Neutral Citation Number: [2014] EWHC 3236 (Admin)

Case No: CO/3807/2014

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2014

**Before :**

**MR JUSTICE GREEN**

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**Between :**

| | |
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| **Gibraltar Betting & Gaming Association Ltd** | **Claimant** |
| **- and -** | |
| **(1) The Secretary of State for Culture, Media & Sport** | **1st Defendant** |
| **(2) The Gambling Commission** | **2nd Defendant** |
| **- and -** | |
| **(1) The Government of Gibraltar** | **Interested Parties** |
| **(2) The Gibraltar Gambling Commissioner** | |

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**Dinah Rose QC, Brian Kennelly** and **Jessica Boyd** (instructed by **Olswang LLP**) for the **Claimant**
**Kieron Beal QC and Oliver Jones** (instructed by **The Treasury Solicitor**) for the **1st Defendant**
**Adam Lewis QC and Tom Cleaver** (instructed by **The Gambling Commission Legal Department**) for the **2nd Defendant**
**Lord Pannick QC** and **Ravi S Mehta** (instructed by **Mishcon De Reya**) for the **1st Interested Party**
**Charles Brasted** (instructed by **Hogan Lovells International LLP**) for the **2nd Interested Party**

Hearing dates: 23rd & 24th September 2014

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# Approved Judgment

# INDEX

**Mr Justice Green :**

## A. Introduction, issues and conclusion

### *(i) The Parties*

1. The Claimant is the Gibraltar Betting and Gaming Association Limited ("GBGA" or "the Claimant"). It is a Gibraltar-incorporated trade association which represents the collective interests of international online gambling operators licensed or intended to be licensed in Gibraltar. The members are predominantly companies incorporated within Gibraltar. Its members, some of whom are familiar British names, provide gaming services to consumers in the UK. One of its members, Yggdrasil Gaming Limited ("Yggdrasil"), is situated, registered and licensed in Malta. It offers services to other gambling operators situated in Malta which in turn provide gambling services including to British customers. Yggdrasil is in the process of applying to be licensed in Gibraltar in order that it may provide business-to-business services to operators licensed in Gibraltar and providing services elsewhere.

2. The First Defendant is the Secretary of State for Culture, Media and Sport ("Secretary of State" or "First Defendant") and is responsible for policy making and legislative proposals with respect to gambling, racing and entertainment licensing. For the purposes of this case the Secretary of State appears in order to defend the Act of Parliament from this challenge. The Second Defendant is the Gambling Commission ("GC"). The GC was established pursuant to the Gambling Act 2005 ("GA 2005"). It is statutorily required to regulate commercial gambling in Great Britain and to exercise the powers granted to it by statute.

3. Her Majesty's Government of Gibraltar ("HMGoG"), and the Gibraltar Gambling Commissioner ("GGC"), have appeared as Interested Parties in this litigation.

### *(ii) Claimant's challenge*

4. This is a challenge to the legality of and Act of Parliament. The Claimant challenges the legislative framework introduced by the Gambling (Licensing and Advertising) Act 2014 ("GLAA 2014") which amends the GA 2005. The Government described the changes as "*fundamental*" in its 2011 Impact Assessment. It entails a change from a system of regulation based upon place of supply to one based upon place of consumption. Under the old system the GC regulated operators who had equipment in the UK but not those that did not. These latter operators were not ignored but were permitted to advertise within the UK upon the basis (a) that they were from the EEA; or (b) that they were from Gibraltar; or (c) that they were based in States whose regulatory regimes the UK Government approved of (the so-called "White Listed states").

5. Under the old system the GC ultimately regulated between 15-20% of operators who supplied internet gambling to customers within the UK. Many of the larger operators had, in the wake of the introduction of the GA 2005, relocated to offshore jurisdictions such as Gibraltar or Malta. Indeed, approximately 55% of the operators providing on-line gambling in the UK are based in Gibraltar and are regulated there.

6. In about 2010 the Government began to consult over changes to the regime in view of concerns about its inability to exercise universal regulation. The exact reasons given for this have been the subject of intense debate in the course of this case. I will return to these later. Under the new regime the pivot for regulation is the place of consumption. Any operator either based in the UK or who operates facilities which could, in effect, be accessed in the UK is required to be licensed by the GC.

7. The Claimant challenges the new scheme. It is important from the outset to be clear about what is, and what is not, being challenged. It is not contended that any particular or specific component of the new regime is illegal. There is no specific condition that is to be imposed in a licence that is impugned. It is not, for example, said that there is no legitimate reason for demanding that licensees retain records, or provide regulatory returns, or pay fees, or respond to investigatory requirements etc. The challenge is taken up at the macro-level. The new regime in its entirety is unlawful because it is adopted for an improper purpose and in its implementation will not achieve any legitimate objective. The new regime will in actual fact undermine consumer protection and create perverse incentives which will encourage the uptake of unlicensed gambling. It is unnecessary and excessive in view of the fact that a less extreme and more proportionate alternative exists (in particular the so-called "passporting proposal" advanced by the Claimant) which would, more than adequately, meet any legitimate objective which the Government and Parliament could have for the regulation of gambling and would obviate all of the costs and burdens and inefficiencies of the new regime. Finally, it is submitted that the scheme is discriminatory in that it treats all operators alike even though there are clear and objective differences between them which Parliament has failed to take into account or pay due regard to. In particular it is said that off-shore on-line service providers are already subject to (extensive) regulatory burdens in their primary place of operation and Parliament has failed to take account of the risk of duplicated or unnecessary regulation in relation to those operators. This root and branch challenge is launched under Article 56 of the Treaty on the Functioning of the European Union ("Article 56 TFEU") which prohibits restrictions upon the provision of services between Member States unless they are proportionate and non-discriminatory.

8. The stance adopted by the Claimant is reflected in the all embracing nature of the declaratory relief sought which is that:

> "The New Licensing regime is unlawful, in that it is a disproportionate restriction on the freedom to provide services guaranteed by Article 56TFEU"

The Claimant also seeks a supplementary declaration that the decision of the Minister and the GC to adopt the new regime and reject the passporting proposal is irrational in domestic law:

> "The decision of the Minister and/or the GC to adopt the New Licensing regime, and to refuse to adopt the passporting proposal was irrational".

9. The Defendants, of course, reject these criticisms. They submit that the Claimant has mischaracterised the new regime, that the new rules are reasonable and proportionate and not discriminatory and that the passporting proposal would be cumbersome and

bureaucratic and, in any event, simply does not meet the concerns and objections that the Government and Parliament maintained to the old regime and which have led to the decision to introduce the new regime. They submit that in adopting the regime in the circumstances which prevail Parliament and the executive enjoy a wide margin of discretion to choose the appropriate method of regulation both under EU and domestic law. They also raise two important points of principle. First that the scope of protection afforded by Article 56 TFEU does not extend to an organisation such as the Claimant, which is a trade association and not a person providing services between Member States and that therefore the Claimant has no *locus* to bring the claim under Article 56 TFEU. Secondly, the provision of services between Gibraltar and the United Kingdom constitutes the provision of services within a single Member State and that any restrictive effects are "purely internal". It is submitted that for this reason also Article 56 TFEU is not engaged.

***(iii) The expedited nature of the claim***

10. This claim for judicial review has come before the Court on a highly expedited basis. The Bill received Royal Assent on 14th May 2014. The Commencement Order was made on 10th September 2014 and the principal provisions of the Act, amending the GA 2005, were scheduled to come into force on 1st October 2014. The Claim Form seeking judicial review was served on 13th August 2014. An application for urgent consideration was also made on 13th August 2014. Over the course of the ensuing two weeks the First and Second Defendants acknowledged service and served Summary Grounds of Resistance. The application came before Hickinbottom J on paper who granted permission to apply for judicial review on 12th September 2014. Detailed directions were given for the service of documents with the substantive hearing expedited and set down to be heard on 23rd and 24th September 2014. For reasons that I will return to later, it is necessary to record that Hickinbottom J concluded that whilst some grounds were stronger than others he was of the view that the case was arguable in its entirety. Further, he did *not* order the determination of any preliminary issues, for instance as to the *locus* of the Claimant to bring the claim.

11. The parties thereafter engaged in a Herculean effort to compile what turned out to be a very substantial body of documentary and witness statement evidence in readiness for the hearing. Inevitably, given the acute time constraints involved, applications were made during the hearing before me to adduce new evidence and I allowed new documents, statistics and witness statements to be admitted. I should add that I did not perceive any of the parties to be materially disadvantaged by the process. This is not least because the arguments advanced, in particular by the Claimant, are not new. They reflect submissions made over the course of a lengthy legislative process which included a consultation exercise and detailed pre-legislative scrutiny by a committee of the House of Commons which heard evidence in oral and written form from all sides of the debate. I would add that I am grateful to all counsel who appeared for the concise yet vigorous submissions made which assisted me significantly.

12. The scale and complexity of the issues arising meant that the production of written reasons for my decision was inevitably going to take me beyond the 1st October 2014 date for the new measures to come into force. I floated the idea with the parties that I would, if it was felt absolutely necessary, declare the result at a point prior to 1st October 2014 when I was sufficiently certain about my conclusions, with reasons to follow. Upon consideration, the Secretary of State indicated that his preferred course

was to delay the coming into effect of the legislation by one month until 1st November 2014 thereby giving me time to complete this judgment.

*(iv) Summary of issues*

13. The issues as they have arisen can be summarised as follows:

i) **Issue I: Whether the measures are disproportionate, discriminatory or irrational:** Is the new regime in violation of Article 56 TFEU upon the basis that it is disproportionate and/or discriminatory? Further, was it irrational and unlawful under domestic law for the First and Second Defendant to reject the Claimant's "passporting proposal"?

ii) **Issue II: Whether the Claimant has *locus* to seek a judicial review**: Does the Claimant have the right to invoke before the High Court the directly effective right contained within Article 56 given that it is a trade association which, itself, does not provide services in the United Kingdom but, rather, provides representational services to its members which are predominantly Gibraltar based gambling operators? The Defendants say Article 56 TFEU can be invoked in judicial review proceedings only by a person who actually provides cross-border services.

iii) **Issue III: The constitutional relationship between the UK and Gibraltar**: What is the proper analysis of the relationship between the UK and Gibraltar? Is a restriction imposed by the UK on the provision of services from Gibraltar to the UK a purely internal matter, or a restriction on trade between one Member State (the UK) and a third territory or is it even a restriction on trade between two different Member States? The answer to this first question informs the related question: To what extent does Article 56 TFEU apply to restrictions on trade which do not occur between Member States?

*(v) Conclusion/Outcome*

14. In relation to the issues arising I have concluded that the Claimant has not established that the new regime is unlawful under EU law or domestic law. It is neither disproportionate, nor discriminatory, nor is it irrational. The new regime serves a series of legitimate objectives. There is no reason to doubt Parliament's judgment that it will achieve a reasonable degree of effectiveness and there is no proper basis for concluding that it is or will be discriminatory in its effects. Further, I reject the submission that the new regime will create perverse incentives and lead to the creation of an illicit market of unscrupulous service providers. I also reject the submission that the passporting proposal would meet the legitimate objectives of Parliament or prove effective or achievable without significant bureaucracy and extra cost. My conclusions in relation to the decision of Parliament to adopt the new legislative regime apply equally to the position of the GC in relation to implementation.

15. I have, in arriving at this conclusion on the EU law grounds, applied a test of *manifest in/appropriateness.* But I have also concluded that had I applied any more intensive or intrusive standards of judicial review (whether under EU or domestic law) I would have come to the same conclusion. The Government addressed itself to all of the

relevant considerations, it has explained its policy in terms that are logical and rational, and it had a sufficient basis of evidence or concerns for its position to be warranted. There are no errors or flaws in that logic or in the procedures which led to the adoption of the final policy conclusion. This, in my judgment, is a clear cut case.

16. As to the other two issues (*locus* and the constitutional status of Gibraltar) the outcome of these additional issues has no bearing upon the conclusion in this case which is that the challenge fails. They were however advanced by the Secretary of State as fundamental and threshold objections to the entire challenge. I have decided therefore that I should address them fully. My conclusions on these are as follows.

17. First, so far as *locus* is concerned I have concluded that on the facts of this case the Claimant did have the right to bring this claim and I would not have refused appropriate relief purely upon the basis of lack of a sufficient interest.

18. Secondly, in relation to the constitutional position as between the United Kingdom and Gibraltar I have concluded that Gibraltar is not to be treated as the same Member State as the UK for the purpose of Article 56 TFEU. Equally, Gibraltar is not a Member State in its own right so a restriction on trade between itself and the UK is not one on inter-Member State trade. Gibraltar is a territory with a different legal and political status to that of the UK as is made clear in Article 355(3) TFEU. However, the conclusion that Gibraltar and the UK are legally separate does not mean that a restriction on the provision of services between the two territories is without more a restriction engaging Article 56 TFEU. Whether there is such a consequence is a question of fact which focuses upon whether any of the restrictions are capable of exerting a spin-off, indirect, effect on inter-Member State trade. In the event, whilst I have expressed scepticisms as to whether such an effect could in fact arise, it has not been necessary to form a decided conclusion on this.

19. The end result is that the claim does not succeed.

## B. The regulatory regime under challenge

### *(i) Introduction*

20. I turn now to consider the new regime which is the subject matter of the Claimant's challenge. It is necessary to describe the scheme in its entirety because the Claimant's challenge is to the whole scheme and not to certain parts only. In this section I have set out my views, *en passant*, on some of the complaints made by the Claimant about the structure of the new regime. In particular I have set out conclusions on: the extent to which the regime may be subsequently revised to take account of new developments, the extent to which the scheme permits the GC to exercise discretion and flexibility, and, the burden of fees.

21. The GA 2005 is subject to amendment by virtue of the GLAA 2014. In the text below I will, for the sake of convenience, refer to the GA 2005 albeit in its amended form.

### *(i) The Gambling Act 2005 (GA 2005) and relevant changes brought about by the Gambling (Licensing and Advertising) Act 2014 ("GLAA 2014")*

22. The GC was established pursuant to section 20 GA 2005. In the exercise of its functions the GC is required under section 22 to "aim":

> "(a) To pursue, and wherever appropriate to have regard to, the licensing objectives, and
>
> (b) To permit gambling, in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives".

23. The "licensing objectives" are set out in section 1, and are in the following terms:

> "In this Act a reference to the licensing objectives is a reference to the objectives of —
>
> (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
>
> (b) ensuring that gambling is conducted in a fair and open way, and
>
> (c) protecting children and other vulnerable persons from being harmed or exploited by gambling".

24. It is apparent that the essential stance adopted by the GA 2005 is permissive. It is notable that, in this regard, the United Kingdom has adopted a more tolerant approach to gambling than is evident from the legislation of many other Member States of the EEA, or elsewhere throughout the world. In many such jurisdictions forms of gambling permitted in the United Kingdom are either prohibited or provided only by a State or State sanctioned monopoly or exclusive licensee.

25. Pursuant to section 23 GA 2005 the GC is required to prepare a statement setting out the principles to be applied by it in the exercise of its functions under the Act. The statement shall, in particular, explain how the principles to be applied are expected to assist the GC in the pursuit of the licensing objectives. The statement is required to be reviewed from time to time and is to be published. Before issuing or revising a statement the GC is required to consult widely with operators but also with persons representing the interests of persons carrying on gambling businesses and with the public. The GC also has a duty, pursuant to section 26, to advise the Secretary of State about the incidence of gambling, the manner in which gambling is carried on, the effects of gambling, and, the regulation of gambling.

26. Part 3 of the GA 2005 establishes certain offences of a criminal nature related to gambling. Section 33 is entitled "Provision of facilities for gambling". Before setting out the content of this provision it is necessary to define the expression "facilities for gambling". The relevant definition of this is found in section 5 which provides as follows:

> "(1) For the purposes of this Act a person provides facilities for gambling if he —

> (a) invites others to gamble in accordance with arrangements made by him,
>
> (b) provides, operates or administers arrangements for gambling by others, or
>
> (c) participates in the operation or administration of gambling by others".

It is apparent, therefore, that an off-shore provider of gambling services will provide "facilities for gambling" in the UK simply by virtue of the fact that he creates facilities which may be accessed in the United Kingdom; and this arises even if the operator has no physical presence in the United Kingdom.

27. As already observed, Part 3 GA 2005 sets out criminal offences relating to gambling. Section 33, so far as relevant, provides as follows:

> **"33. Provision of facilities for gambling**
>
> (1) A person commits an offence if he provides facilities for gambling unless —
>
> (a) an exception provided for in subsection (2) or (3) applies, or
>
> (b) an exception provided for by any of the following provisions applies —
>
> ...
>
> (2) Subsection (1) does not apply to any activity by a person if —
>
> (a) he holds an operating licence authorising the activity, and
>
> (b) the activity is carried on in accordance with the terms and conditions of the licence.
>
> (3) Subsection (1) does not apply to any activity by a person if —
>
> (a) he acts in the course of a business carried on by a person who holds an operating licence authorising the activity, and
>
> (b) the activity is carried on in accordance with the terms and conditions of the licence.
>
> *(3A) Section 36(3A) limits the application of this section in cases involving the use in Great Britain of certain facilities for remote gambling*".

The italicised text set out above constitutes an amendment brought about by the GLAA 2014.

28. Section 36 GA 2005 is an important provision. It was amended by the GLAA 2014. Section 36(3) was removed and replaced by a new section 36(3) and (3A). I set out the entirety of the provision in full below. The old text is underlined and the new (replacement text) is italicised:

> **"36. Territorial application**
>
> (1) For the purposes of section 33 it is immaterial whether facilities are provided —
>
> (a) wholly or partly by means of remote communication;
>
> (b) subject to subsections (2) and (3), inside the United Kingdom, outside the United Kingdom, or partly inside and partly outside.
>
> (2) Section 33 applies to the provision of facilities for non-remote gambling only if anything done in the course of the provision of the facilities is done in Great Britain.
>
> (3) Section 33 applies to the provision of facilities for remote gambling only if at least one piece of remote gambling equipment used in the provision of the facilities is situated in Great Britain (but whether or not the facilities are provided for use wholly or partly in the United Kingdom).
>
> *(3) Section 33 applies to the provision of facilities for remote gambling only if –*
>
> *(a) at least one piece of remote gambling equipment used in the provision of the facilities is situated in Great Britain, or*
>
> *(b) No such equipment is situated in Great Britain but the facilities are used there.*
>
> *(3A) In a case within subsection (3)(b), the person providing the facilities commits an offence under section 33 only if the person knows or should know that the facilities are being used, or are likely to be used, in Great Britain.*
>
> (4) In this Act "remote gambling equipment" means, subject to subsection (5), electronic or other equipment used by or on behalf of a person providing facilities for remote gambling —
>
> (a) to store information relating to a person's participation in the gambling,
>
> (b) to present, to persons who are participating or may participate in the gambling, a virtual game, virtual race or

other virtual event or process by reference to which the gambling is conducted,

(c) to determine all or part of a result or of the effect of a result, or

(d) to store information relating to a result.

(5) In this Act "remote gambling equipment" does not include equipment which —

(a) is used by a person to take advantage of remote gambling facilities provided by another person, and

(b) is not provided by that other person".

29. The combined effect of sections 33 and 36 of the GA 2005, in their amended form, is to create a criminal offence for those operators who provide unlicensed and unauthorised facilities for gambling in the United Kingdom even if that operator has no facilities or equipment physically present in the United Kingdom.

30. The licensing regime itself is set out in Part 5 of the GA 2005. Section 65 GA 2005 identifies different types of licence for such activities as operating a casino, operating a bingo facility, operating a betting pool, providing facilities for betting, acting as a betting intermediary, the provision of gaming machines available for use in an adult gaming centre, the making of gaming machines available for use in a family entertainment centre, the manufacture, supply, installation, adaptation and maintenance or repair of gaming machines or parts thereof, the manufacture supply installation or adaptation of gaming software, and the promotion of lotteries.

31. Any operating licence must, pursuant to section 66, specify the person to whom it is issued, the period during which it is to have effect, and any conditions attached by the GC pursuant to sections 75 or 77.

32. Section 67 concerns "Remote gambling". It provides in full, as follows:

**"Remote gambling**

(1) An operating licence is a "remote operating licence" if it authorises activity to be carried on —

(a) in respect of remote gambling, or

(b) by means of remote communication.

(2) A remote operating licence may not also authorise activity which is neither —

(a) in respect of remote gambling, nor

(b) carried on by means of remote communication.

> (3) An operating licence must state whether it is a remote operating licence or not".

33. A person seeking a licence must apply to the GC. The application must: specify the activities to be authorised by the licence; specify an address in the United Kingdom at which a document issued under the Act may be served upon the applicant; be made in such form and manner as the GC directs; state whether the applicant has been convicted of a relevant offence; state whether the applicant has been convicted of any other offence; contain or be accompanied by such other information or documents as the GC may direct; and, be accompanied by the prescribed fee.

