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Money Val - Anti-Money Laundering Processes and Procedures

As readers may by now be aware, Gibraltar will be subject to Money Val's evaluation processes and procedures.

Money Val was established in September 1997 by the Committee of Ministers of the Council of Europe to conduct self and mutual assessment exercises of the anti-money laundering measures in place in Council of Europe member states.

The Gibraltar Bar Council formed an Ad Hoc sub-committee in December 2016 to consider and respond to draft Guidance Notes that were provided by the Government of Gibraltar. The AML Guidance Notes are being finalised and are expected to be issued in the next couple of months. It is expected that law firms will have a transitional period to review their protocols before formal commencement of the revised supervision envisaged by the Guidance Notes. An Information Note will be released to inform users as to the scope and intention of the Guidance Notes in due course.

In-house vs Private practice - Interview with Anthony Ladislaus of William Hill



Q. How long have you been in an in-house role?

A. Just over 2 years now.

Q. What are the main areas you deal with on a day to day basis?

A. The job is varied. As one of Britain's largest bookmakers, and with our strong online presence, a day at William Hill can mean covering any number of different areas of law from regulatory issues, advertising, marketing and sponsorships, IP, data protection, customer services and social responsibility, commercial contracts, property issues, disputes, dealing with our

many external lawyers across all the jurisdictions in which we operate, looking at new laws and how they might impact on the business or working with colleagues to find better and more efficient processes. In short, a day can be anything!

Q. What do you enjoy most about being in-house?

A. Probably the diversity of the job. It is incredibly rewarding to start a project from proof of concept stage and work on it until it becomes a live product for customers on our website or mobile app. As the world is becoming more connected technology is more and more prevalent in today's living. Working at William Hill I have had the opportunity to learn more about how the law has developed across a number of jurisdictions to deal with society's increasing reliance on technology. In addition, challenges like learning how to contract for 'agile ways of working', 'sprints' and 'scrum methodology' (which is a popular way of working in the software development world) have made being in-house even more interesting as you are freely able to chat to the Dev Teams and immerse yourself in their day to day which is worlds apart from law!

Q. Do you miss anything from private practice?

A. In-house life involves having different matters thrown at you from all directions, so very often due to sheer volume and time constraints, you need to either make judgement decisions or send work out to external counsel and never really get the chance to drill down to a granular level of law. Before joining William Hill, whilst working at Peter Caruana & Co I got used to delving into case law and textbooks, following cases through from the very first case on a subject matter all the way through to the latest judgment. The reason behind that level of detail was to fully understand how the law had evolved to arm yourself with as much relevant information as possible to be able to apply the law to your client's facts. The geek in me misses the opportunity to go into that level of detail!

Q. What is the most rewarding experience you have had to date?

A. As a Chelsea fan for some 23 years, working on our sponsorship deal with Chelsea was amazing! When the deal was announced on the Chelsea website it was probably the closest I'll ever come to featuring on the site! Even now when Chelsea play at home and the William Hill banners appear it is an awesome feeling – especially since we have also worked on the promotions advertised too!

Q. How do you see the legal profession developing in Gibraltar over the next 10 years?

A. There is the obvious impact of Brexit and how that will affect the evolution of our laws. That aside, new regulation for lawyers across the board and the introduction of a law course at the university is a welcome addition to the training the younger members of the Bar will receive. It will allow them to network with their peers as well as develop a rounded understanding of the requirements of Gibraltar law. I hope that this continues to flourish. We are now seeing a greater competition amongst law graduates to secure jobs within the legal industry and I am of the view that competition is healthy and should result in more 'all-rounders' who bring more to a firm than just being 'lawyers'. Students are being encouraged to work to differentiate themselves from their counterparts and this should put us in good stead for the future. Further, Inner Bar's growth should mean that Gibraltar cases traditionally farmed out to UK Counsel should stay within the jurisdiction; there is no shortage of expertise. This means that junior counsel should get exposed to more niche areas of law through junioring QCs and result in a better legal service for Gibraltar.

Foundations

The dawn of the New Year saw the publication of the Private Foundations Bill 2017 ("the Bill"). Once enacted, the Bill will provide a long-awaited framework for the establishment of foundations in Gibraltar.

What is a Foundation?

A foundation is an entity with separate legal personality which can hold and deal with property in its own name as absolute legal and beneficial owner, for specific purposes. The purposes can be very wide, and indeed can be "anything capable of fulfilment" as long as they are not illegal, immoral or contrary to public policy. As long as the Foundation Charter permits, the purposes can be amended.

