providing a meeting place for punters from all over the world to play against each other, creating an industry which would have been unimaginable as little as ten years ago. In 2008 online gaming alone generated over €15.6 billion worldwide in revenue. European Parliament studies indicate that, even as other industries shrink amid the economic downturn, the remote gaming sector is growing by between 8% percent (Austria) and 17% (Italy) a year in the EU¹.

¹ <http://euobserver.com/9/27752>



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Against this backdrop, operators large and small have sought the optimal arrangements to “legitimise” their operations by obtaining whatever credentials, recognitions or licenses that are available to them to provide their players with more peace-of-mind and to dispel the “fly-by-night” perception that may be associated with internet-based businesses, particularly when these operators expected players to deposit funds before playing for money. The fact that internet businesses are perfectly mobile - operating equally effectively from Valletta, Vilnius or Vladivostok - made the attainment of such credentials, recognitions or licenses significantly easier since operators could congregate in those jurisdictions which offered operators the possibility of licensing their remote gaming business without any material setback. These jurisdictions include Costa Rica, Curacao, Khanawake, Alderney, Isle of Man and Malta to name a few.

Malta’s role as a regulatory hub

Malta immediately recognised the importance of remote gaming as a niche market and was quick to adopt a regulatory framework in the year 2000 through an amendment of the Public Lotto Ordinance². Malta’s approach has always been that of providing a workable legal framework for Malta-based licensees through active and effective enforcement, safeguarding the collective interests of Malta-based licensees and protecting the interests of players as consumers of remote gaming services provided by such licensees. With these principles firmly established, Malta has matured into a respected jurisdiction for the regulation of online gaming and this position was further reinforced in 2004 when Malta became a full member of the European Union.

The Lotteries and Gaming Authority, which has succeeded the Public Lotto Department as the regulator of the industry, continues to demonstrate commitment and determination to retain its position as Europe’s leading remote gaming jurisdiction. Besides, the establishment of certain legal and diplomatic precedents over the past few years have gone some way towards establishing clearer parameters for Malta-based operators, providing them with heightened levels of comfort, and it is towards these developments that we turn our attention at this stage.

1. **Obstacles in the way of enforcing public policy restrictions applicable in an EU Member State against Malta-based operators- The Zeturf Case**

The case of **Paris Mutuelle Urbain vs Zeturf Limited**, otherwise referred to as the “Zeturf Case” was a significant legal milestone from a Maltese legal perspective as it gave interpretational life to the application of Council Regulation on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EC 44/2001), creating a procedural obstacle for the enforcement in Malta of any public policy judgments delivered by a court in another Member State.

By way of general factual background, Zeturf Limited, a Maltese-registered company was licensed by the Malta Lotteries and Gaming Authority (LGA) in 2005 to act as bookmaker, holding a Class 2 Remote Gaming Licence and began its operations in June of that year. Barely a fortnight after launched its online operations, Zeturf was served with a writ issued by PMU alleging that Zeturf was breaching PMU’s monopoly to organize betting activities on horse races, a monopoly which is granted to PMU by law. An

² Malta Public Lotto Ordinance, 1932 – Chapter 70 of the Laws of Malta

http://www.lga.org.mt/common/file_provider.aspx?id=633607206523227500



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interim order was issued by the French tribunal on the 8th July 2005 in which Zeturf Ltd was ordered "to cease on-line bet taking operations on horse races organised in France" and a penalty of €15,000 per day was to apply with effect from the lapse of 48 hours from notification of the court's decision. This decision was subsequently confirmed by the Paris court of appeal on the 4th January 2006.

Subsequently, PMU sought to have the judgment recognised and enforced in Malta, in terms of Regulation 44/2001. On the 16th March 2006 the Maltese First Hall of the Civil Court upheld PMU's request and ordered that the decision given by the Court of Appeal in Paris become enforceable against Zeturf. At this stage Zeturf appealed to the Maltese Court of Appeal to overturn this order for the recognition and enforcement of the French judgment. Zeturf based the main thrust of its appeal on the arguments that the order issued by the French court was in fact of an administrative nature and that consequently regulation 44/2001 could not be invoked for administrative matters.