34. The general principles and criteria which are to be applied by the GC in determining whether to grant a licence are set out in section 70. These include (not surprisingly) having regard to the licensing objectives. They also require the GC to form and have regard to an opinion of the applicant's suitability to carry on the licensed activities, and to consider the suitability of any gaming machine or other equipment to be used in connection with the licensed activities. Section 70(2) empowers ("may") the GC to have regard to:

> "(a) the integrity of the applicant or of a person relevant to the application;
>
> (b) the competence of the applicant or of a person relevant to the application to carry on the licensed activities in a manner consistent with pursuit of the licensing objectives;
>
> (c) the financial and other circumstances of the applicant or of a person relevant to the application (and, in particular, the resources likely to be available for the purpose of carrying on the licensed activities)".

35. Section 70(4) stipulates that the statement required to be produced pursuant to section 23 (see above) must specify the principles applied by the GC in considering applications under section 69. Further it must, and in particular, specify the kind of evidence to which the GC will have regard when assessing integrity, competence and financial or other circumstances. The section provides that the evidence might include interviews conducted by or on behalf of the GC, references provided to the GC at the request of the applicant, information or opinions provided to the GC by other persons, information sought by the GC as to the solvency in general and financial reserves in particular of the applicant, the completion of training and the possession of qualifications.

36. In determining whether to grant a licence the GC is not permitted to have regard to the area within Great Britain within which it is proposed to provide facilities or the expected demand for facilities which it is proposed to provide.

37. Section 75 *et seq* concerns the conditions which may be imposed within licences. In particular, section 75 confers upon the GC a power to specify conditions. The provision, in full, is in the following terms:

> **"75. General conditions imposed by Commission**

> (1) The Commission may specify conditions to be attached to —
>
> (a) each operating licence, or
>
> (b) each operating licence falling within a specified class.
>
> (2) For the purposes of subsection (1)(b) a class may be defined wholly or partly by reference to —
>
> (a) the nature of the licensed activities;
>
> (b) the circumstances in which the licensed activities are carried on;
>
> (c) the nature or circumstances of the licensee or of another person involved or likely to be involved in the conduct of the licensed activities.
>
> (3) Where the Commission issues an operating licence it shall attach to the licence any condition specified under subsection (1) as a condition to be attached to operating licences of a class within which each licence falls".

38. It follows from the above that the GC is empowered (but not obliged) to specify conditions. Conditions may be attached to operating licences or operating licences falling within a specified class. Where the GC grants an operating licence it is obliged to impose those conditions which it considers are relevant to a class where the operating licensee falls within that specified class.

39. Pursuant to section 76 the GC is empowered to amend or invoke conditions specified under section 75. Section 76(1) is in the following terms:

> "(1) The Commission may amend or revoke a condition specified under section 75; and a reference in this section to the specification of a condition includes a reference to the amendment or revocation of a condition".

40. An issue arose in the course of submissions as to the scope and effect of this power of amendment or revocation and whether that power applied to class licences under section 75(1)(b). The issue arose in the context of the Claimant's submission that there was no flexibility on the part of the GC to create bespoke or tailor-made class conditions and that this was a flaw in the legislative regime in that it prevented the GC from taking account of the nature and extent of regulation already imposed upon operators by foreign regulators. It was submitted that this increased the scope for the (unnecessary) duplication of regulatory conditions, obligations and burdens on operators. Ultimately this was advanced in order to support the Claimant's primary contention that the scheme of the legislation was disproportionate.

41. My provisional view as to the scope of section 76(1) was that it empowered the GC to amend conditions contained in either individual operating licences or class licences and that the GC was not, thereby, fettered in its ability to modify licences to take

account of the situation individual licensees found themselves in. However, counsel for both the Secretary of State and the GC submitted that upon a teleological or purposive interpretation of sections 75 and 76 combined the GC was constrained in that it had no ability to vary the conditions contained in a class licence. For the purpose of this judicial review I propose to accept the construction placed upon section 76 by Miss Dinah Rose QC for the Claimant, which as I have observed was shared by the Defendants, and work upon the basis that the GC has no power to vary the minimum set of conditions to be imposed in association with a licence and that this, at least to some degree, does fetter the ability of the GC to mould licence conditions to suit the particular position of individual licensees. I should, however, make clear that I am not deciding, as a matter of law, that this is the correct construction of section 76, which is a matter which may be left for another day. I am proceeding upon this basis since it is favourable to the Claimant and is the view of the legislation presently held by the Secretary of State and by the GC.

42. Finally, in relation to the imposition of conditions, pursuant to section 77 the GC, when issuing an operating licence, is empowered to attach conditions thereto. The scope and nature of the power to attach conditions is elaborated upon in sections 79 and 80 GA 2005. There is nothing particularly surprising about the content of these provisions which reflect the powers conferred upon regulators in other economic sectors. It empowers the GC and the Secretary of State to impose conditions restricting the activities that may be carried on in reliance upon the licence by reference to the nature of the activities, the circumstances in which they are carried on or their extent. Conditions may also be imposed which address the facilities that may or must be provided in connection with the licensed activity, the manner in which the facilities are provided, the number of persons that may or must be employed in the provision of facilities, the financial resources which must be made available for particular purposes to the person providing the facilities. There is, moreover, in section 79(4)(e) a power to impose a condition about "any other matter". Section 79(5) permits the imposition of conditions relating to the financial circumstances of the licensee or of any other person involved or likely to be involved in the conduct of the licensed activities, in particular in relation to the making of provision for the maintenance of reserves in respect of potential liabilities.

43. Section 79(6) concerns remote operating licences. It is in the following terms:

> "(6) A condition of a remote operating licence may restrict the methods of communication that may be used in the course of the licensed activities".

44. Further conditions may be imposed relating to the manner in which the facilities for gambling are advertised or described. Section 76(8) permits the imposition of conditions concerning the provision of assistance to persons who are or may be affected by problems relating to gambling.

45. Section 79(9) permits the imposition of conditions which make provision for the establishment of the identity of users of facilities, for the recording of the identity of such users, or for restricting the provision of facilities to persons who are registered in respect of facilities in advance.

46. Section 80 GA 2005 concerns "Requirement for personal licence". This imposes an obligation upon the GC to use its powers under sections 75 and 77 to ensure that in respect of each operating licence at least one person occupies a specified management office in or in respect of the licensee or in connection with the licensed activities, and holds a personal licence authorising the performance of the functions of the office. The purpose of section 80 is to require operators to identify individuals performing senior management roles in relation to the gambling activity who, pursuant to licence, will be made responsible for the proper performance of the licensing operator's licence obligations.

47. A final matter that I need to address in relation to the statutory framework concerns the provisions relating to advertising in Part 16 GA 2005. Pursuant to section 330 a person commits a criminal offence if he advertises unlawful gambling. The net effect of the section is that gambling is unlawful if it is unlicensed. Section 327 defines "advertising" in broad terms:

> "(1) For the purposes of this Act a person advertises gambling if —
>
> (a) he does anything to encourage one or more persons to take advantage (whether directly or through an agent) of facilities for gambling,
>
> (b) with a view to increasing the use of facilities for gambling, he brings them or information about them to the attention of one or more persons, or
>
> (c) he participates in or facilitates an activity knowing or believing that it is designed to —
>
> (i) encourage one or more persons to take advantage (whether directly or through an agent) of facilities for gambling, or
>
> (ii) increase the use of facilities for gambling by bringing them or information about them to the attention of one or more persons".

48. It is a defence for a person charged with an offence under section 330(1) GA 2005 to show that he reasonably believed that the advertised gambling was lawful: cf section 330(4). Further, section 330(5) imposes a burden upon the prosecution to establish that a person indicted knew or should have known that the advertised gambling was unlawful: cf section 330(5).

49. Section 333 GA 2005 was amended by section 3(3) GLAA 2014. It concerns the territorial application of rules relating to remote advertising. So far as relevant the provision is in the following form. The amended provisions are italicised in the text below, the repealed provisions are underlined:

> "**Territorial application: remote advertising**

...

(2) The prohibition in section 330(1) applies to advertising by way of remote communication only if —

(a) the advertising satisfies the test in subsection (4),

(b) the advertising satisfies the additional test in subsection (5) or (6), if relevant, and

(c) the gambling to which the advertising relates satisfies the test in subsection (9).

...

(4) The test referred to in subsections (1)(a), (2)(a) and (3) is that the advertising involves —

(a) providing information, by whatever means (and whether or not using remote communication), intended to come to the attention of one or more persons in Great Britain,

(b) sending a communication intended to come to the attention of one or more persons in Great Britain,

(c) making data available with a view to its being accessed by one or more persons in Great Britain, or

(d) making data available in circumstances such that it is likely to be accessed by one or more persons in Great Britain.

...

(9) The test referred to in subsections (1)(c) and (2)(c)...is —

(a) in the case of non-remote gambling, that it is to take place in Great Britain, or

(b) in the case of remote gambling, that at least one piece of remote gambling equipment to be used in providing facilities for the gambling is or will be situated in Great Britain.

*(b) in the case of remote gambling, that –*

*(i) at least one piece of remote gambling equipment to be used in providing facilities for gambling is or will be situated in Great Britain, or*

*(ii) no such equipment is or will be situated in Great Britain, but the facilities are or will be capable of being used there*".

50. The net effect of the amendments is that whereas it was previously a criminal offence to advertise the unlawful services of operators who had at least one piece of remote gambling equipment located in Great Britain or who were not in an EEA (including Gibraltar) or White List jurisdiction, it is, pursuant to these amendments, now a criminal offence to advertise the unlawful services of operators based anywhere in the world even though no gambling equipment is located in Great Britain. It is a criminal offence provided the operator's facilities are capable of being used in Great Britain. It follows that an operator, wherever they are located in the world, whose services are capable of being used by customers in Great Britain and who is not licensed by the GC will attract criminal liability if it advertises its services in this jurisdiction. This will apply even if the operator has no intention of targeting British customers but is not able effectively to block such customers accessing its services.

***(iii) Statement of principles for licensing and regulation: September 2009***

51. I turn now to the administrative measures adopted under section 23 GA 2005 which are in place to implement the statutory regime. In September 2009 the GC issued a statement of principles for licensing and regulation. It is relevant to identify some of the salient features of this statement since, notwithstanding the amendments to the GA 2005, they will, largely, retain their currency under the new regime. Paragraph 2.3 addresses what the GC expects from applicants for licences:

> "2.3 The Commission expects applicants for licences to:
>
> • be able to demonstrate that they can meet the Commission's suitability assessment
>
> • ensure that the activities they plan to carry out will be conducted in a manner which minimises the risks to the licensing objectives
>
> • work with the Commission in an open and co-operative way
>
> • disclose to the Commission anything which the Commission would reasonably expect to know".

52. It is apparent that the GC expects (and evidence before the Court indicates that the expectation is justified) co-operation from licensees. All regulatory regimes, of whatever hue, operate to a greater or lesser degree upon the basis that the regulated community undertakes a degree of self-assessment and maintains co-operative relations with the regulator. This is a point to which I will return later in the context of the Claimant's submissions that the enforcement regime under the GA 2005 as amended is inadequate. Paragraph 2.5 of the statement elaborates:

> "2.5 The Commission also expects those holding licences, including, as appropriate, personal licences, to:
>
> • conduct their business with integrity
>
> • act with due care, skill and diligence

> • take care to organise and control their affairs responsibly and effectively and have adequate systems and controls to minimise the risks to the licensing objectives
>
> • maintain adequate financial resources
>
> • have due regard to the interests of customers and treat them fairly
>
> • have due regard to the information needs of customers and communicate with them in a way that is clear, not misleading, and allows them to make a properly informed judgment about whether to gamble
>
> • manage conflicts of interest fairly
>
> • work with the Commission in an open and co-operative way
>
> • disclose to the Commission anything which the Commission would reasonably expect to know".

53. In section 3 of the statement entitled "Applicable principles" the GC sets out in broad terms its position in relation to a number of matters. In particular, in paragraph 3.4, the GC states that it will keep its regulatory approach under review, and will make changes to that approach when appropriate (for example, to reflect experience on new developments). This has resonance in the context of the Claimant's submissions that the present regime is inadequate. That criticism must be viewed in light of the position of the Secretary of State and the GC that the new regime may need to be adapted over time.

54. An important statement affecting how the GC will exercise its powers is paragraph 3.13 in relation to requests for information:

> "3.13 The Commission will request only that information which it requires and will avoid duplicating requests by seeking to obtain information from government bodies (for example, the Serious Fraud Office) and other regulators (for example, the National Lottery Commission, the Office of Fair Trading, the Office of Communications and the Financial Services Authority) where it is possible, and appropriate, to do so".

The Claimant relies upon paragraph 3.13 as enunciating the important principle of the avoidance of duplication. The Claimant submits that the new regime is however rife with duplicative obligations and burdens which supports its contention that the overall regime is disproportionate.

55. Finally, paragraph 3.24 concerns coordinated regulatory action and is in the following terms:

> "3.24 The Commission will take coordinated regulatory action with government bodies and/or other regulators where it is appropriate to do so".

Support for the principle of mutual co-operation between regulators is found further in paragraph 4.11 where the GC states that it will seek to build and maintain good liaison and close working relationships with local authorities, other regulators and law enforcement bodies including in relation to the sharing of information and the investigation of offences.

***(iv) Licensing, compliance and enforcement policy statement: September 2009***

56. In September 2009 the GC also issued a licensing compliance and enforcement statement which set out the GC's policies in relation to the assessment of risk, the licensing of operators and key personnel, the carrying out of compliance activities, and, enforcement. The gravamen of the statement was that the level and nature of the GC's interventions would depend upon its assessment of the likelihood of risk presented by the activity or operator in question and the taking of proportionate action. Risk was measured by reference to the impact upon the statutory licensing objectives:

> "3.5 All applicants are required to supply the Commission with sufficient and complete information to support their application and in particular information that will enable an assessment on their suitability to be made. *However, the Commission takes a risk based and proportionate approach to the amount and detail of information an applicant is required to provide.* Guidance on the type of information required is included in the guidance notes that accompany the application form".
>
> (emphasis added)

57. The statement goes on to set out a series of criteria the GC would apply in determining applications for licences. Once a licence is granted the GC seeks to ensure through its compliance work that the licensee remains suitable to hold a licence and that it conducts itself in a manner consistent with the licensing objectives, the requirements of the Act and the conditions set out in the licence and related codes of practice: cf Statement paragraph 4.1. The GC states (cf paragraph 4.5):

> "Assessments and visits will be used proportionately, as the Commission will seek to target those areas of greatest risk to the licensing objectives".

58. In relation to the overall conduct of the GC at paragraph 4.9 of the Statement the following is stated:

> "4.9 The Commission will:
>
> • act reasonably in discharging its powers under the Act and conducting assessments and visits
>
> • exercise its powers under the Act fairly, responsibly and with due respect for other parties involved

> • explain what information is required, and why, to ensure requests are appropriate, proportionate, minimise disruption to the business, and enable the relevant person to comply fully with the request
>
> • seek the co-operation of others wherever possible and only use its statutory powers when necessary".

59. In relation to requests for information the GC states (cf paragraph 4.10):

> "4.10 A request for the production of any records or to provide an explanation of records will be made either orally or in writing, dependent upon the individual circumstances of each case. Wherever possible, licensees will be given a reasonable period of time to comply with the request. The Commission will seek to take into account the burden placed on the individual or business when removing records so that it causes minimal disruption".

60. In paragraph 4.16 under the heading "Risk Assessment and proportionality" the GC states:

> "4.16 The decision about how best to deal with any issues will be informed by an assessment of risk. This will ensure that the Commission's resources are focussed primarily on those operators, individuals and activities which present the greatest risks to the licensing objectives".

***(v) Licence conditions and codes of practice (consolidated version): May 2014***

61. In May 2014 the GC issued a consolidated and up to date version of the applicable licence conditions and codes of practice (hereafter "LCCP"). For the reasons that I have set out above at paragraph [41] I treat the LCCP as irreducible minimum conditions applicable to all operators which are not susceptible to modification to take account of the individual circumstances of particular licensees. As I have already explained this is significant by virtue of the Claimant's submission that the GC is denied, under the present regime, the ability to modify licences to take account of objectively justified, and legitimate, differences between particular licensees.

62. It is also relevant, at this juncture, to record that the position of the Secretary of State and of the GC is that whilst it is appropriate to maintain a uniform set of minimum conditions there is nonetheless considerable flexibility conferred upon the GC as to the manner in which those conditions are applied and enforced. And it is in this latter context that the GC enjoys considerable latitude and discretion to take account of the different circumstances that individual licensees find themselves in, including taking account of the fact that a particular licensee might already be subject to effective regulation in an off-shore jurisdiction. Because it is no part of the Claimant's case that any particular operating licence condition is disproportionate in and of itself it is not necessary for me to set out the detail of particular conditions. It suffices to record that the minimum licence conditions concern such (wholly unexceptional and unsurprising) matters as: the individual (natural) persons who are to be subject to

personal licences, technical standards, equipment specifications, remote gambling equipment and gambling software; peer to peer gaming and other networks; the protection of customer funds (by way of segregation of funds and disclosure to customers); cash handling and payment methods and services; provision of credit by licensees and the use of credit cards; the requirement upon licensees to satisfy themselves that the terms upon which gambling is offered are not unfair and meet the reasonableness test provided for in domestic legislation; the display of licensed status; compliance with prohibitions on certain types of casino or prize gaming games that appear on lists prohibited by the GC; restrictions on the tipping of staff holding personal licences; regulations concerning lotteries including those operated by societies and local authorities; restrictions on the use of betting intermediaries; regulations and controls in relation to pool betting; the putting into place of policies and procedures designed to ensure that the staff of licensees co-operate with the enforcement officers of the GC; reporting obligations in relation to key events and other identified reportable events; and, restrictions and limitations in relation to the use of gaming machines. In the same document the GC sets out the provisions of the relevant Code of Practice. This relates to such matters as: co-operation with regulatory authorities and the responsibility which licensees must take for third party's activities; money laundering provisions; detailed provisions relating to the protection of children and other vulnerable persons; provisions designed to ensure fair and open dealing; provisions concerning marketing; complaints and disputes; obligations to be imposed upon the staff of licensees; information requirements, and gaming machines.

***(vi) The scope for the exercise of discretion in implementation and enforcement***

63. It is relevant that in their substance many of the conditions imposed in the LCCP are not prescriptive; on the contrary they require the licensee to comply with obligations, the detail of which will be determined separately by the GC. In other words there is considerable scope for flexibility on the part of the GC to modulate observance with licence conditions to suit the nature and the position of individual licensees.

64. In the context of the present case the Claimant has complained especially about the potentially disproportionate manner in which information requests might be made and the risk (which the Claimant says is real and immediate) that burdensome and duplicative information requirements will be imposed upon licensees. Condition 15 entitled "Information requirements" sets out a detailed set of requirements imposed upon licensees to provide the GC with information relating to actual or suspected offences under the Act. Licensees are also required to disclose to the GC events which could have a significant impact upon the nature or structure of a licensee's business. This might include, for example: the presentation of winding up petitions; the identification of persons holding more than a specified percentage of the issued share capital of the licensee; the entering into arrangements with third parties relating to gambling activities for "other than for full value"; the appointment of persons occupying key positions or ceasing to occupy key positions in the licensee; material changes in the licensee's banking arrangements; breaches of covenants to a bank or other lender; defaults; court judgments; the grant, withdrawal or refusal of any application for a licence or other permission made by the licensee to a gambling regulator in another jurisdiction, etc. Licence condition 15.3.1 applies to all operating licences. It is in terms which make it clear that the extent of the burden to be imposed

upon a particular licensee is contingent not upon some pre-determined prescriptive set of rules laid down in the conditions, but upon a request from the GC:

> "**1.** On request, licensees must provide the Commission with such information as the Commission may require about the use made of facilities provided in accordance with this licence, and the manner in which gambling authorised by this licence and the licensee's business in relation to that gambling are carried on, including in particular information about:
>
> **a** the numbers of people making use of the facilities and the frequency of such use
>
> **b** the range of gambling activities provided by the licensee and the numbers of staff employed in connection with them
>
> **c** the licensee's policies in relation to, and experiences of, problem gambling.
>
> **2.** In particular within 28 days of the end of each quarterly period or, for those only submitting annual returns, within 42 days of the end of each annual period, licensees must submit a Regulatory Return to the Commission containing such information as the Commission may from time to time require".