Establishing a Foundation

The Founder, being the person who provides the initial assets, or endowment, to the foundation, makes an irrevocable endowment. The foundation is then set up and governed by the Foundation Charter and Foundation Rules which detail the purposes, beneficiaries and guardian of the foundation, as well as rules on how it should be administered.

Details of the endowment, councillors and guardians, and copies of the Foundation Charter are filed at Companies House, which will be keeping a Register of Foundations. Upon completion of the registration, Companies House will issue a Certificate of Establishment, serving as conclusive evidence of the foundation's registration.

Parties in a Foundation

The Founder can reserve certain powers to himself, such as the ability to appoint and remove the Guardian or councillors, or to amend the foundation's purposes or constitutional documents.

The Foundation Council, made up of the councillors, manages the entity, makes distributions to beneficiaries and works to achieve the purposes. The Council must include a Gibraltar resident body corporate holding a Class VII licence (professional trustee).

A guardian can also be appointed to further safeguard the purposes, and indeed must be so appointed where there are no designated beneficiaries, or more than 50 beneficiaries, or a class which is insufficiently certain. This provides protection for beneficiaries, whilst allowing the class of beneficiaries for a foundation to be flexible.

Like a trust, foundations will have beneficiaries. The Bill describes two types, disenfranchised and enfranchised beneficiaries, with the latter being entitled to copies of the constitutional documents, and disclosure of records and accounts.

Taxation

Foundations will be taxed similarly to Gibraltar companies. The rate of tax is 10% which will be charged on profits or gains accrued or derived in Gibraltar from any trade, profession or vocation. The beneficiaries ordinarily resident in Gibraltar of a foundation will only be taxed in Gibraltar on distributions received, the use of assets owed, used or leased by the foundation, or any loan received from the foundation.

Advantages

A foundation can be used for the protection of family property, whether for succession planning reasons, or to protect assets from economic or political uncertainty, creditors or liabilities. Unlike a trust, a foundation has legal personality and can hold assets as legal and beneficial owner. The concept of the trust is often met with confusion or difficulty in civil law jurisdictions, which may not recognise it. Conversely, the use of foundations

is common and understood in civil law jurisdictions, facilitating transactions and planning.

The Bill also provides a detailed mechanism for overseas foundations to be registered in Gibraltar, which may be useful for tax-planning, asset protection and other purposes. There is also a mechanism for the conversion of companies limited by guarantee, which have previously been considered as the Gibraltar equivalent to foundations.

Foundations have the unique feature of holding property for specific purposes. It is a legal entity, with a structure similar to that of a corporate, with a management board, and unlike a trust, the separation of ownership and administration of the assets.

Conclusion

Given the importance of the development of the financial services industry in civil law countries, particularly in emerging markets outside the EU, the existence of an entity which is widely recognised and is a viable alternative to the more traditional trusts or company structures, is highly anticipated to assist in Gibraltar's growth.



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Data Protection - Brexit won't save data controllers from new Data Protection Regulations.

Key points:

- The UK's decision to leave the EU will not affect the commencement of the GDPR in Gibraltar;
- GDPR comes into force on the 25 May 2018;
- Institutions who presently process data should conduct an assessment of the implications of the GDPR
- GDPR main changes are:
 - More detailed description of what is considered as personal data;
 - Removal of requirement to register;
 - Increased accountability & documentation of compliance;
 - Increased obligations of transparency and nature of processing to data subjects
 - Serious penalties for breach.

Outline

The relevance of the European Union's General Data Protection Regulation ("GDPR") should be considered in any SME-transaction or review over the next 12 months. The GDPR is

the first substantive change to EU data protection regulation since 1995. The Data Protection Act 2004 in Gibraltar is the transposition of the Data Protection Directive 95/46/EC. As these new EU regulations are set to be in force as of the 25 May 2018 and to replace the existing regime, it is relevant to consider any relevant applicability issue in respect of Gibraltar and the UK given the UK's decision to leave the EU.

The below is not a full consideration of the application of the GDPR in Gibraltar. However, it is merely an outline to stimulate further review of the application of the GDPR to any institution that processes personal data. The consideration of the GDPR would be particularly relevant in any transnational activity of a SME, particularly technology businesses and public bodies.