The Maltese Court of Appeal observed that although PMU was organised as a commercial company, it is controlled by the State as a non-profit making organisation with the primary objective - enshrined in its statute - of safeguarding French public policy in respect of betting on horse races. Consequently, it was reasoned by the Court, PMU acted before the French Courts not within the ambit of private law that regulates civil or commercial dealings between private persons, but in the ambit of public law intended to safeguard a monopoly in the interest of l'ordre public francais. The Court concluded that it necessarily follows that the subject matter of the decision of the Court of Appeal of Paris dated 4th January 2006, although formally or apparently of a civil nature or commercial, in reality falls within the ambit of Public law, therefore it is expressly excluded from the remit of Regulation 44/2001. On the basis of this conclusion the Court cancelled and revoked the decision of the First Hall of the Civil Court and denied the request for the enforcement of the judgment against Zeturf in Malta.

The effect of this decision was that it created a barrier to any sovereign states or person/s acting under their authority attempting to enforce public policy judgments pronounced by the courts in their jurisdiction against operators established in and operating from Malta.

2. **The challenging of enforcement measures adopted by a Member State intended to restrict accessibility to the websites of Malta-based gaming operators- The Italian ISP Blocking Measures**

Legal procedures are not the only route that may be considered by sovereign states in seeking to enforce their laws and public policies within their territories or political borders. Indeed, the new world order of the internet requires new approaches to enforcement. With this approach in mind, Italy, for example, adopted a creative approach towards enforcing its prohibition of allowing non-Italian gaming operators from offering their services in Italy. In February 2006 the Amministrazione autonoma dei monopoli dei Stato (AAMS) - which falls within the responsibility of the Italian Ministry of the Economy and Finance - ordered Internet Service Providers (ISPs) based in Italy to block over 650 internet gaming sites which were not licensed in Italy and considered to be illegal, to protect Italian gamers from "phishing" – the fraudulent acquisition of passwords and credit card details. All operators based and licensed in Malta were included in this list. The ISPs faced a fine of € 180,000 for each default in blocking the listed sites in breach of the order. Malta-based operators and the LGA were obviously outraged by the situation and took collective action to counter the effects of the order without delay. As a temporary solution, the websites of Malta-based operators were linked to the LGA's website and disguised using a web anonymiser to hide the IP addresses. As a result, the only visible IP address for Maltese gambling websites would be the address of the Maltese gaming authority. The response by the Italian authorities has been to include the IP address of the Maltese Gaming Authority



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in the list of blocked websites.

The Maltese government and a number of Malta-based operators separately lodged formal complaints with the European Commission about the measures introduced by AAMS with a view to having infringement proceedings instituted against Italy. However, in the course of the prior formal exchanges between the Commission and Italy in this regard, Italy appears to have knuckled under the pressure and proceeded to open its market to those operators obtaining an Italian gaming license.

Although Italy's enforcement measures were generally effective in blocking out Malta-based operators from Italian ISPs, this incident served to demonstrate the LGA's role in exercising its lobbying and political influence to champion the assertion of the right of Malta-licensed operators to avail themselves of the freedom to provide services within the EU, as enshrined in the Treaty of Rome.

3. **Intervention intended to protect players' interests and the stability of gaming systems- The Boss Media Case**

Another case which emphasised the LGA's role as the protector of players and its licensed operators alike is the Boss Media case (*Trillion Limited vs Boss Media AB et*) filed in the First Hall of the Civil Court on the 29th April 2008. The application, filed by Trillion Limited as operators of the poker affiliate website "Pokertrillion", sought to recover damages from Boss Media as a result of an allegedly illegal termination of its affiliate agreement by Boss Media. The dispute was purely private and pecuniary in nature and did not involve any regulatory issues, and it is only as a consequence of events that this case became relevant for the LGA.

Contemporaneously with the filing of its claim for damages, Trillion requested the Maltese courts to order the issuance of a precautionary warrant of seizure against Boss Media for the purpose of seizing the defendant's assets, with a view to having any potential final judgment for such damages ordered against Boss Media enforced against the assets so seized. This warrant was intended specifically to seize the servers operated by Boss Media in a co-location centre in Malta, which servers were made available to its licensees to conduct their Malta-based operations from. Initially, this warrant did not pose any threat to Boss Media's continued ability to operate its business from the servers, which remained within the co-location facility under the custody of a custodian or "consignatory".