65. It is not, in my judgment, fair or correct to describe the system as "one cap fits all". I accept the submission of the Secretary of State and the GC that whilst it is appropriate to maintain a single level of conditions which are not subject to change there is, yet, considerable scope for a differentiated implementation which takes account of the risk assessment made by the GC in any particular case. This, so it seems to me, is an important consideration when measuring the proportionality of the present system and I return to this point later.

66. Evidence was given in the course of these proceedings by Ms Jenny Williams, a Commissioner and the Chief Executive of the GC, which I accept. In paragraphs 47 and 48 of her Witness Statement Ms Williams responded to the Claimant's contention that the GC would apply the same conditions to all applicants. Her response was in the following terms:

> "47. As the Commission has made clear, at conferences and in discussion with operators and the Remote Gambling Association, under the new licensing regime the Commission will have a broad discretion about how best to protect consumers and pursue the licensing objectives in the Act. For example, the Commission may require an operator to have a "mirror" server located in the UK or a British representative, or to provide a bond, or some other bespoke condition depending on the circumstances. We will use our powers in section 77 of the Act to impose specific licence conditions, on a case by case basis, to applicants in particular to those applying from outside the European Union or "white listed" jurisdictions. However, in

> such cases, the Commission's starting point will not be to limit itself by reference to a prior detailed study of the requirements imposed by the local regulatory regime, the likelihood that those requirements will be adequately enforced, and the effect of that regime on the Commission's pursuit of its licensing conditions in the particular case, instead it will assess whether the operator can meet the requirements for selling to consumers in Great Britain.
>
> 48. The Commission will continue to exercise discretion about how much reliance it should place on information or evidence from other regulators, just as it does at the moment given that many of our non-remote licence applicants hold licences in other jurisdictions. In the Commission's view it is more effective to retain such flexibility and decide, on the basis of the evidence, applications on a case by case basis, as that allows the Commission to take account to changes in the nature of the jurisdiction and the individuals in post (in both the regulator and the operator) and the actual material provided by the applicant or by the home regulator".

67. The upshot of the Defendants' position is therefore that whilst there is a single set of minimum standards (the LCCP) there is nonetheless power over and above those minimum conditions to impose bespoke conditions pursuant to section 77 GA 2005 and to take account, in the implementation and enforcement of existing conditions, of the particular position of individual licensees. It is for this reason that Ms Williams stated that the GC would continue to exercise discretion about how much reliance it placed upon information or evidence provided to it by other regulators.

***(vii) The fees payable under the regulatory regime***

68. A further component of the Claimant's contention that the new regime is disproportionate centres upon the burden of costs which operators will bear. An important part of these costs is the fees payable both upon application for a licence and annually to the GC. The fees are set by statutory instrument: The Gambling (Operating Licence and Single-Machine Permit Fees) Regulations 2006: 2006 No. 3284 (the "Regulations"). The provisions concerning fees applicable to the present case came into force on 1st January 2007. Part 3 of the Regulations concerns the application and annual fees for remote operating licences. The authority to impose fees is provided for in section 100 GA 2005.

69. The fees are configured upon a graduated basis predicated upon "Annual Gross Gambling Yield". The methodology for calculating this yield is set out in Regulation 3. It is calculated by reference to the formulae "A+B-C" where: "A" is the total of any amount that would be paid to the licensee by way of stakes arising from licensed activities; "B" is the total of any amounts (exclusive of VAT) that would otherwise accrue to the licensee in connection with licensed activities; and where "C" is the total of any amounts that would be deducted by the licensee in respect of the provision of prizes or winnings in relation to the licensed activities. Put more crudely annual gross gambling yield is the value of bets received less winnings paid out.

70. The calculation of fees payable is targeted upon the licensed activity and it hence cannot be said that fees are paid in relation to revenues from extraneous activities. Further, fee levels are not calculated on the basis of gross returns but on the lesser (and hence more favourable to the licensee) basis of Annual Gross Gambling Yield which, whilst not equating to net profits, is nonetheless a computation which is moving towards a profit calculation for the specific activity in issue (it would appear to leave out of account an allocation of common fixed or variable costs).

71. And yet further it can be seen from a comparison of the stipulated fees for each licensed activity as against the Annual Gross Gambling Yield that the fees represent a very small percentage of that yield. Two examples suffice to make the point based upon the fees chargeable from 6th April 2012 (which was the latest date provided to the Court). The first example concerns the holder of a casino operating licence who has an annual gross gambling yield exceeding £500 million. Such a licensee would pay £63,671 by way of application fee and £155,425 by way of annual fee. The total in fees payable by an operator with an annual gross gambling yield exceeding £500 million would therefore be fractionally in excess of £219, 000 which amounts to 0.03% of the licensee's Annual Gross Gambling Yield. The second example concerns a casino operating licensee with an annual gross gambling yield of £250-500 million. The application fee for such a licensee is £37,591 and the annual licence fee is £117,746. Once again as a percentage of Annual Gross Gambling Yield the costs are extremely small. It is correct to say, of course, that the fees payable will not be the only costs which an operator must bear as a consequence of being licensed since the day to day cost of compliance will be an additional cost not reflected in fees payable.

## C. The Claimant's passporting proposal

### *(i) Introduction*

72. I turn now to the proposal advanced by the Claimant which was ultimately rejected by the Secretary of State as a model for future regulation. The Claimant submits that the Government acted illegally in rejecting this proposal because in all material respects it was far superior to the new regime. I set out below a chronological record of how the proposal evolved over time. This serves to highlight the salient features of the scheme and what it would therefore have entailed for the Government, had it been accepted.

### *(ii) The initial proposal*

73. On 9th October 2013 members of the Claimant trade association met with officials from the Department of Culture, Media and Sport and HM Treasury to discuss the proposed point of consumption regulatory regime. Subsequently the Claimant provided officials with a briefing paper describing its practical solutions to the issues that were identified in the course of that meeting. In a letter of 31st October 2013 to the relevant minister the Claimant stated:

> "We believe our proposals would minimise the legal and practical risks whilst delivering on the UK Government's overall objectives of maximising taxation receipts and minimising harm to consumer protection. We should underline that our proposed solutions for DCMS may not require specific changes to the Gambling Bill itself, but instead depend on the

use of statutory instruments and changes to the Gambling Commission's licensing conditions and Codes of Practice (LCCP)"

***(iii) The submission that point of consumption regulation would generate an illicit market***

74. The central thesis of the briefing paper was that the introduction of a point of consumption regime would lead to the evolution of an unlicensed, unregulated, non-compliant sector of illicit operators:

> **"2. Summary of concerns with the overall point of consumption regime (POCR)**
>
> • It is very likely that many customers will simply migrate to unlicensed, unregulated and non-compliant operators.
>
> • These unlicensed, unregulated operators will have a significant market advantage over the licensed, regulated and compliant operators.
>
> • There will be no effective deterrent and significant incentive to unscrupulous unlicensed, unregulated operators in targeting UK consumers.
>
> • The unregulated market operators will have the opportunity to gain customers as they haven't previously been able to in the competitive UK market because they will be in a position to compete on unfairly advantageous terms with the reputable operators.
>
> • There is ample evidence of such migration in various continental markets that have implemented national licensing and regulatory regimes e.g. France, Italy and Spain.
>
> • It is estimated by the Italian regulator that up to 50% of the market is unregulated. In France, it has been estimated that approximately 70% of sports betting takes place via unlicensed operators, with gross gaming revenue from licensed sports betting operators declining 24% in the third quarter of 2011 by comparison to the year before.
>
> • Following the US on-line gambling shut down in 2007 (post-implementation of the Unlawful Internet Gambling Enforcement Act in October 2006), legislation and enforcement measures in themselves were not sufficient to ensure the prevention of unlicensed activities. Even with the recent regulation of remote gambling in the States of Nevada and New Jersey, a significant amount of unlicensed activity is expected.

> • Additional taxation and the increased compliance and licensing costs flowing from the POCR will act as a "double-whammy" for foreign operators without any corresponding benefit to UK consumers in respect of jurisdictions that are deemed sufficiently regulated.
>
> **There is overwhelming evidence that there will be a very real risk of consumer harm should the POCR measures be implemented in their entirety in their current form which will undermine consumer protection and has the potential to reduce taxation receipts, the precise opposite of what the UK Government stated aim".**
>
> (emphasis in original)

*(iv) The recognition of foreign licensing as sufficient*

75. The Claimant's solution was for the GC to recognise, in effect as sufficient, the licences granted by foreign recognised regulators. Either the foreign licence would be wholly sufficient or the GC would grant a domestic licence upon the back of the foreign licence:

> "Operators should continue to be able to advertise and transact with the UK provided the regulator in their home jurisdiction is approved. A licence issued by such a recognised regulator would allow an operator to provide services to customers in the UK without unnecessary impediment. This would either be on the basis of that licence itself being sufficient (a form of "passporting" as is used in the financial services sector) or on the basis of the issue of a separate licence from the UK Gambling Commission predicated on the licence issued to the operator by the recognised local regulator. Such a regime would be similar to that successfully adopted in the EU in relation to financial services and is in line with the movement of the EU towards mutual recognition and would avoid unnecessary restrictions, compliance costs and substantive licensing fees that will be incurred by operators in suitable jurisdictions under the proposed POCL".

76. The proposal assumed that the GC would continue to delegate to the foreign regulator the responsibility for licensing operators providing services to Great Britain. It was assumed that the foreign licence would either be recognised *per se* or would be replicated without any further (material) supervision or effort on the part of the domestic regulator. It was for this reason that the Claimant was able to submit that this was a form of movement towards "mutual recognition". The briefing paper continued to identify what the Claimant submitted were fundamental flaws in the proposed new regime and to extol the virtues of its alternative "passporting" proposal. Under the proposed "passporting" regime it was accepted that either the Secretary of State or the GC would need to undertake an approval process of a foreign regulator and may need to enter into "Memoranda of Understanding" with those regulators to

govern such matters as the sharing of information and the taking of enforcement action. The end-piece to the briefing paper was in the following terms:

> "In summary:
>
> Our position is that, to the extent that our proposed passporting regime constitutes a restriction under Article 56, it is a proportionate and lawful one.
>
> As stated above, it is in practice impossible and dangerous for the UK Gambling Commission to effectively regulate operators overseas and the GBGA can provide very substantial evidence to support this. The nearest comparison with the position regarding authorisation of financial services firms shows why the proposed approach is unworkable and endangers UK consumers and the UK's jurisdictional and licensing reputation.
>
> In the absence of a legal framework that covers the EU, the proposal to require recognition of suitable jurisdictions and regulate and effective regulation through the means we have outlined is a perfectly sensible, proportionate and lawful way forward, entirely consistent with EU law.
>
> This provides a much better model than that currently being pursued by many EU Member States and that has led to a balkanisation of the remote gambling market within the EU, much to the detriment of the companies listed in the UK that are world leaders in this area of e-commerce".

77. On 9th November 2013 Mr Peter Howitt, the Chief Executive of the Claimant, sent to the Minister a copy of a briefing paper which outlined the evidence which the Claimant intended to give to the Public Bill Committee on the Gambling (Licensing and Advertising) Bill. Once again the essential point advanced by the Claimant was that the proposed changes to point of consumption regulation would have unintended consequences and would drive UK consumers to the unregulated market and compromise consumer protection.

***(v) The evolution in the passporting proposal to dual licensing***

78. In early December 2013 the Claimant once again met with the Minister who, upon this occasion, invited the Claimant association to outline the features of its proposal so that it could be discussed with DCMS and the GC. Upon this occasion there was a shift in the position adopted by the Claimant. Now the Claimant accepted that even remote operators would be required to be licensed by the GC not as a matter of right but following a substantive analysis by the GC of the quality of the local licensing and regulatory regimes. The proposal now incorporated four key elements. First, a process for the assessment and recognition of overseas regulators and the establishing of working practices (particularly information sharing) between recognised regulatory authorities and the GC and liaison between them upon an on-going basis. Secondly, the adoption of provisions for applications by and issuing licences to passporting operators. Thirdly, the adoption of provisions for scrutiny and enforcement in relation

to passporting operators. Fourthly, the fashioning of individual licences to reflect prior conclusions about the quality and effectiveness of foreign licensing regimes. The Claimant proposed as follows:

> "Our proposal would require all operators wishing to offer remote gambling services into the UK to obtain a licence from the Gambling Commission. It is therefore very different to the current unrestricted EEA and White List regime. The Commission will retain the power to issue or to refuse to issue a licence, but the requirements placed on operators and the fees payable by them could be limited – unlike the proposed place of consumption regime – to those that are justifiable and proportionate based on the quality of the local licensing and regulation".

79. The Claimant now recognised that a substantive domestic licence would be required, the content of which would need to be individually tailored to the particular circumstances of each licensee. However, the standard level of fees would need to be abated to take account of the nature and extent ("quality") of the off-shore licensing regulatory regime.

***(vi) The rejection of the passporting proposal by the Minister: 26th February 2014***

80. The Minister, having considered the passporting proposal, rejected it on 26th February 2014. The rejection letter, so far as relevant, was in the following terms:

> "As you are aware, the purpose of the Remote Gambling Bill is to enhance consumer protection by ensuring consistency regulation by the Gambling Commission. All remote gambling operators that wish to engage with British consumers will be required to obtain a remote operating licence from the Commission, regardless of where they are based.
>
> Unfortunately, I do not think that passporting as outlined in your letter will assist us to achieve this. Whether it is Gibraltar or any other jurisdiction, a passporting approach would undermine the achievement of consistency of regulation. Consistent with the purpose of the Bill, I hope the Gambling Commission and overseas regulators, including the Gibraltar regulator, will [to] continue to work together within the existing regulatory framework. I am content this framework provides wide scope for co-operation and sharing of best practice between regulators.
>
> ...
>
> Your letter also raises your concern that the Gambling Commission lacks sufficient information-sharing powers. I am content that the Gambling Commission has all the powers it needs under the Gambling Act 2005 to share information with overseas operators where it is appropriate to do so.

> I hope that the Gambling Commission and overseas regulators, including the Gibraltar regulator, will continue to work together as much as possible to ensure a smooth transition to the new regime".

***(vii) The Claimant's submission that the Defendants misunderstood the passporting proposal***

81. I now address a point raised by the Claimant which is that the Defendants have misunderstood the nature of the passporting proposal. At various points in the Secretary of State's evidence there is a suggestion that the passporting proposal would entail a lack of any direct supervisory power on the part of the GC. The Claimant submits that this is incorrect. I have set out above my reading of the way in which the passporting proposal evolved. In my view in its first iteration it was being advanced upon the basis that in pith and substance the foreign regulatory licence should be treated as fully sufficient or at least that the GC should rubber stamp the foreign licence; and it was only in its later iteration that the subtle but important change emerged that the GC would act as a form of supplementary or back up licensor but that this would mean (in the Claimant's case) that the GC did have full oversight. Given the way in which the proposal evolved I can well understand how the confusion in the mind of the Secretary of State has occurred. I accept however that in the final version it was proposed that there be in effect two regulators working together with the GC as the junior partner but having certain powers to control the operator though licence.

## ISSUE I: WHETHER THE MEASURES ARE DISPROPORTIONATE, DISCRIMINATORY OR IRRATIONAL

### D. The *prima facie* application of Article 56 TFEU to the new licensing regime

***(i) Article 56 TFEU***

82. I turn now to consider the application of Article 56 TFEU to the new licensing regime. Article 56 TFEU provides:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".

83. The prohibition in Article 56 TFEU is engaged where any national measure is "*liable to hinder or make less attractive*" the exercise of the fundamental freedom to provide services within the Union: see for example Case C – 55/94 *Gebhard* [1995] ECR I – 4816 at paragraph [37].

***(ii) The Claimant's case on the restrictive effects of the new regime***

84. The Claimant submits that the restrictive effects of the new regime (which hence *prima facie* attract the application of Article 56 TFEU) are as follows:

i) The requirement to comply with a range of regulatory obligations imposed by the GC which may be duplicative or inconsistent with those of the local regulator but which are not necessarily better calculated to protect consumers.

ii) The requirement for operators to provide detailed information to the GC over and above the information required to be provided to local regulators.

iii) The requirement for operators to identify the location of a customer upon each occasion that the customer uses a remote gambling service.

iv) The requirement for operators to engage with their foreign regulator (i.e. the GC) for matters normally reserved and more properly dealt with by the local regulator which will necessitate the taking of expensive UK legal advice on a duplicative and potentially conflicting basis.

v) The requirement for operators to have an address in the United Kingdom for the purpose of the GC issuing documents to the operator.

vi) The substantial licence and application fees which will have to be paid.

vii) The requirement to procure all gambling software from other operators licensed by the GC irrespective of the efficacy of established testing methods designed to ensure that gambling software meets the required standards and the proportion of the operator's overall business undertaken with customers in Great Britain. It is said that in practice many operators may be unable to isolate software that it uses in respect of customers using its facilities in Great Britain from software it uses for customers using facilities elsewhere which will mean that all software might have to comply with the GC requirement even if a negligible number of customers are located in Great Britain.

viii) The requirement set out in the proposed LCCP and GC guidance on regulatory returns to overseas operators which propose a separation of data that relates to the activity of British customers and data that relates to customers elsewhere.

***(iii) The concession by the UK Government that the new regime is prima facie prohibited by Article 56 TFEU***

85. My task in this regard is simplified because the Secretary of State accepts (albeit not necessarily in the same terms as the Claimant) that *prima facie*, the new regime infringes Article 56 TFEU in that it amounts to a restriction upon the freedom to provide gaming services within the Union (i.e. between the UK and the other Member States – this was not a concession directed at the position as between the UK and Gibraltar). This concession was, moreover, made in correspondence between the UK and the European Commission in response to an opinion submitted to the Commission by Malta on 4th March 2013 in which the Maltese State contended that the proposed reforms constituted an unlawful restriction upon the freedom to provide remote gaming and betting services for the reason that the purpose of the reforms was not consumer protection, as stated by the UK Government, but taxation. Further, the Maltese State argued that even if the purpose of the measure was consumer protection it doubted that such measures were necessary or proportionate. In its response the UK Government stated:

> "The UK Government accepts that the proposed reforms constitute a restriction of freedom of services under Article [56 TFEU]. However, as set out below, the UK Government considers that the proposed reforms are a lawful restriction on the freedom of gaming and betting services and satisfy the conditions of necessity and proportionality as laid down by the CJEU".

86. This response, submitted on 4th April 2013, made clear to the European Commission that the UK Government did not propose to take any action on account of the complaint of Malta. Before me, neither Defendant sought to resile from the concession made to the Commission. Accordingly, the argument in the present case has focused upon the justification for the restriction, but not whether a restriction exists.

## E. The proportionality test: The relevant law

### *(i) The scope for justification: Legislative basis*

87. I turn now to the scope for a measure which *prima facie* violates Article 56 TFEU nonetheless to be justified. By virtue of Article 62 TFEU the provisions of Article 52 TFEU apply with regard to Article 56 TFEU. Article 52 TFEU is in the following terms:

> "The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health".

88. The concepts of public policy, public security and public health have themselves been subject to considerable extrapolation in the case law of the CJEU. Where a legitimate objective justifies the adoption of a restrictive measure the overall assessment is subject to a proportionality requirement. In the text below I set out the law on what is and is not an objective justification and then I address the proportionality test in detail with particular reference to its application to legislative measures.

### *(ii) Acceptable grounds of justification: Consumer protection, prevention of fraud, curtailment of the inducement to squander funds, other overriding "public interest" grounds*

89. It is clear, and common ground in the present case, that a measure may be justified upon grounds of consumer protection: See by way of example Case C – 390/12 *Pfleger* (30th April 2014). At paragraph [41] the Court stated:

> "According to the Court's established case-law, restrictions on games of chance may be justified by overriding requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling…".

Similar views were expressed by the Court in Case C – 46/08 *Carmen Media Group Limited* [2010] ECR I-8149 where, at paragraph [55] the Court stated that restrictions on gaming activities could be justified by imperative requirements in the public interest such as consumer protection, the prevention of fraud, the prevention of incitements to squander money on gambling, all of which fell within the more general ground of justification of preserving public order. These objectives were said to *"...limit betting activities in a consistent and systematic manner"*.

***(iii) The inadmissibility of economic grounds of justification***

90. On the other hand, case law also establishes that measures restricting the freedom to provide services between Member States may not be justified on purely economic grounds. The precise boundaries of what is and what is not an economic justification are not writ in stone. A restriction designed to raise tax would be an economic objective and, as such, inadmissible as a justification: See for example Case C – 243/01 *Gambelli* (6th November 2003) paragraphs [61] and [62], though even here the Court apparently accepted that the financing of social activities through a levy on the proceeds of authorised gaming may legitimately constitute an "*incidental beneficial consequence*" of a restriction provided it is not the "*real*" justification for the restrictive policy adopted. In Case C – 153/08 *Commission v Spain* [2009] ECR I-9735 the Court stated as follows:

> "43. Concerning, third, to the Kingdom of Spain's argument that the income received by the bodies and entities whose games of chance benefit from the exemption in question is used to finance socially-useful infrastructure and projects, it should be noted that the Court has already held that, although it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services... It is moreover apparent from the Court's case-law that economic grounds are also not included among the grounds in Article 46 EC which could justify a restriction of the freedom to provide services guaranteed by the Treaty...".