Applicability of the GDPR to Gibraltar

Gibraltar is a territory to which the Treaty establishing the European Economic Community, now superseded by the Treaty on the Functioning of the European Union ("TFEU"), applies. Further information on the applicability of the TFEU to Gibraltar is set out in the opinion written by the Gibraltar Government's EU adviser, now Attorney General (which can be found here). Gibraltar is a territory for whose external relations the UK as Member State is responsible. Given the United Kingdom's referendum decision to leave the European Union in June 2016, Gibraltar's position in respect of its obligations under EU law, and for relevant purposes the GDPR, is presently expected to follow that of the UK. At present the UK Government has not publicly disclosed any formal process to withdraw from the European Union.

It is understood that the UK Government's intention is to leave the EU and Article 50 TFEU will be triggered by the end of March 2017. Should Article 50 TFEU be triggered by the UK Government on the 31 March 2017, this will leave a period of up to 2 years (up to 31 March 2019) for the UK and thereby Gibraltar to negotiate the UK's withdrawal from the EU. The applicability of EU law will cease to apply to the UK and presumably Gibraltar, unless Gibraltar were to obtain a different status within the EU, 'from the date of entry into force of the withdrawal agreement or [the end of the 2 year period]' (Article 50(3) TFEU). On this assumption that the UK and thereafter Gibraltar do not agree to a withdrawal agreement before or on the 24 May 2018, the GDPR will be directly applicable in Gibraltar, without need for further transposition under local legislation in the UK and Gibraltar (Article 16 TFEU), to the UK and Gibraltar as of the 25 May 2018.

In the event that the GDPR does not apply to the UK and Gibraltar by virtue of the TFEU, it is assumed that the UK and Gibraltar would be considered a 'third country' for the purposes of the GDPR. As a result, it is assumed that Gibraltar and/or the UK may wish to be able to transfer data across borders to and from EU Member States. In order for Gibraltar to do so, it would need to provide an adequate level of data protection. This would result in Gibraltar providing protection essentially equivalent to that guaranteed by the GDPR. Therefore even in the event that the GDPR may not be applicable in Gibraltar by virtue of the TFEU it is likely that Gibraltar may wish to introduce legislation of similar equivalence in a post-EU environment. This is something highlighted by Susie Alegre of Doughty Street Chambers in London in her written submission to the House of Lord's Brexit Committee at paragraph 5.

The Main Changes

There are a number of changes introduced by the approximately 200 paged GDPR. The following are commonly considered to be some of the more centre stage changes and implications of the GDPR:

- The GDPR catches data controllers and processors outside the

EU. In essence, it matters who the data is about as opposed to where the data lives.

- The GDPR applies to 'personal data' and includes a detailed definition of this which includes for example IP addresses, cookie identifiers (on web-browsers) or other identifiers such as radio frequency identification tags (RFID).
- The GDPR introduces onerous accountability obligations on data controllers to demonstrate their compliance such as documentation, conduct an impact assessment for more risky processing, compile lists of what data is being processed and minimise unnecessary processing of personal data. The GDPR also introduces the requirement, in certain circumstances, for controllers to appoint a data protection officer in an organisation.
- The GDPR also introduces a requirement to make it easy for data subjects to give and withdraw their consent. Individuals or organisations at this stage may be reminded by the EU's position on 'cookie notices' on websites of recent years. The requirement to make it easy for data subjects enter in or out of processing data should be equally as clear.
- The regulations also introduce an on-going requirement to be transparent about the ways data is processed in an easily accessible format.
- Importantly, data controllers are required to notify most data breaches to the Data Protection Authority (in Gibraltar's case, the GRA) and, where feasible, within 72 hours of awareness.

- A change which many data controllers/processors may welcome is the removal of the requirement to notify or seek approval from the regulating authority. The aim of this appears to be to alleviate data controllers of the administrative and financial burden of this regulatory requirement. At present the requirement to register/notification is £20. The GRA however may wish to replace this source of funding from elsewhere and in other ways.

When the first draft of this article was written the Gibraltar Regulatory Authority (the "GRA") had not yet issued their guidance. The GRA have now provided an initial outline document and will continue to provide guidance in the lead up to the effective date of the regulation. Reviewing these documents would be recommended for further information.