Eventually, however, Trillion obtained a court order for the removal or shutting down of the servers, on the basis of the court's acceptance of Trillion's argument that the continued operation of the servers could lead to a diminution in their market value- and it is at this point that the servers were exposed to vulnerability. Boss Media successfully extended the enforcement period by two months, that is until the 18th September 2008, allowing it a more reasonable time to organize the migration of any business affected by the removal of such servers. Clearly, the defendant depended on these very servers for the continuity of its business and had every interest to ensure that any private dispute would not have the effect of causing an effective economic sabotage to its Malta-based business.

The LGA followed these developments closely to ensure that no interruption in the business of Boss Media licensees was experienced as a result of this private dispute between Trillion and Boss Media. As the 18th September deadline drew closer it became increasingly clearer that this deadline would not be sufficient for a full migration of that business to an alternative co-location site. Consequently, on the 10th September 2008 the Authority took the bull by the horns and filed an application in court in its capacity as the regulator



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of remote gaming business in Malta to ensure that the appropriate time-frames and procedures were followed in the course of applying the court's order for the removal or shutting down of the servers. The LGA argued that the enforcement of the warrant would materially impinge on the smooth operation of the industry, posing a great risk to operators using the defendant's servers and to players registered with such licensees. It requested the Court to order: (i) the notification of all interested third parties of the removal or shutting down of the servers, (ii) the appointment of qualified experts to oversee the removal or shutting down of the servers, and (iii) the extension of the 18th September deadline for a further period of 6 weeks.

On the 12th September the court decreed that the LGA, as a regulatory authority constituted by law, had sufficient *locus standi* or legitimate interest to intervene in the dispute on the basis of the fact that such intervention was aimed at enabling the Authority to exercise its role as regulator of the industry by safeguarding the interests of Malta-based and licensed operators. The LGA's requests were acceded to in their entirety and the Authority continued to exercise an active monitoring role to ensure full and proper compliance with the court's order within the set parameters. The enforcement order was, however, never implemented since Trillion withdrew all proceedings in the following weeks.

From a Maltese legal and regulatory standpoint this case provides a significant milestone in establishing the LGA's *locus standi* to intervene in any private disputes where circumstances threaten to cause an interruption in the stability of the industry or to the continuity of remote gaming business from Malta. This recognition goes some way to complementing the LGA's role and enabling to exercise this role in a more complete and effective manner. The Authority has proved itself a dynamic and effective regulator, placing the interests of its licensees and their players at the forefront of its day-to-day regulatory function.

Besides, we understand that the LGA has also spear-headed an extensive exercise to review Malta's law of procedure to ensure that the assertion or enforcement of creditors' rights do not cause disproportionate prejudice to third parties, as could have been the case if the servers were removed or shut down prematurely in terms of the first court order obtained by Trillion.

The benefits of experience paving the way forward

Malta's legal, regulatory, diplomatic and political systems have experienced substantial pressure from all sides as a result of its becoming the jurisdiction of choice for most operators seeking to market their services within the EU, and the three incidents analysed in this article serve to demonstrate the LGA's versatility in addressing industry-related issues, be they legal, regulatory, diplomatic or political and regardless of the materiality or complexity of the issues involved. This versatility is further complemented by the Maltese Government's commitment to providing an environment of sound and reliable regulation, with the ambition that this general approach to regulation may well become the benchmark within the European Union.

With increasing pressure building up within the EU's institutions to put together a coherent approach to regulating gaming, Malta's vision of being a centre for the effective regulation of remote gaming, coupled with the LGA's on-going support, may well prove to have been ahead of its time. Indeed, Malta is likely to tap into the further opportunities created by legal and political developments brought about by the European Union's institutions, besides the fleshing out of legal precedent relating to remote gaming issued by the European Courts of Justice on the basis of the principle of free movement of services. If the period of employment exceeds one month and the employee's working hours exceed eight hours per



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week, the employer is bound to give the employee within 8 working days from the commencement of employment, either (i) a written contract of employment, or (ii) a written statement of minimum conditions, which must be furnished to the employee. Such information is expected to include such basic things as the normal rates of pay, overtime rates, hours of work, place of work and leave entitlement. Wages should be paid at regular intervals not exceeding 4 weeks in arrears. Different periods of pay can be agreed in a collective agreement.

The author would like to thank Ms Natalie Renou, In-House Counsel at Tain for her assistance with some of the research for this article.

13th August 2009

Zammit & Associates - Advocates is one of Malta's leading legal practices actively involved in e-commerce and remote gaming law. The firm offers a full spectrum of services including company registration, preparation and review of remote gaming licence applications prior to submission and on-going support for operators establishing their operations in Malta.

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