91. Equally, in other cases the Court has made clear that whilst traditionally measures designed to reduce or curtail competition would be unacceptable, in the specific context of gambling, competition in its unbridled form tended to increase consumer welfare problems (e.g. addiction) and that therefore measures taken to restrict competition could be categorised as consumer orientated: See e.g. *Pfleger* at [46] set out in paragraph [97] below.

***(iv) The proportionality test: Constituent parts***

92. It is also common ground that whether the restrictions upon the freedom to provide services are justified entails the court examining whether the measures adopted are proportionate. The test of proportionality as applied in the context of justification for erstwhile restrictions on rights of free movement has been grappled with by the domestic courts for a long time. For many years the most oft-cited formulation of the test was that laid down by Lord Diplock in *R v Goldstein* [1983] 1 WLR 151 at 154,

155. That case concerned justifications for an import ban on CB radios which, in the absence of a proper justification, would have violated the prohibition on state measures restricting the importation of goods between Member States. In a memorable judgment Lord Diplock both defined the ingredients of the test and then encapsulated its essence:

> "To demonstrate what it is required to demonstrate in order to enable a state to avail itself of the derogation from article 30 for which article 36 provides, it is necessary to adduce factual evidence (1) to identify the various mischiefs which the challenged restrictive measures were intended to prevent, (2) to show that those mischiefs could not have equally effectively been cured by other measures less restrictive of trade, and (3) to show that the measures were not disproportionately severe having regard to the gravity of the mischiefs against which they were directed. This last mentioned consideration involves the concept in Community law (derived principally from German law) called "proportionality". In plain English it means "*You must not use a steam hammer to crack a nut, if a nutcracker would do*".

93. The test articulated by Lord Diplock has required reformulation subsequently but the pithy translation from German learning to common law aphorism assists in identifying one of the key vices of measures which are disproportionate: they interfere to an intolerable degree in private freedom of action and it is intolerable since a perfectly legitimate objective can be achieved by far less draconian means.

94. In more recent times the proportionality test has been spelled out in slightly different terms. A classic formulation, which has been endorsed and applied on numerous occasions in the domestic courts (and which is relied upon by the Claimant in the present case) is that contained in the judgment in Case C-331/88 *FEDESA* [1990] ECR I - 4023. Here the Court broke the test down into constituent parts:

> **"The alleged infringement of the principle of proportionality**
>
> 12 It was argued that the directive at issue infringes the principle of proportionality in three respects. In the first place, the outright prohibition on the administration of the five hormones in question is inappropriate in order to attain the declared objectives, since it is impossible to apply in practice and leads to the creation of a dangerous black market. In the second place, outright prohibition is not necessary because consumer anxieties can be allayed simply by the dissemination of information and advice. Finally, the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.

> 13 The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.
>
> 14 However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 *Schräder* [1989] ECR 2237, paragraphs 21 and 22)".

95. These passages identify the stages to the analysis: (1) The Court must identify the objective of the measure in question and determine whether it is a lawful objective or not; (2) the court must then determine whether the measure is effective to achieve the (*ex hypothesi*) legitimate aim in question; (3) the Court must then determine whether the measure is no more onerous than is required to achieve that aim (if there is a choice of (roughly) equally effective measures), and (4), in any event the measures must not produce adverse effects which are disproportionate to the aim pursued.

### *(v) The evidential task of the national Court: Full assessment*

96. A mere recitation of the test tells a national court little or nothing about either the exactitude with which the Court must assess (evidentially) the various components of the test, or, the latitude which the Court must accord to the choices actually made by the decision maker.

97. As to the former Ms Dinah Rose QC, for the Claimant, relied upon Case C-390/12 *Pfleger* (30 April 1214) in which the Court of Justice ruled (in a case involving the legality of justifications for restrictions upon gambling) that national courts, who are given the task of actually determining whether measures are proportionate or not, must undertake a full assessment of the underlying facts. The judgment reflects the position adopted by the Court in many other judgments involving gambling and I set out below the entirety of paragraphs [43]- [52]:

> "43. In addition, it should be recalled that the restrictions imposed by the Member States must satisfy the relevant conditions of proportionality and non-discrimination, as laid down in the Court's case-law. Thus, national legislation is appropriate for guaranteeing attainment of the objective pursued only if it genuinely reflects a concern to attain it in a

consistent and systematic manner (see, to that effect, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* EU:C:2009:519, paragraphs 59 to 61 and the case-law cited).

44. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (Case C-176/11 *HIT and HIT LARIX* EU:C:2012:454, paragraph 25 and the case-law cited).

45. In the specific area of the organisation of games of chance, national authorities enjoy a sufficient measure of discretion to enable them to determine what is required in order to ensure consumer protection and the preservation of order in society and — provided that the conditions laid down in the Court's case-law are in fact met — it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary to prohibit betting and gaming wholly or in part or only to restrict them and, to that end, to lay down more or less strict supervisory rules (see, to that effect, Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* EU:C:2010:504, paragraph 76, and *Carmen Media Group* EU:C:2010:505, paragraph 46).

46. Furthermore, it is not disputed that, unlike the introduction of free, undistorted competition in a traditional market, the presence of that kind of competition in the very specific market of games of chance, that is to say, between several operators authorised to run the same games of chance, is liable to have detrimental effects, owing to the fact that those operators would be led to compete with each other in inventiveness to make what they offer more attractive than what their competitors offer, and thereby to increase consumers' expenditure on gaming and the risks of their addiction (Joined Cases C-186/11 and C-209/11 *Stanleybet International and Others* EU:C:2013:33, paragraph 45).

47. However, the identification of the objectives in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the referring court (see, to that effect, *Dickinger and Ömer* EU:C:2011:582, paragraph 51).

> 48. It is also for the referring court, while taking account of the information provided by the Court, to determine whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law as regards their proportionality (see *Dickinger and Ömer* EU:C:2011:582, paragraph 50).
>
> 49. In particular, it is for that court to satisfy itself, having regard inter alia to the actual rules for applying the restrictive legislation concerned, that the legislation genuinely meets the concern to reduce opportunities for gambling, to limit activities in that area and to fight gambling-related crime in a consistent and systematic manner (see *Dickinger and Ömer* EU:C:2011:582, paragraphs 50 and 56).
>
> 50. In that regard, the Court has previously held that it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality (see *Dickinger and Ömer* EU:C:2011:582, paragraph 54 and the case-law cited).
>
> 51. It cannot, however, be inferred from that case-law that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue (see, to that effect, *Stoß and Others* EU:C:2010:504, paragraph 72).
>
> 52. Accordingly, the national court must carry out a global assessment of the circumstances in which restrictive legislation, such as that at issue in the main proceedings, was adopted and implemented."

98. The salient points coming from this judgment may be summarised thus: (1) the principles of proportionality and non-discrimination apply to restrictions in the field of gaming; (2) the fact that the position adopted by a Member State differs from that adopted by other Member States is not relevant to proportionality since the test is applied (in this particular area – which is not characterised by harmonisation) by reference to the policies adopted "*solely*" by the authorities of the state concerned (but see on this point paragraphs [124] – [131] below); (3) national authorities enjoy a sufficient measure of discretion to enable them to determine what is required in order to ensure consumer protection and the preservation of order in society and this includes the adoption of more or less strict *supervisory* rules; (4) unlike in a "*traditional market*" competition is not an unalloyed benefit since it can serve to decrease consumer welfare and increase consumer harm; (5) it is for national courts to

determine as a question of fact what the objective(s) of a measure is or are; (6) it is also for the national court to apply the proportionality test and examine all of the relevant rules and regulations and to adopt a "*global assessment*" of all surrounding circumstances; and (7) Member States bear the burden of proving justification but this does not necessarily extend to producing "*studies*". I take from this that when examining the GA 2005 as amended I must undertake a relatively detailed assessment of the justification for the measures but it must nonetheless be a rounded or "*global*" assessment and I would not without more reject an explanation proffered by the State simply because, for example, it has not been substantiated quantitatively. There was in actual fact no suggestion made to me in the course of argument that I should not adopt a detailed approach to the evidence.

***(vi) The margin of appreciation to be accorded to the decision maker: The meaning of "manifest" as in "manifestly inappropriate"***

99. I turn now to the somewhat vexed issue concerning the extent or breadth of the discretion which the Court should confer upon the decision maker. It has become almost trite to say that the intensity of judicial review is context driven. It is almost equally trite to say that when the issue involves deep and complex issues of political judgment the courts will exercise self-restraint. The evaluation by a court of the nature of the underlying issue of substance is hence a starting point which leads to an instruction to judges viz., the more political and value-laden an issue the less the courts will interfere. But how this then translates into an *actual* and *practical* test that the Court then applies is far from clear. In cases where judicial deference to the decision maker is warranted courts talk about a wide margin of appreciation and translate this into expressions such as "*manifestly inappropriate*" or its converse "*manifestly appropriate*". But this is a conclusion not a test. It begs the question as to when the inappropriateness of the measure is "*manifest*" and how this is determined. What does the expression mean?

100. In neither EU nor domestic law is there an articulation of what is understood by "manifest". The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain. The etymology is from the Latin "*manifestus*" - palpable or manifest. These definitions are helpful only to a degree. What has to be "*manifest*" is the inappropriateness of a measure. There are two broad types of case where inappropriateness is put in issue. First, where it is said that a measure is vitiated by a clearly identifiable and material error. These are the relatively easy cases because the error can be identified and determined and its materiality assessed. The error may be a legal one, e.g. the measure is on its face discriminatory on grounds of nationality (as in *R v Secretary of State for Transport ex Parte Factortame* [1991] ECR I-3905). It may be a glaring error in logic or reasoning or in process. But even here there are complications since whilst it is true that an error which is plain or palpable or obvious on the face of the record may easily be termed "manifest" that cannot be the end of the story. An error which is clear and obvious my nonetheless not go to the root of the measure; it might be peripheral or ancillary and as such would not make the disputed measure manifestly inappropriate. Equally an error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or

actuary might have exclaimed that it was an "*obvious*" error or a "*howler*", and even then only once they had performed complex calculations, does not mean that the error is not manifest. An error in the placing of a decimal point may exert profound consequences upon the logic of a measure. This suggests that manifest in/appropriateness is essentially about the nature, and, or centrality/materiality of an error. An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome.

101. But a measure might also be manifestly inappropriate, not because it is possible to pinpoint errors in reasoning or process, but simply because the end result fails the proportionality test to a sufficient degree to warrant the grant of relief. In these cases determining when the measure crosses the Rubicon and becomes manifestly inappropriate is a much more illusive process. This is essentially the invitation made to me by the Claimant in this dispute. Here it is not said that the GA 2005 or the decision to reject the passporting proposal is manifestly inappropriate because there is some identified howling error at the core of the logic or reasoning. Here the Claimant argues that upon the application of the proportionality (and discrimination) test the ultimate answer is that the measure fails one or more parts of the test to such a degree that I would be justified in declaring the licensing system set up by Parliament to be unlawful.

### *(vii) Guidance from European jurisprudence*

102. An important source of guidance as to where the line might be drawn in cases such as this is found in European Court case law. The judgment in *FEDESA* (*ibid*) is a useful starting point since that explains that the approach to be adopted depends upon the nature of the decision being challenged. The Court indicated that a test of manifest inappropriateness would apply in cases involving political choices. At paragraph [14] (see at paragraph [94] above) the Court observed that because the substance of the case concerned an area of policy (agriculture) in which political choices identified in the Treaty itself had to be made, this resulted in the conferral upon the decision maker of a margin of appreciation which translated into the conclusion that for the national court to find that the measures in question was unlawful it had to be: "... *manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.*" The Court did not proceed to explain what was meant by "*manifest*". In the present case the decision which has been taken is the introduction of a point of consumption regulatory regime in the field of remote internet gaming. This is an aspect of the wider market in gambling. Restrictions on the provision of gambling imposed by Member States have spawned extensive litigation. And as to this the Court of Justice has over many years expressed considerable ambivalence towards gambling and, in consequence, accorded to Member States a broad margin of appreciation which, in practical terms, has led it to refrain from striking down what, in other fields of economic activity, might be viewed as extreme or even draconian restrictions upon the freedom to provide services.

103. The ambivalence stems from an appreciation that in its essential nature gambling involves a depletion of consumer resources. As it was put by Advocate General Bott in Case C-42/07 *Liga Portuguesa de Futebol Professional* [2009] ECR I 7633 (*"Liga Portuguesa"*) at paragraph [248]:

> "248. Games of chance and gambling, for their part, can only function and continue for the great majority of players who lose more than they win. Opening the market in that field, which would increase the share of household budget spent on gaming, would only have the inevitable consequence, for most of them, of reducing their resources".

104. Routinely, the Court has acknowledged that many Member States view gambling as impinging harmfully upon their moral, religious and cultural traditions and beliefs and gambling is frequently associated with a "*high risk of crime*" (Case C-275/92 *Schindler* paragraph [60]). The Court also recognises that gambling incites spending which "*...may have damaging individual and social consequences*" (*ibid*). This is not an area where the ordinary libertarian instincts of the Court to encourage free and unfettered trade are discernible. As already observed (see paragraph [91] above) the Court has stated that free competition in relation to gambling tends towards consumer harm not benefit.

105. This ambivalence felt by the Court, and reflected in jurisprudence for over two decades, translates into a reluctance by the Court to dictate to the Member States how they should legislate in this field. More especially the Court has repeatedly confirmed that Member States have a "*...wide measure of discretion to determine what is required in order to ensure consumer protection and the preservation of order in so*ciety" (Case C – 156/13 *Digibet* paragraph 32). The Court has held that this broad margin extends to such disparate facets of regulation as: (a) whether certain or even all gambling activity should be prohibited (Case C – 247/09 *Dickinger* [2011] ECRI-8185 paragraph [99]; Joined Cases C-186/11 and C209/11 *StanleyBet* (24th January 2013) paragraph 44; *Digibet* (ibid) paragraph [32]); (b) the strictness or laxity of supervisory rules (*Digibet* (ibid) paragraph [32]); (c) which national body should have entrusted to them regulatory powers (joined cases C – 159/10 and C – 160/10 *Fuchs and Kohler* [2011] ECR I-6919 paragraph [55]) *Digibet* paragraphs [33] *et seq)*; (d) the permitting or tolerating within a single Member State of different areas (such as the German *Lander*) which adopt different and ostensibly inconsistent approaches to gambling (*Digibet* (ibid) paragraphs [34] – [39]). Member States may thus impose restrictions on gambling or supervisory licensing regimes on operators. Licensing regimes may be imposed regardless of whether the operator is regulated one or multiple times in other EEA jurisdictions (and *a fortiori* elsewhere). Measures which, broadly pursue, consumer protection or crime suppression objectives are legitimate. Member States which adopt licensing regimes with these objectives in mind enjoy a wide margin.

***(viii) Guidance from domestic jurisprudence***

106. In the present case the Defendants submit that, upon the basis of domestic law, there is a high threshold for a proportionality challenge to legislation generally, and not just in the field of gambling. They cite: *R (Eastside Cheese Co) v Secretary of state for Health* [1999] 3 CMLR 123 CA per Lord Bingham CJ at [48]; *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437 ("*Sinclair Collis*"); *R (British Telecommunications plc) v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021; and *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1080 at [54] – [57]. The Defendants

submit that for the GA 2005 as amended to be declared unlawful it must be shown that it is "*manifestly inappropriate*" applying a wide latitude to Parliament.

107. Particular stress was placed upon the judgment in *Sinclair Collis* where the Court of Appeal addressed the alleged disproportionality of a ban on cigarette vending machines introduced to combat serious health problems to children. All three of the Judges (Lord Neuberger MR, Arden LJ and Laws LJ) endorsed the test of proportionality in *FEDESA* (ibid). However, there was disagreement as to the outcome of the case with a majority (Lord Neuberger and Arden LJ) dismissing the appeal (which upheld the restrictions). Of relevance to the present case is the attempt by the Court to add some flesh to the concept of manifest in/appropriateness. A number of points from the judgments of the majority are worthy of specific mention.

108. In the Judgment of Lady Justice Arden (see [85], [124]-[131] and [141] – [144] the following points were made:

i) The test was applicable in cases relating to public health;

ii) Where what was in issue was an Act of Parliament the level of intensity of review for the purposes of the proportionality test was that of "*manifest error*".

iii) The test of "*least intrusive means*" either did not apply at all or applied with the same lower level of intensity.

iv) In relation to the least intrusive means the Claimants bore the burden of adducing evidence to show that there were other equally suitable means of achieving the gain in public welfare sought by the legitimate aim of the state in pursuing the measure.

109. Lord Neuberger also made observations of relevance to the present case:

i) In areas of policy where a wide margin of appreciation is attributed to the legislature that same margin is attributed to the executive [198] – [199];

ii) The breadth of the margin of appreciation depends upon the circumstances of the case and is not a concept or a test that can be expressed with precision:

> "200. The breadth of the margin of appreciation in relation to any decision thus depends on the circumstances of the case and, in particular, on the identity of the decision-maker, the nature of the decision, the reasons for the decision, and the effect of the decision. Further, because the extent of the breadth cannot be expressed in arithmetical terms, it is not easy to describe in words which have the

> same meaning to everybody, the precise test to be applied to determine whether, in a particular case, a decision is outside the margin. It is therefore unsurprising that in different judgments, the same expression is sometimes used to describe different things, and that sometimes different expressions are used to mean the same thing."

iii) So far as the obligation to choose the least restrictive measures was concerned:

> "203. Further, "when there is a choice between several appropriate measures recourse must be had to the least onerous". In para 6.3 of the European Commission's *Guidance* referred to in paras 42 and 142 above, "the existence of alternative measures hindering trade less" is described as "an important element in the analysis of the justification [for a particular measure] by a Member State", and it is also said that a Member State has "an obligation to opt for the 'less restrictive alternative', and failure to do so will constitute a breach of the proportionality principle".
>
> 204. However, that factor should not be applied by a court in such a way as to usurp the role of the primary decision-maker. So, where there is an alternative possible measure, there may be a difference of view as to which measure would be less onerous, and, unless the view of the Member State's government that its measure is the more appropriate is manifestly wrong, the court should not substitute its own view for that of the government. This is, I think, what the Court of Justice had in mind, when it said in *National Federation of Fishermen* [1995] ECR I-3115, para 59, that a measure could not be challenged as disproportionate "merely because other kinds of measures could have been adopted, since the selection of measures to be taken is a political decision falling within the purview of the Member State

concerned, within the limits set by Decision 92/593".

110. Lord Neuberger also stated (at [237]) that although he found some of the justifications for the ban in the documents leading up to introduction of the measures "*not very convincing*" they were not "*so weak nor so illogical as to justify a court interfering with the ban, at least in the absence of some other consideration*".

***(ix) Factors in the present case relevant to the margin of discretion***

111. In the text below I have set out my conclusions on the various factors which the parties have identified and which are said to be relevant to the margin of discretion to be accorded to the decision maker in the application of the proportionality and discrimination tests. These focus upon such matters as: the status of the decision maker; the social and other risks associated with the regulated activity; the extent to which regulatory perfection is achievable; the preparedness of the decision maker to keep the regulatory regime under review; the nature of the reasons advanced to justify the measure and whether they are based on a prophylactic desire to curb future harm; the extent to which the reasons are susceptible to clear yes/no answers or are based upon projections about future consequences. In addition the materiality of alleged flaws and errors is relevant. This is a non-exhaustive list.

112. **The GA 2005 as amended is an Act of Parliament**: This case is not a "*Factortame*" type case where it is said that the Act of Parliament is flawed in a clear and legally identifiable way because (as there) it discriminated on grounds of nationality. Here the challenge is to structural policy choices made for the purpose of regulation. All of the case law underscores the point that an Act of Parliament is at the apex of the exercise of the democratic decision making process. A court should only interfere with the GA 2005 if there are fundamental errors or where the policy choices adopted are wholly unsupported by evidence or unconnected with any lawful policy objective and cannot on any logical or sensible basis be said to be consistent with the various limbs of the proportionality test.

113. **The risk associated with the service being regulated – remote internet gambling**: In this case Parliament has legislated to address an issue relating to the provision of a service provided over the internet considered to be high risk. Remote gambling services are highly profitable for those that provide the service but the financial benefit to the provider can be at the expense of the social welfare of the consumer and can bring about a high consequential social and economic (clean up) cost for the State. In my view this should be treated as an area of high social and consumer welfare concern. A court should accordingly be slow to second guess Parliament's assessment of risk.