Regulatory Uncertainty about EU-US Data Transfers

The EU - US Privacy Shield (that has been known to replace the US - EU Safe Harbor framework that was ruled invalid by the ECJ) was only adopted in 2016, has been challenged in Ireland as is due for a review expected by summer 2017. These considerations of the EU - US data flows will now be done alongside and simultaneously to negotiations on bilateral exchanges between the UK and the EU as a result of Brexit. These would be of concern for international technology companies who depend on the unrestricted distribution of personal data worldwide, such as cloud software providers which are increasingly used by various industries.

The Implications

The GDPR imposes more robust sanctions for non-compliance, with penalties being as high as €20,000,000 (approx. £18,000,000) or 4% of the total annual global turnover, whichever is greater for the most serious infringements.



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Opinion of the Advocate General on whether Gibraltar and the UK are a single member state for the purposes of the freedom to provide services

On the 19 January 2017, Advocate General Szpunar delivered his opinion on questions referred by the English High Court in the judicial review brought by the Gibraltar Betting and Gaming Association ("GBGA") against the UK Commissioners for Her Majesty's Revenue and Customs Her Majesty's Treasury.

By way of background, the UK in 2014 adopted a new tax regime, requiring gambling service providers to pay a gambling duty in respect of gambling services provided to UK persons, regardless of whether the gambling service provider is located in the UK or elsewhere such as in Gibraltar.

GBGA who provide remote gambling services to customers in the UK and elsewhere took issue with this new tax regime, given that gambling services offered from Gibraltar to the UK are subject to an additional duty in the UK. The GBGA argued that the tax is contrary to the freedom to provide services, enshrined in Article 56 of the Treaty on the Functioning of the European Union ("TFEU").

The Advocate General said that the question on whether or not Article 56 TFEU can be invoked depends on whether or not the UK and Gibraltar are part of the same Member State.

The Advocate General took the view that while it is clear that EU law does apply to Gibraltar, it is silent on the relationship between the UK and Gibraltar when it comes to application of the fundamental freedoms. The Advocate General noted that it is the UK and not Gibraltar that had assumed obligations towards the Member States in ratifying EU Treaties. Therefore, infringement proceedings with respect to Gibraltar are brought against the UK and Gibraltar cannot institute infringement proceedings itself. The Advocate General found that the application of EU law to Gibraltar did not create new or supplementary rights between the UK and Gibraltar that are in addition to those flowing from UK and Gibraltar constitutional law.

The Advocate General concluded:

"I propose that the court should hold that, for the purposes of Article 56 TFEU, Gibraltar and the UK are to be treated as one entity. There is a purely internal situation which does not trigger the applicability of Article 56 TFEU. In the alternative, should the Court find otherwise, I propose that the provisions of the New Tax Regime which are contested in the present case should not be regarded as a restriction on the freedom to provide services, given that they apply without distinction and on a non-discriminatory basis to gambling service providers located in the UK and elsewhere".

It is important to note that the Advocate General's Opinion is not binding on the Court of Justice and the final Judgment remains pending.

As we are all aware, this case has been superseded by the Brexit referendum vote. What, if any, effect this opinion and subsequent judgment will have on Gibraltar once the United Kingdom triggers Article 50 and formal negotiations begins with the EU, will be interesting to see. An opinion that at first glance does not appear positive for Gibraltar, could perhaps prove useful. There could now be the argument that whatever agreement is negotiated between the EU and the United Kingdom, in particular in regards to services, should also apply to Gibraltar as the UK and Gibraltar are to be treated as one entity. Time will tell.



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AGM and Nomination Deadlines

Members are reminded that the 23rd Annual General Meeting will be held at the Gibraltar Yacht Club on 26th April 2017 at 5:00 p.m. You should have all received the Notice of the AGM together with other information. Please ensure that the Nomination Forms are properly completed (both the nominee and nominating subscribers must be fully paid-up for the nominations to be accepted). The Nomination Forms must be addressed to the Treasurer and may be submitted by hand or by post to the Council's offices or by e-mail to barcouncil@gibtelecom.net by no later than Friday 7th April.

Snippets

- Consultation of the expected Law Council Constitution finalised in February 2017
- Legal Services Bill expected to be presented to Parliament before summer 2017
- Council engaged in discussions with Judiciary on draft Code of Conduct. A subsequent Consultation exercise expected
- Middle Temple visit expected in May 2017
- Court of Appeal session 20-31 March 2017
- Council in discussions with new Minister for Justice on Legal Assistance

Contributions

If you are interested in contributing an article, please contact us at barcouncil@gibtelecom.net. Suggestions for posts are always encouraged.

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