114. It was not predicted when the 2005 GA came into force that this would lead to the preponderant part of the industry moving offshore to circumvent the reach of regulation. The Claimant has criticised the Government upon the basis that it is rowing back from liberalisation but in truth what the Government is seeking to do is to restore a position of universal regulation. The gist of the Claimant's case is that its members, many of whom were companies of British origin targeting the British market, should be able to continue to be regulated in a light touch way by the regulator in Gibraltar. It seems to me that if the Government cannot lawfully move to

a point of consumption regime that the prospect of any form of regulation of remote e-commerce becomes exceedingly difficult. This is a broad policy factor justifying the present stance.

115. **Guidance from jurisprudence at the EU level**: I have set out above (paragraphs [102] – [105]) conclusions on the case law of the Court of Justice. It is apparent that when measuring a national legislative measure to regulate gambling under Article 56 TFEU a wide margin of discretion is accorded to the Member State. I accept however in this regard the submission of the Claimant that there are gradations of margin of appreciation. Ms Dinah Rose QC submitted, and I agree, that the margin can narrow as policy choices are made. The UK is not a state that takes a moral or religious stance against gambling. Had the UK taken such a position then case law suggests that a very broad margin of discretion would be attributed to the state to permit it to take this position. However, the UK has adopted a liberal view and, whilst it persists in this view, it would be wrong to say that this entitles the State *carte blanche* to adopt whatever measures it chooses. Having taken a liberal position the State must act proportionately within the confines of its choice. This does not however mean that it will not still enjoy a relatively generous margin of discretion but that will nonetheless have been affected by its earlier decision to permit gaming. One especially important point (which I address in detail at paragraphs [124] – [131] below) is that the Court of Justice has established that a Member State may introduce a licensing regime based upon the place of consumption even though operators are also regulated elsewhere.

116. **The inability to achieve 100% efficiency**: By the very nature of the internet there will be difficulties for any regulator in exercising total supervision over offshore operators. The Government recognises that there is no such thing as an enforcement regime which is 100% perfect or efficient. But it takes the view that a combination of goodwill amongst service providers, the threat of criminal and other regulatory sanctions, and cooperation with foreign regulators, will prove sufficiently robust. Unless it is possible to discern material and central errors in this reasoning this is a perfectly logical policy stance for Parliament to take.

117. **Willingness to review the situation:** The Government has stated that it will watch and learn and if *lacunae* or flaws emerge it will consider strengthening the legislation. This is not a regime set in stone. This also is a factor which should lead a Court to respect a policy choice made by the State and not therefore be quick to criticise a measure upon the basis that it might not be readily subject to effective enforcement.

118. **Materiality**: A failing which is "manifest" is one which goes to the heart of the measure being challenged. In this case the challenge is lock, stock and barrel to the entire regulatory regime. The Claimant has no interest in seeing the downfall only of bits of the regime (an odd licence condition here or there) which leaves the scheme intact. It is all or nothing. This is an important consideration. It might (arguably) be possible to identify certain aspects of the scheme which are less than ideal, or weak or even inappropriate. But the relief seeks the nuclear option of the death of the scheme through a declaration. For a court to grant this relief the failings found must therefore go to the very essence of the scheme. The very concept of consumption based regulation must be shown to be flawed. Errors that do not go this far cannot, on this basis, be categorised as "*manifest*".

119. **The type of reasoning required of the State to justify a measure**: Some measures no doubt need to be justified quantitatively. But not every measure does. Ms Dinah Rose QC, for the Claimant, criticised the lack of hard evidence justifying the new measures. In my view the extent to which a justification requires evidence to support it depends upon the nature of the measure in issue. As Lord Neuberger pointed out in *Sinclair Collis* (para [238]) some measures appeal to common sense and not to an arithmetical or a "*mechanistic*" analysis. Some measures can also be justified "*as a matter of elementary economic logic*" (ibid para [242]) and equally some criticisms of a measure can be justified by the same token. In relation to a justification advanced by the state for a measure a court will look to see if "*careful thought has gone into the calculations*" (ibid para 237]) or whether the assumptions appear "*fanciful*" or not (ibid). The view expressed in *Sinclair Collis* is consistent with the position adopted by the Court of Justice in *Pfleger* (ibid) paragraph [51] (set out at paragraph [97] above) to the effect that "studies" are not always required by way of justification.

120. In this case Mr Beal QC for the Secretary of State, whilst pointing out that the Government had an evidential basis for its concerns which he submitted was sufficient (see the evidence provided by the Government to the EC Commission set out at paragraph [151] below), placed considerable weight upon the fact that the Government was acting pre-emptively, *ex ante*, in order to forestall harm and obviate risk. He argued that the GC had oversight of only a small fraction of the operators providing services in the jurisdiction so that the Government could not possibly know with certainty of the extent to which problems were arising or as to risks which might eventuate. He contended that for a regulator who purported to regulate the market to be able to exercise control over fewer than 20% of the relevant providers was profoundly unsatisfactory. Mr Lewis QC, for the GC, echoed these concerns. Ms Dinah Rose QC for the Claimant argued to the contrary that case law suggested that there had to be, extant, evidence of real harm before a measure could be adopted. I agree with the Defendants on this. In areas relating to public health protection the precautionary principle is well established: See per Laws LJ in *Sinclair Collis* paragraphs [42] and per Lady Justice Arden at [142] – [143]. For my part I can see no objection in a case such as the present in relation to a service with known and serious risks to the public being based upon a universal licensing system seeking to forestall anticipated harm. In my view – even if there were no evidence of actual harm – I would still find that in this area a regulator was entitled to introduce a supervisory scheme designed to ensure universal regulation. It is not disputed that remote gambling can cause serious harm, nor is it submitted that the GC has not received many queries by concerned individuals or consumers. The document trail leading to the introduction of the new measures is replete with the GC referring to illustrations of concern and harm. It is true that there is no quantified log or body of cases of harm to be put before the Court by way of justification. However, this is an area where the Court cannot say that the concerns expressed are fanciful or illogical or that there is no discernible basis for Parliament to introduce a universal point of consumption regulatory scheme.

121. **The extent to which facts underlying the policy choice are justiciable**: Lady Justice Arden in *Sinclair Collis* focused upon questions of objective factual accuracy. She stated: "*It is one thing for a court to scrutinise a fact relied on where it is clearly right or wrong and is capable of being subjected to the judicial process. But where the accuracy of facts is not clear - and this applies particularly to scientific or*

*technical evidence - the Court of Justice applies a "precautionary principle". It leaves it to the decision-maker to decide which facts or opinions to act on*" (para 141]). This is, in my view, a relevant consideration in the present case. The criticisms made of the new regime are not susceptible to a clearly "right" or "wrong" analysis.

122. **Avoiding second guessing predictions as to the future success of the measure:** Lord Justice Laws (with whom Lady Justice Arden agreed – [141]) in *Sinclair Collis* concluded that the courts should be slow to second-guess evaluations of future impact set out in an impact assessment or the hoped for cost / benefit analysis. He concluded that courts should focus essentially upon the "*basis*" on which the decision maker acted. In the present case the brunt of the Claimant's challenge is based upon conjecture as to future consequences: e.g. the system will in the future create illicit trade and it will in the future be ineffective in terms of enforcement. Whilst under EU law the burden of proof lies on the Member State to justify the measure when a criticism is as to the possible future consequences of a restriction and where the Government has (as it has here in the impact assessment) addressed future consequences, then this also is a factor against a finding of manifest inappropriateness in relation to legislation.

123. **Views of the European Commission**: Mr Beal QC referred me to the fact that the Commission, being fully cognizant of the dispute, has not proceeded against the United Kingdom in infraction proceedings for breach of Article 56 TFEU or otherwise objected. The Government has placed before the Commission all of the principal documents that were before this Court. The Commission has also been the recipient of complaints from the Claimant association and from the State of Malta and the Commission has received justification from the Government. In my view a Court can place some modest weight upon this. But the mere fact that the Commission has not objected does not necessarily mean that a clean bill of health has been given to the United Kingdom. It is well known that the Commission prioritises its complaints and does not commence infraction proceedings in relation to every violation that it suspects has occurred. In *Sinclair Collis* Lady Justice Arden observed (ibid para [113]) that it was "*...not completely without significance*" that the Commission had not taken action against the United Kingdom. I think that this limited statement is about as far as this point goes.

124. **The relevance of the position of foreign regulators:** Much of the attack upon the new regime involves the submission that the Government's margin of discretion should be limited because other competent foreign regulators already supervise the operators. Case law of the Court of Justice, however, shows the Court to be unimpressed with the argument that one Member State should follow another (mutual recognition) and has suggested that the proportionality of a State's regulatory measures in this field of activity should be assessed in isolation.

125. In *Liga Portuguesa* (ibid) a reference was made pursuant to Article 234 EC from the *Tribunal De Pequena Instancia Criminal Do Porto* in the course of proceedings in relation to fines imposed upon certain gambling operators and sporting associations for violating Portuguese legislation governing the provision of certain games of chance via the internet. An issue arose as to the significance of the existence of foreign regulation. The Court of Justice stated as follows:

> "69. In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators".

126. The position adopted in *Liga Portuguesa* (ibid) has been followed in Case C-176/11 *HIT and HIT LARIX (12th July 2012)* paragraph 25 and in *Pfleger* (ibid) at para 44. In these cases the Court has – at least arguably – gone one step beyond the position adopted in *Liga Portuguesa* and suggested that the assessment of the legality of a state's measures should take place "*solely*" by reference to the internal position the state concerned. For example in *Pfleger*:

> "44. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of proportionality of the provisions enacted to that end. *Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure* (Case C-176/11 *HIT and HIT LARIX* EU:C:2012:454, paragraph 25 and the case-law cited)."

(italics added)

127. Further, in joined Cases C – 316/07, C – 358/07 to C – 360/07, C – 409/07 and C – 410/07 *Markus Stoss* [2010] ECR I-8069 the Court, at paragraphs [112], [113], held that absent harmonised mutual recognition a Member State was entitled to require providers of services to that State to be authorised, i.e. licensed:

> "112. Having regard to that margin of discretion and the absence of any Community harmonisation in the matter, a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law
>
> 113. It follows in particular that each Member State retains the right to require any operator wishing to offer games of chance to consumers in its territory to hold an authorisation issued by its competent authorities, without the fact that a particular operator already holds an authorisation issued in another Member State being capable of constituting an obstacle".

128. In this case, the Claimant argues that the fact of foreign regulation is highly, indeed pivotally, relevant. But this argument is contradicted by the approach adopted by the Court. The language used in *Markus Stoss* ("*without the fact ... being capable of constituting an obstacle*") is a strong indication that point of consumption regulation is treated as lawful and justified notwithstanding the existence of foreign EEA regulation.

129. Some indication to the contrary however is found in the ruling of the EFTA Court in Case E-3/06 *Ladbrokes Ltd* (30th May 2007). This was relied upon by Ms Dinah Rose QC for the Claimant. She accepted that this judgment was not binding upon the CJEU nor upon this Court but she stated that it was informative and that the underlying principle was correct. Mr Beal QC for the Secretary of State was content for the analysis of the GA 2005 to proceed upon this basis. The fifth question posed by the national court to the EFTA Court was framed in this way:

> "The fifth question
>
> 82. By its fifth question, the national court asks whether Article 36 EEA precludes a national statutory rule prohibiting the provision and marketing of gaming for which no licence has been granted in Norway, but which is approved under national law in another EEA State."

130. The EFTA Court held that the fact that different levels of protection applied throughout the EEA was irrelevant and the Court underlined the fact (relied upon heavily by the Defendants in the present case) that the fact that operators might be regulated in State A did not necessarily imply an adequate level of protection where the services were to be provided in State B, i.e. in the place of consumption. However, the Court also held that even though States did not have to follow or mutually recognise each other this did not mean that they should ignore the existence of foreign regulation altogether:

> "85. In that respect, the Court recalls that when determining the objectives of their policy on gambling and betting, the Contracting Parties enjoy a margin of discretion to define the level sought with respect to the protection of consumers, the maintenance of public order and other legitimate aims (see paragraph 42 above). Consequently, different levels of protection may exist throughout the EEA. A licence permitting the offering of gaming services may be less strict in the home State of the gaming operator than in the host State. Levels of protection may differ, in particular, with respect to the kind of games permitted, the frequency of gambling opportunities being made available, and the forms of marketing deemed acceptable. Moreover, protecting consumers in highly specific areas such as gambling and betting, as well as maintaining public order, may require different approaches depending on the respective characteristics of each society. Even if the

> legislation and practice in the home State of the operator ensures a high level of protection in relation to the sociological features characterizing that state, this may not necessarily amount to the same level of protection with respect to the features characterizing the state where the services are to be provided.
>
> 86. At the outset, the EEA State where the services are to be provided thus has a right to require possession of a licence issued on the same conditions as its own nationals, even if the service provider already holds a licence issued by the home State. However, national measures must not be excessive in relation to the aims pursued. This would be the case if the requirements to which the issue of a licence is subject coincided with the requirements in the home State. That means, firstly, that in considering applications for licences and in granting them, the Contracting Party in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of establishment and secondly, that *it must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State* (see, for comparison, Case 279/80 *Webb* [1981] ECR 3305, at paragraphs 19–21)".

131. For the purpose of analysis I adopt the conservative position set out in the EFTA Court judgment in *Ladbrokes* to the effect that foreign licensing requirements must be taken into account. Mr Beal QC, for the Secretary of State, did not demur and accepted it was arguable. He submitted that it made no difference to the outcome because the GC had made clear that it would take into account foreign regulation. This enables me to err on the side of caution and, in the event, this is favourable to the Claimant's case.

## F. Proportionality: Does the new place of consumption based regime serve a legitimate objective?

### *(i) The issue: The legitimacy of the objectives pursued*

132. I turn now to consider the Claimant's case on the facts. I start with the objection, within the framework of the proportionality test, that no proper objective has been pursued.

### *(ii) Conclusion on the issue of legitimate objective*

133. I should state at the outset that I do not accept the Claimant's submissions in this regard. I am quite clear that in introducing the new regime Parliament had perfectly legitimate objectives in mind.

134. In the text below I summarise the principal justifications advanced by Parliament which I conclude are legitimate. The main objectives set out during the legislative process (and which I infer were accepted by Parliament) were as follows:

a) To better satisfy the statutory licensing objectives in section 1 GA 2005.

b) To improve the consistency of the application of the Act to all operators providing services in the UK.

c) To enable the GC to obtain more comprehensive information about the market and the operators providing services to the UK market so as to achieve better supervision and protection of consumers.

d) To protect consumers by increasing transparency about regulation and thereby avoiding the risk that consumers are misled or confused.

e) To ensure that social problems arising out of gambling are addressed more fully and effectively.

f) To ensure that all operators bear social and financial responsibility for the adverse social consequences of remote gambling.

g) To ensure that all operators bear similar regulatory costs.

***(iii) The source of relevant evidence: Parliamentary privilege***

135. Some debate arose in the course of the hearing as to what was a proper source in which to search for information about the scheme's purposes and objectives. The question was raised whether the use in Court proceedings of the report of a Select Committee and/or evidence given by a public official to such a committee might violate Article 9 of the Bill of Rights 1689 which provides:

> "Freedom of speech – that the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament".

136. In *R (on the application of Bradley) v Secretary of State for Work & Pensions* [2007] EWHC 242 (Admin) Bean J had to consider whether it was proper to admit a report of a select committee and/or evidence given by a public official to that committee in the light of Article 9. The Judge expressed a somewhat sceptical view as to the possibility that mere reference to a report in a court could hinder the freedom of speech of Parliament (cf paragraph 35); though he was of the view that to permit the evidence of a witness to a select committee to be relied upon in court would constitute a violation of the freedom of speech contained within the Article. At paragraph 34 he stated:

> "I agree with Mr Speaker that to allow the evidence of a witness to a Select Committee to be relied on in court would inhibit the freedom of speech in Parliament and thus contravene article 9 of the Bill of Rights. It would have been open to the Ombudsman, who was served with this claim as an interested party, to have put the substance of the observations she made to

> the Select Committee into a witness statement, a letter or a public statement which could be adduced in evidence by either side. But she has not done so, and has (entirely properly) decided not to take an active part in these proceedings. I should not, therefore, allow her oral evidence to the Select Committee to be relied upon in court".

137. In *R (Age UK Ltd) v Secretary of State for Business Innovation and Skills* [2009] EWHC 2336 Blake J was confronted with a similar question in the context of an application for judicial review of the Employment Equality (Age) Regulations 2006. The challenge involved him in assessing material relating to the Parliamentary history of the Regulations which included the evidence presented to and conclusions of Parliamentary committees of both Houses of Parliament. The Attorney General intervened to contend that it was constitutionally improper for the court to receive in proceedings the record of evidence given by a witness to a Parliamentary Committee and the view of the Committee itself. *Bradley* (ibid) was cited in support (cf para [45]) as was the judgment of Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin). In this latter case the High Court permitted an appeal from the Information Tribunal which had placed reliance upon Parliamentary evidence adduced before it when a Minister was giving evidence as to whether certain information was exempt or not under the provisions of the Freedom of Information Act. The Judge held (per Stanley Burnton J at [59]):

> "If the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it. To put the point differently in raising the possibility of its reliance on the opinion of the Select Committee, the Tribunal potentially made it subject to submission as to its correctness and of inference which would be a breach of Parliamentary privilege".

138. In coming to his conclusion in *Age UK Ltd* the issue in the light of previous case law Blake J held:

> "50. In my judgment, there is no constitutional impediment to the court receiving the material that the parties and the intervenor seeks to place before it for the purpose of informing itself as to the statutory history, the relevant considerations that led to the formation of policy, the aim of the policy in promoting the Regulations, and the existence of factors that might be relevant to the assessment of whether the Regulations were proportionate in their derogation from the principle of equal treatment of the grounds of age. The purpose of receiving this material is for the court to inform itself of any consideration that may be relevant or carry weight when it reaches its own conclusions that it has a constitutional duty to reach. In receiving and informing itself from Parliamentary materials, the court is not adjudicating upon whether anyone else who has expressed a view, (whether a Parliamentary Committee, a Minister or a witness to a Committee) is right or wrong as a matter of law or fact. Nor, in my judgment, will receipt of such material have a chilling effect on the willingness

> of witnesses to give evidence to such Committees. What is said to Parliament is said in public, recorded and reported on in public for all interested to read.
>
> 51. In my judgment, what the constitutional principles identified in *Prebble, Al Fayed, Bentley* and the *OGC* case indicate are as follows:
>
> i) The court must be astute to ensure that it does not directly or indirectly impugn or question any proceedings in Parliament in the course of judicial proceedings.
>
> ii) 'Impugn or question' extends beyond civil or criminal sanction for any statement in Parliament but includes a judicial determination as to whether a statement in Parliament is right or wrong. The judge cannot receive evidence of what is said in Parliament for the purpose of agreeing or disagreeing with it.
>
> iii) The court must reach its own conclusions on questions of law and the legality of administrative action, subordinate legislation, and whether primary legislation is compatible with the European Convention on Human Rights or provisions on European Community Law. It cannot reach those conclusions by agreeing or disagreeing with the expressions of opinion that may have occurred inside Parliament, however eminent or well qualified may be the people expressing those opinions".

139. He also held that insofar as Stanley Burnton J or Bean J were adumbrating wider and less flexible principles he did not share their views: See paras [52] *et seq.*

140. In the present case there is no rooted objection on the part of the Government to the use of Parliamentary material. Indeed, Mr Beal QC relied upon the existence and contents of the two Parliamentary Committees that had been involved in pre-legislative scrutiny. In my view, echoing the position of Blake J in *Age UK Ltd*, it would have been artificial to limit the exercise so as to circumvent Parliamentary material given that the very purpose of the exercise is to identify what the legislature's intent in fact was. I should add that none of the conclusions that I reach in any way trespass into the concern that was expressed by Stanley Burnton J, namely the passing of judgment on the view of a Minister in Parliament as to the legality or otherwise of government conduct. More generally it was not suggested by any party that having recourse to any source would infringe Article 9 of the Bill of Rights.

***(iv) The legislative objectives of the GA 2005***

141. The starting point is the licensing objectives set out in section 1 GA 2005 which continue to apply under the new regime. These are set out at paragraph [23] above and focus upon the suppression of crime and disorder, the conducting of gambling in a fair and open way and the protection of children and other vulnerable persons from being harmed or exploited by gambling. In my view these are, predominantly, consumer protection or public order objectives which are legitimate under EU jurisprudence. These objectives predated the amendments which reflect the new consumption based

regime. In framing the new regime Parliament was bound (since there was no suggestion that the licensing objectives should be modified) to devise a scheme which met those objectives. The Claimant accepts that an assessment of proportionality is essentially forward looking. It is difficult to see therefore how the new regime may be operated other than by reference to legitimate objectives. The various implementation documents published by the GC all take as their starting point the licensing objectives. For example the introduction to the "Statement of principles of licensing and regulation" (September 2009) takes as its point of departure the licensing objectives and the duty of the GC in the exercise of its power to have regard to these objectives. The same applies to the Licensing, compliance and enforcement policy statement of September 2009 which, moreover, explains that the GC will intervene when it identifies a risk where risk is said to be by reference to the licensing objectives (cf Statement para [2.3]): See paragraphs [56] – [60] above.

***(v) Consultation papers***

142. These same objectives flow through the consultation exercise conducted by the DCMS. The first consultation was commenced on 22nd March 2010 in a document entitled "A Consultation on the Regulatory Future of Remote Gambling in Great Britain". In Chapter 3 of the consultation entitled "The Need for Change" the Department identified a number of concerns that it considered might warrant the adoption of a new approach. These may be summarised thus.

143. First, there was concern as to the increasing number of gambling operators that had moved off-shore who were therefore outside the scope of regulation. It was acknowledged that the GC did not have a monopoly on good regulation and that most, though not all, sites targeting British consumers would be subject to some form of regulation in their home jurisdiction. There were, nonetheless, different regulatory standards and approaches and consumers might therefore experience varying levels of protection depending upon which operators they dealt with.

144. Secondly, the Department noted that absent specific requirements overseas service providers were not compelled to report information, such as instances of suspicious betting activity, to the GC or relevant sports bodies even where such activity involved British sports or consumers. Nor were operators licensed overseas obligated to contribute towards "*research, education and treatment of problem gambling in Britain*". At paragraph [3.14] the Department identified differences in the policies adopted by overseas regulators towards such issues as social responsibility and other measures that could assist a person to control gambling. They expressed the view that this could result in different measures of protection for British consumers depending upon where the operator or website was regulated. They observed:

> "These differences inevitably lead to confusion amongst consumers who may not be aware that their different gambling activities are subject to varying levels of protection".

Further, the Department identified the fact that overseas licensed operators had different levels of testing and security requirements and the GC was not able to assess their robustness which could ultimately mean that consumers were gambling on websites that had not been independently tested or audited to the standard expected of licensees subject to the GA 2005. This concern was in the context of the fact that the

robustness of software used by games providers was linked to the ultimate fairness of games to consumers. At paragraph [3.16] the Department stated:

> "3.16 The Commission receives many enquiries from British consumers about gambling activity licensed offshore. There have been enquiries in relation to social responsibility (for example, where consumers have been unable to self exclude from websites) and unfairness (for example, where winnings are not paid out or where complaints have not been satisfactorily dealt with). However, as the Commission does not regulate these operators, they can only refer enquirers to the regulator in the originating jurisdiction and cannot investigate the complaints or follow up to determine whether the issues go on to be resolved.
>
> 3.17 These enquiries give us a general indicator of the common problems that exist for British consumers and indicate that some people are unaware that they are gambling on an overseas licensed website and are not protected by British law".

145. The Department also raised the issue of money laundering and other financial crimes and pointed out that there was no specific requirement upon licensees to pass information in relation to financial crime to SOCA with the consequence that the Department could not be sure that the relevant UK authorities received all relevant information regarding the potentially criminal activities of British citizens.

146. It is apparent from the consultation paper that the main objective of the Department focused upon different facets of consumer protection and public order.

***(vi) Impact Assessment: June 2011***

147. On 2nd June 2011 the Department issued an Impact Assessment on Remote Gambling Regulation (the "Impact Assessment"). This expressed the view that the system for regulation of remote gambling was not working and was unsustainable. In response to the question "what are the policy objectives and the intended effects?" the Impact Assessment stated:

> "The policy objectives are to ensure that the licensing objectives and related protections in the 2005 Act continue to be afforded to GB consumers and to ensure that the costs of demands placed on the GB Gambling Commission resulting from the activities of offshore operators are not subsidised by licence fees paid by GB-based operators. The Gambling Act 2005 will be simplified so that remote gambling is regulated on a point of consumption basis, so all operators selling into the British market, whether from here or abroad, will be required to hold a GB Gambling Commission licence, increasing protection for GB consumers, supporting action against illegal activity (including sports betting integrity) and removing market distortions".

148. The objectives referred to in the Impact Assessment largely replicate those articulated in the earlier consultation document. They may be summarised as follows.

149. First, because of the lack of an international consensus about software and technology standards consumers may unwittingly be exposed to divergent degrees of protection when gambling with offshore service providers. Secondly, there is no obligation upon overseas operators to report suspicious behaviour or other events affecting the integrity or financial stability of the operator. This leads to a patchwork of different degrees of protection for consumers and an inability on the part of the GC to ensure consistent protection. Thirdly, the GC has no ability to prevent or curtail illegal match fixing of British based sports events. Fourthly, some overseas operators refused to co-operate to provide information to the GC and even where they do so, upon a voluntary basis, it was often inadequate. Overseas operators sometimes refused to co-operate upon the basis (whether justified or not) of overseas data protection laws. Fifthly, foreign operators failed to contribute towards the costs of the GC's increasingly sophisticated betting integrity function. For example in their consultation response the Central Council for Physical Recreation said that "*the success of the whole range of action taken on integrity...will be severely limited and possibly rendered entirely obsolete if such a large proportion of the on-line betting industry operates outside UK licence conditions and regulation*". Sixthly, consumers risked gambling on a website without knowing, or being misled as to, whether the game is regulated. Many operators had different products licensed in different jurisdictions but a consumer could access those products from the same branded homepage, often without knowing that they could be inadvertently gambling with an operator not licensed by the GC. This led to confusion for consumers. The GC received enquiries about social responsibility (for example where consumers have been unable to self exclude from websites) and unfairness (for example where winnings have not been paid out or where complaints have been unsatisfactorily dealt with). However, the GC could not directly investigate these complaints or enquiries. Seventhly, similar problems arose in relation to carriers of advertisements who could find it difficult to understand where the service or product that they were being asked to advertise was regulated and this had sometimes resulted in illegal advertising of foreign gambling. Eighthly, foreign operators were able to circumvent or avoid measures designed to protect consumers and promote socially responsible gambling. All operators licensed by the GC had to comply with the LCCP which required such licensees to have put into place policies and procedures intended to promote socially responsible gambling and which required licensees to commit to and set out how they would contribute to: research into prevention and treatment of problem gambling; public education on the risks of gambling and how to gamble safely; and the identification and treatment of problem gamblers.

150. The Impact Assessment acknowledges a risk that certain unscrupulous companies might seek to circumvent the regime and continue to advertise within the UK without obtaining a licence. However, the Government concluded that the new enforcement package consisted of sufficient powers and sanctions to reduce this risk to an acceptable level. The Government acknowledged the limitations of such measures. The Impact Assessment states:

> "109. No solution, short of one imposed at disproportionate cost and unacceptable limits on consumer choice and freedom

> will ever be 100% effective. This proposal, however, is no worse than the present position with non-white list/EEA operators who have to operate via third parties, and who may have some additional powers as licence fee and fines are a recoverable debt.
>
> 110. By putting in place a fair and open system of regulation which provides operators with the ability to apply for a licence to access British consumers, the vast majority of remote gambling in Britain will be effectively regulated. It is already the case that a large proportion of gambling operators demonstrate corporate and social responsibility and we envisage that these operators will want to show their commitment to this by complying with the regime we are proposing.
>
> 111. Whilst there will always be operators who refuse to comply, we anticipate that these will be limited in number and will have such a miniscule impact on the protection of British consumers and licensed operators that to implement excessive enforcement measures would be disproportionate when compared to the risk they present".

***(vii) The position of the UK Government in communications with the European Commission***

151. The European Commission requested information from the UK Government in relation to the "*need to introduce restrictive measures to safeguard the protection of British consumers*". On 8th April 2013 the UK Government answered the Commission's information request in the following terms which reflect the position set out in other documents and my summary at paragraph [134] above:

> "The UK Government refers to and relies on the command paper published with the draft Bill and regulatory Impact Assessment dated June 2011 which details the evidence justifying the proposed reforms.
>
> The UK Government considers that strengthening consumer protection is a necessary prudential step to limit the risks of harm to British consumers in the future particularly as more countries permit on-line gambling. As set out in the Impact Assessment, the Gambling Commission now has oversight of less than 20% of the British remote gambling market and does not have the direct access to operators, their systems and data to identify current and developing risks or to address them. Without the reforms and ability to impose consistent requirements on operators, the Gambling Commission will continue to have a very limited view of the risks to consumers in the remote market and would have to persuade an increasing number of jurisdictions to make changes it thought necessary. The Gambling (Licensing and Advertising) Bill will close this

regulatory gap by ensuring all remote gambling operators who engage with British consumers are subject to consistent regulation by the Gambling Commission in accordance with the Gambling Act 2005.

As set out in the regulatory Impact Assessment, the lack of consistent regulation creates significant consumer confusion. The evidence indicates that in many cases, consumers make a reasonable assumption that an operator that is active in Great Britain must be licensed by the Gambling Commission which can lead to confusion. This is evidenced by the enquiries received by the Gambling Commission about gambling activity that is licensed off-shore (see Figure 1 below). In particular, the Gambling Commission has received enquiries about social responsibility (for example, where consumers have been unable to self-exclude from websites) and unfairness (for example, where winnings are not paid out or where complaints have been unsatisfactorily dealt with). However, under the existing arrangements the Gambling Commission cannot directly investigate these complaints or enquiries or follow up to determine whether the issues go on to be resolved, and has to refer the complainant on to overseas regulators.

Figure 1 – Summary of enquiries received by the Gambling Commission between 3 June 2011 and 22 January 2013 which relate to remote gambling operators licensed in other jurisdictions.

| **Jurisdiction** | **Complaints & Disputes Overseas** | **Gambling Transaction** | **Government Department** | **Other** |
|---|---|---|---|---|
| 01 – Alderney | 198 | | | 10 |
| 02 – Antigua & Barbuda | 29 | | | |
| 03 – Costa Rica | 13 | | | 3 |
| 04 – Cyprus | 22 | | | 1 |
| 05 – Gibraltar | 702 | 4 | | 22 |
| 06 – Isle of Man | 94 | | 1 | 8 |
| 07 – Kahnawake | 17 | | | 1 |
| 08 – Malta | 136 | | | 6 |
| 09 – Netherlands | 55 | | | 1 |

| | | | | |
|---|---|---|---|---|
| Antilles | | | | |
| 10 – USA | 21 | 1 | | 7 |
| **Grand Total** | **1287** | **5** | **1** | **59** |

> Even where operators are subject to appropriate levels of regulation overseas there are different regulatory standards and approaches. There is limited consensus in areas such as standards and software testing which inevitably means that British consumers may experience varying levels of protection depending on which operator they deal with. The Gambling Commission has encountered practical difficulties in trying to obtain information or raise queries via other regulators who may well take a different view of priorities or operators. Although some operators do share some information with the Gambling Commission in addition to their own regulator on a voluntary basis, this is often of insufficient detail to be used in an investigation and limits the Gambling Commission's ability to conduct thorough investigation. There have been instances where the Gambling Commission has been unable to obtain the information from the overseas licensed operator or regulator. In some cases the Gambling Commission is told the refusal to provide information is because of overseas data protection requirements.
>
> The UK Government considers that the inability for the Gambling Commission to demand such information, as well as the lack of obligation on operators regulated in other jurisdictions to report suspicious activity to the Gambling Commission or sports bodies constitutes a risk to consumers and to sports betting integrity in the UK".

***(viii) Impermissible economic objectives***

152. There are, it has to be said, a number of objectives set out in the Impact Assessment which, upon analysis, may be said to be economic in nature. These primarily include the following: that the present system operates against the interests of the British economy by providing incentives for operators to base themselves abroad; the concern expressed by trade unions that remote gambling undermines businesses and employment within the United Kingdom and that consideration should be given to the outright prohibition of remote gambling; and, the concern of domestic service providers that foreign operators were subject to less stringent regulatory regimes and thereby enjoyed an unfair competitive advantage in the GB market.

153. In determining the proportionality of the new regime (see paragraph [90] above) such considerations are irrelevant. The regime must stand or fall by reference to legitimate objectives of consumer protection and/or the preservation of public order.

### *(ix) Other source material which is to the same effect*

154. My attention was drawn to the statements of Ministers and other civil servants during the promulgation of the draft Bill all of which were largely consistent with the objectives referred to above. I also had my attention drawn to the conclusions of the Culture, Media and Sport Committee Report "The Gambling Act 2005: A bet worth taking?" published in 2012 and the Culture, Media and Sport Committee of the House of Commons Report published on 1st May 2013 which made essentially the same points. The Secretary of State and the GC placed particular reliance upon the latter report and in particular paragraph [5] of its conclusion and recommendations:

> "5. We support the principle that gambling should be regulated on a point of consumption basis — even the most vociferous opponents of legislation did not argue that the principle was wrong, or that they would refuse to apply for a UK licence — and there are several reasons why it should be so regulated, including equity, consistency, clarity and responsiveness to the needs of UK consumers. The industry argues that most remote gambling by UK customers currently takes place with companies that already meet, or approach, the required standard because they are regulated by 'White-Listed' regimes; and none of our witnesses has raised any specific objection to the costs of or regulatory requirements for obtaining Gambling Commission licences".

### *(x) The validity of the precautionary approach*

155. Finally, I shall deal with the Claimant's submission that the Government acted upon a "precautionary" basis in the absence of any evidence base. I do not agree.

156. First, it seems to me on the basis of the evidence that I have seen that there is sufficient evidence of *existing* concerns for the Government to justify the present course of action. I have set out above (see paragraph [151]) the evidence that the Government advanced to the Commission. I accept the Claimant's point that not all of these necessarily represent justified complaints (as opposed to "concerns") but I also accept the Government's point that given the limited number of remote operators over whom it was able to exercise supervision it is likely that there were many problems or "concerns" that were simply hidden from its view.

157. Secondly, and in any event, the adoption of an *ex ante*, precautionary, approach is justified in a market such as this. The Government has identified a significant lacuna in its system of regulation which was not in contemplation when the GA 2005 first came into effect. At that point it was assumed that the GC would exercise regulation over the preponderant part of those who provided services into this jurisdiction. However, as time has progressed operators moved off-shore and avoided regulation. It seems to me obvious that in relation to an activity which is potentially socially divisive, such as on-line gambling, that those who provide the service should be subject to regulation in the State they target. Even if it were the case that the new regime was introduced upon the basis that it would curtail or prevent harm which had yet to occur that would, on the particular facts of this case, in my judgment be a proper "precautionary" objective for the Government to have acted upon.

*(xi) Conclusion*

158. In my judgment the documentary evidence from 2010 onwards records a strong and consistent justification based upon consumer protection and the protection of public order. These were objectives the Government and Parliament were entitled to pursue. Indeed the statutory licensing objectives set out in the GA 2005 and the nature of the conditions contained within the LCCP and the Code of Practice effectively compel the GC and Secretary of State to operate the new regime in a manner which is focused upon consumer protection and the preservation of public order. The Court of Justice has repeatedly endorsed the principle that Member States can pursue the objective of bringing operators providing services to consumers within their jurisdiction into a licensing regime: See, for example, paragraphs [112] and [113] of the judgment of the Court of Justice in *Markus Stoss* set out at paragraph [127] above. By virtue of the GA 2005 operators hitherto based within the United Kingdom were incentivised to move off-shore. As of the date of this dispute between 80-85% of all operators (by revenue) are based outside of this jurisdiction. In pursuing a point of consumption based regulatory regime the Defendants are bringing within the purview of regulation the 80-85% of unregistered service providers who target the United Kingdom market. As explained above the conditions attached to licences are, in large measure, designed to protect consumers. They do this in a wide variety of ways which spans ensuring solvency and fairness in business practices through to social responsibility requirements. Consumers want to avoid being cheated. They want winnings to be paid. They want their personal data to be kept confidential. They want to have confidence that the operators with whom they deal are properly regulated in these respects and that in the event of a problem they can contact the regulator easily. The State wants consumers to be protected from addiction and wants those who profit from gambling to assume some level of responsibility for the social ills that gambling can lead to. In my view a regime that does no more than bring service providers within the confines of a consumer and public order oriented regime in the State that they target serves entirely legitimate objectives.

159. I recognise that in a number of the documents placed before the Court the Government has identified additional economic objectives which are attractive to it. Indeed the UK Government candidly admitted to the European Commission that a consequence of a consumption based regulation might be to increase the exposure of operators to the domestic tax regime. However it also made clear that this was a by-product of the regime not its principal justification. There is no evidence that the Commission doubted the correctness of this explanation or that it was not *bona fide*. For present purposes, as I have already explained, I have excluded any consideration which may be considered to be economic in nature and have sought to determine whether there is sufficient justification for the new regime based only upon legitimate consumer and/or public order grounds.

## G. Proportionality: Will the new regime be ineffective because it will lead to the growth of illicit trade

*(i) The issue*

160. I turn now to the Claimant's second factual objection which is that the new regime will create a significant economic incentive for illicit trade. It is contended that this

means the new regime will be ineffective (indeed dangerous) and hence disproportionate.

***(ii) Claimant's submission***

161. The Claimant submits that the new regime will have damaging unintended consequences for consumers since it will encourage the development of an unregulated market by incentivising operators to offer gambling services into the UK without a licence and/or in breach of the GC regulatory controls and will thus harm the consumer. It is argued that this means that the measure is not appropriate in proportionality terms.

162. This argument was advanced by the Claimant to the Minister in the course of 2013 and early 2014: See paragraphs [74] above. It was repeated in the course of this litigation. The argument is advanced in the following way. It is said that the UK gambling market is very competitive, margins are traditionally small and customers are highly price sensitive and mobile. The burden imposed by the new regime on reputable operators "*will*" provide therefore a competitive advantage to competing but unscrupulous overseas operators. It is said that "*inevitably*" an element of the costs of the burden of the new regime will be passed on to UK consumers by licensed overseas operators. Further the costs of the burden of the new regime will reduce the marketing spend of compliant operators decreasing the resources that can be applied to attracting and retaining UK customers. It is then said that this "*will*" attract unscrupulous operators to the market who, not having these costs, "*will*" be able to undercut, or enjoy greater profitability than, licensed overseas operators. The nub of the point is in the following terms:

> "As far as the GBGA is aware, the unlicensed market currently has little traction in the UK, and so the New Licensing Regime creates a substantial new threat to consumer protection where none existed".

***(iii) The fallacy in the Claimant's economic assumptions***

163. In my judgment this line of reasoning is unconvincing. Despite the certainty and confidence with which the argument is advanced it is premised upon a series of assumptions that are far from self-evident and, indeed, seem economically counter-intuitive. If they were to acquire forensic "legs" they needed a supporting quantitative assessment of the extent of the costs burden upon operators and then an explanation (probably through economic modelling) as to how those costs would be addressed by operators and with what consequences for each operator and the market as a whole. There is nothing novel or especially difficult about this analysis. Price elasticity assessments are routinely performed in competition cases. Since this argument was advanced in Autumn 2013 there would have been plenty of time for the Claimants to prepare such evidence and, of course, since the Claimants members are ideally placed to know both of their own individual cost structures and the dynamics of the market they are vastly better placed than anyone else to perform this task. But they have not done this.

164. I now set out below my specific reasons for rejecting this argument.

165. First, the actual costs burden which the new regime will impose upon remote operators is highly uncertain and there is no obvious reason to suppose it will be unduly burdensome. I have already set out at paragraph [68] – [71] above the level of application and annual fees. Cursory analysis of the schedule of fees in the Regulation demonstrates that the total fee burden assumed by a licensee will be modest in relation to its relevant licensed gambling turnover (see paragraph [71] above). I accept that the costs burden is not limited to fees alone and that there is a cost associated with compliance but it is hard to understand how this total level of costs could be problematic in the manner postulated. Take the duty to provide information: Can it seriously be suggested that a duty to report suspicious events to the GC or events which impact negatively upon the ability of the operators to remain solvent or retain effective management are of such a nature as to entail substantial costs? The same goes for the duty to provide regulatory returns, which in any event will be the subject of discussion with the GC which has power under the LCCP to tailor disclosure and dissemination requirements. In the absence of some compelling evidence to the contrary I cannot take the view that the overall burden of costs attributable to the new regime will be anything other than an unwelcome irritation or a nuisance as opposed to a major encumbrance. The fundamental objection to the Claimant's case is that the cost burden that is the foundation of its argument is unproven and, on the basis of the evidence before the Court, unlikely to be anything other than a small proportion of the total costs of any particular operator.

166. Secondly, in any event, even if operators must sustain significant costs the Claimant's case is that demand is highly price-sensitive. In such cases each operator will have to decide whether to pass on any incremental cost burden attributable to the new regime in terms of reduced winnings or worsened odds. Normal business logic dictates that in price-elastic markets where demand may switch away from even modest increases in prices (or in this sector worsened odds or reduced winnings) operators will normally seek to avoid passing on cost increases. Operators have options: they might decide to absorb the cost; or defray the increased costs by cost savings elsewhere; or they might decide to pass on only that portion of costs which will not lead to a diversion of demand. I thus reject the suggestion that it is "*inevitable*" that a rational operator will seek to pass on costs. On the contrary, any rational operator will do whatever it takes to avoid or mitigate that strategy if it leads to such undesirable outcomes.

167. Thirdly, *even if* there is a pass-on of costs and there is an adverse effect upon demand, for the Claimant's argument to prevail the scale of the impact must be so significant that it creates a material risk of consumer harm. The effect must be such as to create an incentive which is large and attractive enough to attract unlicensed operators to enter the market and to bear the risk of criminal proceedings or enforcement proceedings against them to shut down the operation. It is hard to conceive of a situation where the prospect of small volumes of incremental trade would be attractive enough to create large scale illicit trade. There is no evidence before the Court to suggest that even if there is a costs pass-on any diversion in patterns of demand would be on such a scale as to create any sort of a real problem. In my view again this seems to me to be inherently improbable.

168. Fourthly, there is implicit in this proposition yet another assumption which is that even if a sufficient incentive for illicit service providers to target UK consumers arose the GC would be powerless to prevent the risk eventuating. For reasons that I give

below (see paragraphs [175] *et seq*) I conclude that the GC nonetheless has a range of possible remedies open to it which, whilst not perfect, the Government is entitled to assume will be reasonably effective. As such, whatever the nature of the incentive that might arise, the existence of sanctions should, at least to a significant degree, serve to prevent any risk to consumers eventuating by reason of the emergence of significant illicit trading.

***(iv) The comparables***

169. The Claimant, as a backstop, refers to a series of comparables from other states where it is said that illicit trades did spring up in the wake of regulation. Some of these were advanced to the Minister in 2013 as set out in paragraph [74] above. Before me the Claimant's case on the emergence of the illicit market was predominantly based upon the economic analysis set out above (cf Claimant's skeleton paragraphs [92] – [97). I have found little in the comparables to guide me. The Claimant's case is very particular. It rests upon the particular hypothetical consequences of a specific increase in costs in a particular market amongst a group of particular operators. The fact that in different jurisdictions involving different regulatory interventions and regimes, and different demand characteristics, diversions to illicit trades have occurred tells one precious little about what might happen in the United Kingdom.

***(v) Did the Secretary of State have to disprove the Claimant's theses about the risk of diversion to illicit trades?***

170. Miss Dinah Rose QC for the Claimant submitted that, in any event, because the risk of the creation of an illicit trade is a possibility and because the risk of diversion to illicit trade had occurred elsewhere the burden of proof lay with the Secretary of State to prove that it had addressed its mind to the issue and had conducted investigations which were sufficient to prove that the risk would not eventuate. In other words it had to prove the negative. Whilst I accept that the burden of proof does lie with the State to justify a restriction which is *prima facie* prohibited under Article 56 TFEU I do not accept that in this instance the Secretary of State had a specific duty to rebut the Claimant's theses about the risk of diversion.

171. First, I do not accept that the argument, on the present state of the evidence before me, has any forensic merit at all. In the absence of a properly evidence based case it did not merit rebuttal; when it was advanced to the Minister it was advanced as assertion. It has never been substantiated. It is now repeated to me as a series of causal steps that are said to be "*inevitable*" or which "*will*" occur; but since it can be seen as a matter of "*elementary economic logic*" (as Lord Neuberger put it in *Sinclair Collis* (ibid) para [242]) that they are neither inevitable nor necessarily will occur, that, in my view, is a sufficient answer to the criticism that the Secretary of State should have engaged in some detailed econometric exercise to prove what elementary economic logic indicates was a non-starter anyway. I am fortified in my conclusion by the fact that the Court of Justice has adapted a similar view: See *Pfleger* (ibid) paragraph [51]; and *Markus Stoss* paragraph [72].

172. In any event, it is clear from the June 2011 Impact Assessment (cf paragraphs 108 *et seq*) that the Government was aware of the risk that some unscrupulous companies might seek to circumvent the regulatory regime. However, the view at that point was

that the risk was modest notwithstanding that no regulatory regime could ever be "100%": See the recitation from the Impact Assessment at paragraph [150] above.

## H. Proportionality: Whether the new regime will prove to be unenforceable

### *(i) The issue*

173. I turn now to the Claimant's third factual challenge to the proportionality of the new regime. The Claimant submits that the new regime will be ineffective in protecting consumers because it cannot be properly enforced and that this renders it disproportionate given the high burden it imposes on operators and the (relative) benefits of the passporting proposal. This is for the following reasons. First, the GC has no meaningful extra-territorial information gathering or enforcement powers and as such it will be impossible to gather information as to an overseas licensee's behaviour (absent complaints) and impossible effectively to investigate such complaints when they are made. Secondly, the new regime includes no mechanism for blocking customers in Great Britain from accessing unlicensed websites and consequently the GC does not have the power to block any compulsory payment system, website or internet service provider. Thirdly, the GC has no powers to prevent or regulate advertising or to enforce against advertisers of unlicensed services where the advertiser is outside of the jurisdiction. Fourthly, the Claimant submits that the GC has not explained how it will meet the additional resourcing requirements of licensing and regulating large numbers of operators established in jurisdictions spread across the world with different language requirements. As a result of these criticisms the Claimant submits that the new regime is inconsistent with the statutory licensing objectives and incapable of achieving its purported aim.

### *(ii) Conclusion*

174. I do not accept these submissions. First, there is no evidence or reason to believe that there will be a major enforcement problem. Secondly, even if there are limitations in the enforcement regime, the Government and Parliament were entitled to take the view that the suite of enforcement powers available to the GC would be sufficient, at least in large measure, to meet the licensing objectives. Thirdly, the Government has acknowledged that if and insofar as this proves not to be the case that it would review the law and take steps to strengthen enforcement powers. I elaborate upon these points below and then address two specific criticisms made by the Claimant concerning the GC's resources and the GC's ability to control extra-territorial activity.

### *(iii) The unproven assumption as to the scale of the enforcement problem*

175. The fundamental objection to the Claimant's submission is that it assumes that there will be a significant number of licensees who either refuse to comply with their licence obligations or refuse to obtain a licence at all. For the reasons that I have already given I reject this submission: See paragraphs [160] to [172] above. Whilst no doubt some unscrupulous traders will be attracted to this lucrative market, there is no reason to suppose that the regime will create an incentive for a large illicit sector to emerge. Hence the scope of any enforcement problem should be limited. Evidence before the Court suggests that there is little problem today of illegal trading. As the Secretary of State has pointed out if such is the position today there is no reason to suppose that the problem will exacerbate materially in the future.

***(iv) The GC's powers should prove reasonably effective***

176. The considered opinion of the Secretary of State and the GC is that the market generally operates in good faith and is compliant and there is no reason to suppose that this will change. Furthermore, in the face of recalcitrant operators the GC can liaise and co-operate with foreign regulators to counter such behaviour. This should be reasonably effective. Indeed it is the essence of the Claimant's case that inter-regulator co-operation is an effective means of regulating markets. Further, the GC has available to it the ability to revoke suspend, amend or vary licences as a means of punishment. It can, pursuant to section 77 GA 2005, impose bespoke additional obligations upon operators. It can prosecute advertisers who act on behalf of delinquent operators. In my judgment, Parliament was perfectly entitled to form the opinion that the new regime would not create significant enforcement problems.

***(v) The relevance of the obligation to review and repair***

177. In any event, the fact that the Government has recognised that it might need to review the regime in the future is another reason not to accept the Claimant's submission. In *Age UK* (ibid) Blake J was confronted with a similar argument. It was said that in the fullness of time the transpositional measures adopted by the Government would prove to be ineffective and this was an argument in favour of its disproportionality. Blake J rejected this argument. He cited the judgment of the House of Lords in *R v Secretary of State for Employment Ex p. Seymour-Smith (No. 2)* [2000] ICR 244 where Lord Nicholls stated that the relevant point in time at which to assess legality was the point in time at which the impugned measure was adopted. He accepted that if a measure turned out not to be effective then, in due course, a duty might arise upon the State to modify the provisions. He stated:

> "As time passed the consistently adverse impact on women became apparent. But, as with the broad measure of discretion afforded to governments when monitoring measures of this type, so with the duty of governments to monitor the implementation of such measures: the practicalities of government must be borne in mind. The benefits of the Order could not be expected to materialise over-night or even in a matter of months. The government was entitled to allow a reasonable period to elapse before deciding whether an order had achieved its objective and, if not, whether the Order should be replaced with some other measure or simply repealed. Time would then be needed to implement any decision. I do not think the Government could reasonably be expected to complete all these steps in six years, failing which it was in breach of Community law. the contrary view would impose an unrealistic burden on the Government in the present case".
>
> (ibid 261H-262B)

178. In the light of this Blake J stated in *Age UK*, at paragraph 34:

> "...in a challenge brought promptly to the legality and efficiency of a transposition on the basis that the national

> measures were *ultra vires* the enabling power under the European Communities Act 1972, the question is principally determined by reference to social policy aims identified by the Government at the time of transposition. I accept that subsequent developments may show that Government is required to review those aims and their impact upon the class who suffer unequal treatment, but just as there is a broad measure of discretion as to the adoption of social policy aims, and the best means of giving effect to them, so there is abroad measure of discretion afforded to Governments as to when those aims and the methods of giving effect to them need to be reviewed".

179. In the present case the Government has acknowledged that the enforcement regime may not achieve 100% perfection. It is also accepted that at some future point in time reform might be required. The question for me, therefore, is whether the decision of the Government to introduce the regime in the face of the sorts of enforcement difficulties that the GC might encounter renders that decision disproportionate. It will be evident for the reasons that I have given above that I do not take that view.

***(vi) The Claimant's specific criticisms***

180. For the sake of completeness, I address the two specific criticisms made by the Claimant of the enforcement regime:

i) The Claimant contends that the GC is "a small organisation, currently equipped to regulate only 15% of the UK market" and will be under-resourced. The GC rejects this submission and I agree. The GC employs approximately 250 staff which figure is due to increase in 2015. It presently regulates in excess of 3000 licensees of which 137 are remote gambling operators. To put the scale of the problem into context Mr Adam Lewis QC, for the GC, submitted as follows:

> "While it is true that the remote gambling operators it regulates are responsible for only 15% of the British consumer market, it is important to note that 55% of that market is regulated by the Gibraltar Gambling Commission, who confirms in his evidence...that he carries out that task with "six experienced staff: three of whom work on licence administration, three of whom work on regulation". With its much greater resources, and the resulting economies of scale, the GC is more than capable of assuming that burden, and the burden of regulating the remaining 30% of the market. The non-remote market it currently regulates is much larger and it involves many of the same issues, so the GC will be able to make use of its existing expertise. [Further] even if the GC's resources prove insufficient, they can be increased. Even if to begin with it had too much work for its current employees to process efficiently, and there were therefore some backlogs and delays – none of which is accepted – that would not render the whole NLR unlawful in the meantime, still less in principle".

ii) In relation to the submission that extra-territorial enforcement is impossible or very difficult the GC submits that: the scale of any problem has been exaggerated by the Claimant; in any event if problems arise these will, in the main, be resolved through liaison between the GC and the foreign regulator; and further (and in any event) sanctions available to it (which include persuading payment service providers to block payments and prosecuting or deterring advertisers in the United Kingdom from advertising such services) will generally prove effective. With regard to the issue of payment blocking the GC explained in evidence before the Court that major payment service providers had already agreed to block payments to and from unlicensed operators and to consult the GC register of licensed operators. In particular the GC had entered into arrangements with PayPal, Mastercard and Visa who account for the vast majority of on-line payments. Other possible payment methods, including top-up cards and crypto-currencies, were heavily reliant upon Mastercard and Visa. Ultimately the position of the GC is that the scale of the problem identified by the Claimant is exaggerated and artificial. The GC also explained, through witness statement evidence, that the ability to advertise to potential customers was critical to the commercial success of remote gambling operators and the GC has powers to curb illegal advertising in co-operation with major websites such as Google, eBay and Facebook. Further, the GC had achieved success in co-operating with advertising bodies, trade associations and advertising carriers to ensure that unlawful services were not advertised in future.

181. Ultimately, the issue is not whether the enforcement regime will, in certain respects, lack efficacy; the issue is whether the decision adopted by Parliament to move to consumption based regulation was defective in view of the enforcement powers available to the GC. In my judgment the policy decision adopted by the Secretary of State was a legitimate one, even if, for the sake of testing the argument, enforcement powers were suboptimal. Such deficiencies as emerged over time can be remedied by future amendments to the legislation.

## I. Proportionality: Is the new regime the least restrictive means for securing the legitimate objectives?

### *(i) The issue*

182. The fourth evidential challenge was that the new regime was a steam hammer to crack the consumer protection and public order nut when a (passporting) nutcracker would suffice: *Pace* Lord Diplock; see at paragraph [92] above.

183. The essential thrust of the Claimant's case was that the passporting proposals amounted to a substantially less restrictive means of securing the legitimate objectives of regulation. It is said that there was "*no doubt*" that the passporting proposal would be effective whereas the new regime could not be. This was because the approved foreign regulators would have access to information and enforcement tools in respect of operators within their territories which the GC did not have. I have set out above, at paragraphs [72] – [81], the history of the evolution of the passporting proposal. In submissions to me the following points were made. First, the passporting proposal would allow the GC to "passport" only those operators subject to local regulation which the GC trusted, i.e. those foreign regulators which supplied information to and

co-operated with the GC. Secondly, the passporting proposal was substantially less onerous for the applicant operators than the new regime because it allowed them to rely to a significant extent upon their local approvals. Such reliance would depend upon whether their regulator was considered by the GC to be of good standing and co-operated sufficiently with the GC. Thirdly, the passporting proposal would not be inflexible and slow (as the GC submitted); there was no reason to assume that overseas regulators would be tardy in providing information and in any event the GC would retain a residual power to modify licences to reflect the fact that different operators might require different levels of scrutiny. Fourthly, unlike the White List system the GC would licence operators "*...based on the quality of their local regulation and their compliance with that foreign regulatory regime. It is not a matter of approving all operators from that country "en bloc" as the GC contends*".

***(ii) Conclusion***

184. I accept that the least restrictive measure test is a proper part of the proportionality assessment. It is set out in numerous judgments of the Court of Justice, including *FEDESA* (ibid) which has been adopted and endorsed in many domestic decisions. It was endorsed by Lord Neuberger in *Sinclair Collis*. Lady Justice Arden stated that she was not sure it existed in that case but that if it did it was subject to an appropriate (wide) margin of appreciation (see paragraph [108] above). I prefer this latter interpretation which is consistent with the weight of case law.

185. In my judgment the manner in which the GC describes the passporting proposal highlights precisely why Parliament was entitled to reject it. There are three core ingredients to the passporting proposal. First, it requires the GC and/or Secretary of State to assess the "quality" of the foreign regulator. This, so it seems to me, is a recipe for bureaucracy and disagreement. It would require the foreign regulator to co-operate fully with the GC and, in effect, submit itself to an approval or accreditation process by a fellow regulator. Further, if the GC found the foreign regulator to be "not up to scratch" then there would necessarily follow a period of protracted wrangling when the GC sought to persuade the foreign regulator to improve its standards so as to permit its licensed community, thereafter, to seek licences in the United Kingdom on a "light touch basis". Secondly, the passporting proposal requires the GC to assess the compliance of foreign operators "with that foreign regulatory regime". Once again this is, in my view, a recipe for protracted argument and dispute. The Claimant has not explained how that appraisal will take place. It is to be assumed that foreign regulators will adopt as their starting position that their licensed community is already effectively regulated. They will not take kindly to suggestions that foreign operators do not comply with their regimes. But in any event precisely how the GC would conduct that inquiry is hard to fathom. Thirdly, in any event, armed with information about the quality of the foreign regulator and the extent of compliance by operators with that regulator, the GC is then (but only then) in a position to draft bespoke licences for each operator. Once again this seems to me to be a recipe for delay, bureaucracy and wrangling. There is almost infinite scope for disagreement as to the quality of the foreign operator and the extent of local compliance and the extent to which this, in turn, feeds into the operator's desire for "light touch regulation". And the risk that competitors will object to their rivals being accorded "favourable" (i.e. discriminatory) treatment risks creating a recipe for litigation.

186. Once again it is not for me to assess the merits or demerits of the passporting proposal. I am only concerned to ask myself whether in view of the criticisms made by the Secretary of State and the GC of the passporting proposal whether it fell within the scope of Parliament to reject it. I am quite clear that Parliament was fully within its rights to adopt the stance that it did.

***(iii) Ancillary points***

187. I shall deal with two further points. First, in paragraph 98 of their skeleton argument the Claimant advanced, albeit lightly, the alternative argument that the current regime is a less restrictive means of securing consumer protection than the new regime. The basis of this argument is quite separate to that of the passporting proposal and presupposes that the benchmarking exercise is the new regime as against the old regime. This argument was not advanced in any detail orally. For the sake of completeness I reject the contention. For reasons already given I am entirely satisfied that Parliament was entitled to take the view that the old regime was ineffective and, in consequence, to move to the new consumption based regime. Secondly, I should address the Claimant's submission that the Secretary of State misunderstood the passporting proposal (see paragraph [81] above). I have set out above how the passporting proposal evolved and how, in its first formulation, it assumed no, or no material, regulatory oversight by the GC over foreign operators. The Claimant states that the Government misunderstood the passporting proposal when they identified as their "*key concern*" that the proposal would undermine "*the need to ensure that the GC had direct oversight of the entire British remote gambling market*" and that applying it to Gibraltar would "*exclude some 55% of the British market from direct oversight by the GC*". The Claimant also points out that the Government assumed that the passporting proposal would mean "*the GC does not have direct access to information from operators*". The Claimant submits that under the passporting system: "*there would be a presumption that operators subject to a effective local regulation would receive a licence from the GC, and that their primary regulator would be the local regulator; but the GC would in all such cases retain the ability to exercise direct oversight, and indeed to invoke the licence where appropriate*".

188. The confusion, if such it really was, has flowed from the fact that the passporting proposal changed only at a late stage to an acknowledgement that there would need to be substantive dual-licensing. The Claimant submitted that in the light of this misunderstanding:

> "To the extent that the [Secretary of State] has misunderstood the suggestion, his rejection of it was unlawful".

189. In my view this is an unsustainable argument. The Government's objections to the passporting proposal set out above apply to the final iteration of the passporting proposal. If there was a misunderstanding it is not remotely the sort of error which would lead to a conclusion that the new scheme was manifestly inappropriate.

190. Finally, the suggestion that the rejection of the passporting proposal is inconsistent with European law ignores the guidance given by the Court which has repeatedly acknowledged that licensing regimes are restrictions but has accorded wide discretion to Member States, for example, to prohibit gambling or restrict it to limited channels or to monopolies run or franchised by the State or otherwise to subject it to a licensing

regime. The old UK regime was the most liberal of all of the EEA regimes. I have already concluded that Parliament was entitled to find that this old regime was not working and gave rise to risks which it was entitled to address by moving to a point of consumption system. It is, therefore, nothing to the point to say that the old regime was less restrictive.

## J. Discrimination/Equality: Is the new licensing regime discriminatory as being contrary to the principle of equal treatment?

### *(i) The issue*

191. The Claimant submits that the new regime is discriminatory in that it applies the requirements uniformly to operators around the world regardless of their local legal and regulatory regimes. The complaint is one of indirect or reverse discrimination. It is said that the regime treats operators alike and thereby fails to take account of objective differences between them. It treats dissimilar situations in a similar manner thereby creates unequal and discriminating circumstances. In contrast it is argued that the passporting proposal provides for the establishment of a regime which is properly sensitive to the important differences which arise between operators subject to different foreign regimes.

### *(ii) Conclusion*

192. I do not accept that the new regime is discriminatory as alleged.

### *(iii) Analysis*

193. First, there is no clear or convincing evidence that there will be any unequal treatment. As to fees there is no challenge to the proposition that they are fixed to recover the costs of regulating the UK market and that those subject to a duty to become licensed are persons who provide services in the UK market. As such, ostensibly, they are non-discriminatory. The same applies to compliance with licence conditions which relate to activities of relevance to the UK market. Again, this is non-discriminatory. The fact that the same operator might be obliged to observe similar licence obligations vis-à-vis other Member States or third territories is irrelevant because it does not concern the UK. It is a distinction without a difference.

194. Secondly in relation specifically to fees the submission that the GC intends to apply the same level of fees regardless is wrong: see paragraphs [68] – [71] above. The fee structure is calibrated and banded so that it differentiates between specific types of gambling service and revenues received. No attack has been launched on the methodology used.

195. Thirdly, the new regime does in any event allow for differences to be taken account of: See paragraphs [63] – [67] above. The GC has made clear that it intends to take into account in the exercise of its functions the regulatory requirements with which an operator may have complied or be complying in connection with its regulation under another regime.

196. Fourthly, and most fundamentally, EU law makes clear that there is no objection to the fact that different Member States operate different regimes. Indeed, the Court has

explicitly ruled that a Member State may subject operators to a licensing (authorisation) regime even when they are subject to licensing or regulation elsewhere. The Court has also been loathe to suggest that in the absence of harmonised mutual recognition Member States must take account of foreign regulation: See cases referred to at paragraphs [124] – [128] above. However, given the position of the EFTA Court in *Ladbrokes* (see paragraph [129] above) I have not excluded the possibility that Member States have a duty to "take account" of foreign regulation. In my judgment either way the submission fails. It is implicit in the case law of the Court of Justice that operators will be subject, at least to some degree, to duplicative regulatory obligations, including fees. However it has never been suggested that Member States must engage in detailed mutual assessments of each other with a view to working out whether they should reduce fees or other obligations. To the extent however that case law requires some account to be taken of foreign regulation then this flexibility is built into the new regime.

## K. Rationality under domestic law: Is the refusal of the Minister and/or the GC to adopt the "passporting" approach irrational?

197. The Claimant, as an alternative, has advanced a domestic law irrationality challenge to the refusal of the Minister and/or the GC to adopt the passporting approach.

198. The Secretary of State objects strongly to this challenge upon the basis that the Claimant cannot rely upon domestic principles of public law to impugn an Act of Parliament: see *Axa General Insurance Limited v HM Advocate* [2011] UKSC 46 per Lord Hope at [46], [49] and [52], citing the speech of Lord Bingham in *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, HL at [45]. Mr Beal QC also submitted that the Claimant was not entitled to circumvent the principles by "*dressing up the challenge as one against the refusal by the Secretary of State to accept the Claimant's*" proposals. He submitted that the target of the challenge was the contested legislative provisions, not any prior decision. He submitted further that the Secretary of State cannot bind Parliament to a particular legislative course and the freedom of Parliament to legislate was unfettered: *R (Unison) v Secretary of State for Health* [2010] EWHC 2655 (Admin) at [9] – [14]. The decision to commit to presenting a Bill to Parliament is not capable of constraining the legislative freedom of manoeuvre which is constitutionally conferred upon Parliament: *R (Wheeler) v Office of Prime Minister* [2008] EWHC 1409 (Admin) per Richards LJ at [41] – [43], [47].

199. In the event it is not necessary for me to rule upon the legal admissibility of the argument in the form in which it is advanced by the Claimant. This is because, even if I were to conclude that it were an admissible argument, for the reasons that I have already given in relation to Article 56 TFEU I am quite clear that the decision was not irrational and was, on the contrary, perfectly logical and reasonable.

200. Insofar as it is contended that the standard of review is stricter under domestic law I should make clear that I have concluded that the new regime passes, in my view, *any* standard of judicial review. I have not been able to identify any remotely unjustifiable flaws in the scheme whether in terms of the purposes for which it has been introduced or as to the mechanisms adopted for its implementation.

## ISSUE II: WHETHER THE CLAIMANT HAS *LOCUS* TO SEEK A JUDICIAL REVIEW?

### L. Introduction: The Secretary of State's objection

201. Mr Beal QC, for the Secretary of State, submitted that the Claimant did not provide facilities for remote gambling to customers in the UK but was, rather, an industry trade association providing representational services to members. It was submitted that, as such, it had no directly enforceable rights under Article 56 TFEU in its own right. Further, an individual was entitled to invoke EU law to challenge the measure of domestic law only insofar as it engaged directly effective EU rights "*which he holds*".

202. The test for whether a natural or legal person has standing to seek judicial review of a measure is governed by section 31 Senior Courts Act 1981. The Claimant must have a "sufficient interest" in the matter to which the claim relates. The question of what is a "sufficient interest" is a mixed question of fact and law. It takes account of the relationship between the Claimant and the matter to which the claim relates and to all other relevant circumstances: See *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses* [1982] AC 617. The notion of an "interest" has been construed flexibly and without undue limitation. The interest may be direct and personal; but it may also be less direct or general or based upon the public interest (see the observations in the White Book (2014) page 1986 paragraph 54.1.11).

### M. Conclusion on *locus*

203. I have come to the conclusion that, in principle, the Claimant does have standing to bring this judicial review. In the text below I deal with this issue in the following way. First, I set out the reasons which have led me to this conclusion. Secondly, I address the important distinction between *locus* and relief which distinction has, with respect, been somewhat overlooked in the submissions and argument of the Secretary of State.

204. The reasons that I have come to the conclusion that the Claimant does, in principle, have *locus* are as follows.

#### *(i) In this case locus should not be revisited following the grant of permission*

205. First, the Court has already granted permission to the Claimant to bring this claim upon the express basis that it will be able to argue its substantive case that the new regime is unlawful. Indeed the Secretary of State accepts that, *prima facie*, the new measures violate Article 56 TFEU and are therefore only valid if and insofar as they can be justified. This case raised a serious and arguable case for breach. The burden of proof is upon the State to justify the restrictions. The case has been pursued upon this basis. All parties canvassed the substantive grounds before me fully with the consequence that the issue of *locus* now has the air of being academic. Given that the claim involved a challenge to an Act of Parliament, to have left this important issue dangling in the air and to have rejected the claim upon the basis of standing would have been, in my view, most unsatisfactory from the perspective of the due and good administration of justice. It could, indeed, have served to encourage future challenges to the legislation by operators from EEA States who would not be disqualified from

bringing proceedings upon this basis (subject to limitation). In *R (Chandler) v Secretary of State for Children, Schools & Families* [2009] EWCA Civ 1011 at paragraph [77] per Arden LJ it was stated that:

> "... where permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing".

206. This is in my view eminently sensible, certainly in a case such as the present. The Claimant did not suggest that *locus* could never be challenged at the substantive hearing. The argument was advanced in a more nuanced manner, which submitted that such challenges should be "sure" in paragraph 121 of its skeleton argument:

> "121. It will rarely be appropriate to treat standing as a preliminary issue in the context of the substantive claim for judicial review, since both the sufficiency of the claimant's interest in the outcome and the appropriateness of any discretionary remedy on matters that stand to be assessed in the context of the claim as a whole and the evidence adduced by the parties (see *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 per Lord Roskill at [656D – E]). Once the substantive stage has been reached, rather than serving as a "threshold issue", it is appropriate for the sufficiency of the Claimant's interest simply to be weighed in the balance when considering the question of relief (*R (Dixon) v Somerset County Council* [1998] Env LR 111 at [117])".

I do not express a view on how rare, rare would be.

***(ii) At least one member of the Claimant association has an acknowledged direct right of action under Article 56 TFEU.***

207. Secondly, the Claimant has as a member a company which the Secretary of State accepts would have *locus* had that company been a Claimant in its own right. The member is Yggdrasil Gaming Limited ("Yggdrasil"). This company is situated, registered and licensed in Malta. It offers services to other gambling operators situated in Malta which in turn offer gambling services directly to British customers. Yggdrasil is in the process of applying to be licensed in Gibraltar in order that it can provide business-to-business ("B2B") services to operators licensed in Gibraltar and providing services elsewhere. In the course of argument Mr Beal QC, for the Secretary of State, accepted that had Yggdrasil been a claimant in its own right then his objection would not have been advanced. In his skeleton argument the following was stated:

> "This particular obstacle could, of course, have been overcome by an individual gambling services provider with EU law rights being joined as a Claimant. However despite the Secretary of

> State giving the Claimant due notice of this point in his pre-action protocol response to the letter of claim, that has not been done. The Claimant has no doubt made a conscious decision to bring the claim simply in the name of the association – a limited company established in Gibraltar – without joining any of its members. But it cannot therefore then purport to rely parasitically on rights which are available (if at all) only to some of those individual members. GBGA had said that the Secretary of State has "no answer" to its argument based on the rights of Yggdrasil…But the answer is a short one. Yggdrasil is not a Claimant. If it were, the Court could have conducted an examination of the impact of such rights under EU law as Yggdrasil may have established. But no evidence of that has been adduced. Given the extremely tight timetable, it is too late for Yggdrasil to be added as a Claimant now, even if the GBGA had made an application for such joinder".

The Secretary of State's position has changed to the extent that he now accepts that Yggdrasil would have had *locus* had it been joined as a separate Claimant. There are, with respect, two answers to Mr Beal's objections in the skeleton. First, as Mr Beal QC pointed out this case came before the Court with extreme speed. Hickinbottom J did not require this matter to be resolved as a preliminary issue, notwithstanding that the point had been raised by the Secretary of State in a response to the letter of claim. As a matter of case management, had this case proceeded at a more normal pace then a judge might have ordered a preliminary issue or the joinder of Yggdrasil or some other company who had clear *locus*. I am of the view that had there been more time this issue would probably have been resolved by the joinder of a person with a direct interest. It thus seems to me technical to refuse to deal with the Claimant's case in such circumstances.

***(iii) Other members of the Claimant association have a clear economic and commercial interest in the outcome***

208. Thirdly, even if, for the sake of argument, the other members of the Claimant association do not have directly effective rights that they can invoke themselves this is not determinative. In domestic law persons with indirect or public interest concerns can in appropriate cases seek judicial review. The Claimant's members – self evidently – are economically affected by the new measures and they have a strong commercial interest in challenging them. Although it has been very much a secondary aspect of the Claimant's case they nonetheless also challenge the new measures under domestic rationality principles where the direct effect point does not arise and hence they have *locus* to raise that challenge irrespective of the Secretary of State's objection.

***(iv) The Claimant has an interest by reason of prior involvement in the consultation and scrutiny processes.***

209. Fourthly, in this case the Claimant was heavily involved in lobbying the Government to reject the new regime and to accept its passporting proposal. It lodged written submissions with the Minister to this effect and framed those submissions in the context of Article 56 TFEU. It also gave evidence to the relevant House of Commons

select committee. No one has questioned that *qua* representative association the Claimant has a direct and strong interest in the economic and commercial and legal issues arising.

***(v) The fact that the Claimant is a representative body is not determinative***

210. Fifthly, case law shows that *locus* is not denied to legal persons simply because a Claimant is a representative body, at least where declaratory relief is being sought. In *R v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 AC 1 (hereafter "EOC") the House of Lords considered the *locus* of EOC which brought proceedings by way of judicial review for a declaration that provisions of the Employment Protection (Consolidation) Act 1978 (that limited the rights of employees not to be unfairly dismissed and to redundancy pay to those employees working continuously for a specified number of years and hours a week and excluded altogether those working less than 8 hours a week) were unlawful. It was submitted that this regime discriminated against women because considerably more women than men worked part-time. The EOC sought a declaration in broad terms:

> "1. A declaration that the United Kingdom is in breach of its obligations under Article 119 of the [EEC Treaty] and the [The Equal Pay Directive] by providing less favourable treatment of part-time workers (most of whom are women) than are full-time workers (most of whom are men) in relation to the conditions for receipt of statutory redundancy pay and compensation for unfair dismissal.
>
> 2. A declaration that the United Kingdom is in breach of its obligations under [The Equal Treatment Directive] by providing less favourable treatment of part-time workers (most of whom are women) than of full-time workers (most of whom are men) in relation to the conditions for receipt of statutory redundancy pay and compensation for unfair dismissal".

The Secretary of State contended that the EOC had no *locus* to proceed. Lord Keith delivered a judgment with whom the remainder of the Committee (save Lord Jauncey) agreed. He held that the EOC had *locus*:

> "The matter to which the EOC's application relates is essentially whether the relevant provisions of the Act of 1978 are compatible with European Community law regarding equal pay and equal treatment. Has the EOC a sufficient interest in that matter? Under section 53(1) of the Act of 1975 the duties of the EOC include: "(a) to work towards the elimination of discrimination, (b) to promote equality of opportunity between men and women generally...". If the admittedly discriminatory provisions of the Act of 1978 as regards redundancy pay and compensation for unfair dismissal are not objectively justified, then steps taken by the EOC towards securing that these provisions are changed may very reasonably be regarded as taken in the course of working towards the elimination of

> discrimination. The present proceedings are clearly such a step".

Lord Keith referred to other cases in which the EOC had been the "initiating party" and in which it had successfully challenged the provisions of social policy said to lack equality. It had been common ground in those proceedings that the EOC had *locus standi*:

> "In my opinion it would be a very retrograde step now to hold that the EOC has no *locus standi* to agitate in judicial review proceedings questions related to sex discrimination which are of public importance and affect a large section of the population. The determination of this issue turns essentially upon a consideration of the statutory duties and public law role of the EOC as regards which no helpful guidance is to be gathered from decided cases. I would hold that the EOC has sufficient interest to bring these proceedings and hence the necessary *locus standi*".
>
> (ibid pages [25G] – [26E])

211. The State had conferred upon the EOC a statutory duty to eliminate discrimination and promote equality and litigation to that end fell within its statutory purpose; this and the fact that it had successfully brought litigation to achieve that goal in the past were held to be sufficient to give it standing.

212. In *R (on the application of Save Our Surgery Limited) v Joint Committee of Primary Care Trusts* [2013] EWHC 439 (Admin) ("*Save Our Surgery*") Nicola Davies J was required to rule upon the *locus* of a corporate vehicle incorporated for the purpose of bringing the claim for judicial review. The Claimant challenged a consultation process which led to a decision to close a hospital. The Defendant submitted that the claim should be dismissed because the Claimant had an insufficient interest: The Claimant was a shell company formed solely for the purpose of the litigation; it had taken no part in the consultation process; it had no involvement in the provision of paediatric cardiac services; and, it was not affected by the decision which it sought to challenge. At paragraphs [101] and [102] Nicola Davies J rejected this submission:

> "101. The claimant contends that it has sufficient interest. Sufficient interest is the remedy afforded by judicial review; in this case the quashing of the reconfiguration decision on the grounds that the consultation process was unfair and flawed. The claimant plainly has an interest in that remedy. The majority, if not all of the individuals who have contributed to the fighting fund, together with the Directors of the claimant, would have a direct sufficient interest in their own right had they brought the claim as individuals. Some of those individuals are clinicians, others are members of the public. The adverse costs in litigation are such that no citizen of ordinary means would prudently contemplate bringing this litigation as an individual. Incorporation was and is the proper means of allowing the interests of a substantial number of

> persons who consider the defendant's position to be unfair and unlawful to be jointly represented. There is no better placed challenger, in fact there is no other challenger.
>
> 102. I am satisfied that the claimant has sufficient interest in these proceedings. The claimant represents many individuals who have contributed financially in order to bring these proceedings. It includes individuals who have been or could be directly affected by the closure of the Leeds Unit and clinicians who work within the unit. Incorporation, following the intervention of the Charity Commission, was a proper means of allowing the interests of a substantial number of such persons to pursue this litigation".

213. In the light of these authorities it follows that the mere fact that a Claimant is representative is not sufficient to deny it *locus*. The constitutional or other purposes advanced by the Claimant organisation, the position and status of its members or those it represents, and the extent to which it has participated in prior consultations all become important considerations in determining whether a particular representative Claimant has standing.

214. The present case is not on all fours with either EOC or *Save our Surgery*. It turns on its own facts. For instance the EOC had a statutory remit to pursue cases of inequality and the pursuit of litigation fell within that statutory remit. As such the bringing of proceedings can readily be said to have been contemplated by Parliament. In *Save our Surgery* there were numerous individual members who were "directly affected" by the closure of the hospital unit in question and the judge was influenced by the fact that the costs of litigation would have been prohibitive for any one or more of those members and that a centrally funded incorporated vehicle was hence a sensible and pragmatic means of advancing their cause. This latter consideration does not apply in the present case where the Claimant's individual members include many large multinational organisations. Nonetheless these authorities are sufficient to rebut the Defendant's submission that an organisation that cannot, itself, invoke a directly effective right cannot, in principle, have sufficient standing to seek declaratory relief.

215. In the present case the Claimant: (i) is a genuine and long standing representative body which has fully participated in the pre-legislative consultative and scrutiny process; (ii) its interest in the issue is nether remote nor hypothetical; (iii) it has (at least) one member whom the Secretary of State acknowledges would have individual rights; (iv) it has other members with a clear and identifiable economic and commercial interest in the issue; (v) the Secretary of State's objection cannot apply to the domestic rationality challenge which Hickinbottom J held was arguable at the permission stage; (vi) as a vehicle designed to represent the interests of its members it acts as a sensible focal point through which those interests may be advanced; and (vii) it seeks declaratory but no other relief. In my view this is sufficient.

## N. The distinction between *locus* and relief

216. I turn to a related question. The Secretary of State supported his objection by reference to cases where the domestic courts have striven to limit the relief granted to cover the effects as they impact upon the successful claimant only. It is important to

distinguish between standing and relief. A person with standing may fail to receive any relief or may receive strictly limited relief. Mr Beal QC cited *EOC* (ibid) at page [27E] where Lord Keith having concluded that the EOC had *locus* stated:

> "At no stage in the course of the litigation, which included two visits to this House, was it suggested that judicial review was not available for the purpose of obtaining an adjudication upon the validity of the legislation *insofar as it affected the applicants".*
>
> (emphasis added)

217. However, when the issue of the scope of the declaration was determined by the House of Lords it was granted in the broad terms proposed by EOC which I have set out above. I do not, however, view this as inconsistent with the principle that relief should be fashioned and tailored to the status of the Claimant. The House of Lords held that EOC had a broad standing conferred under statute by Parliament and the relief granted hence reflected this fact. It does not follow from *EOC* that in another case where *locus* is granted to a person with a purely private interest the relief ultimately granted would be so broad. The principle that relief should reflect the status of the Claimant is reflected in a growing body of case law. For example, in *R (Hurst) v HM Coroner for Northern District London* [2007] UKHL 13 the House of Lords in accordance with the purposive approach of statutory interpretation endorsed in EU law (the "Marleasing" approach) held that the interpretive "effect" was "*...strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way*".

218. In *Hurst* the House of Lords also endorsed the approach adopted by Arden LJ in *Gingi v Secretary of State for Work & Pensions* [2002] 1 CMLR 587 where the Judge approved the following passage from Bennion, Statutory Interpretation (2002) page 1117, which was in the following terms:

> "It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law. Whilst it is at first sight odd that the same words should have a different meaning in different cases, we are dealing with a situation which is odd in juristic terms".

219. In the present case the Secretary of State also points out that a similar approach has been adopted by the CJEU: See for example Case C – 310/97P *Commission v AssiDoman Kraft Products AB* [1999] ECR I-V 363 at [52] – [56].

220. In the case before me the Claimant seeks very broad relief indeed, comparable to that in *EOC*. Had I concluded that the challenge in this case succeeded I would not have granted relief in such broad terms, operating *erga omnes*. I would have sought

submissions as to the proper way to limit the declaratory relief to reflect the Claimants member's specific interests in the outcome of the litigation.

## ISSUE III: THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE UNITED KINGDOM AND GIBRALTAR

### O. The issue

221. I turn now to the second fundamental objection which the Secretary of State advanced to the claim. I have set out my conclusion on this at paragraph [18] above and paragraph [253] below. The Secretary of State contends that the provision of gambling services from Gibraltar to the United Kingdom does not constitute the provision of services between Member States; it is a "purely internal" matter falling outside the scope of Article 56 TFEU. In Case C – 275/92 *Schindler* [1994] ECR I-1039 the Court of Justice at [43] stated that Article 56 was engaged in relation to legislation applicable without distinction when "*...it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services*". It is submitted that neither the Claimant nor its members are providing services from "*another*" Member State because the UK and Gibraltar form part of a single Member State for the purposes of the application of Article 56 TFEU. In this regard the Secretary of State relied upon the ruling of the Court of Justice in Case C – 153/91 *Petit* [1992] ECR I-4973 at [8] – [10] as laying down the principle that purely internal matters were outside the scope of EU law. In that case the Court stated:

> "8. As the Court has consistently held, the provisions of the Treaty on freedom of movement and the regulations implementing those provisions cannot be applied to activities which are confined in all respects within a single Member State...and the question whether that is the case depends on findings of fact which it is for the national court to make.
>
> 9. All the facts established in the national court's judgment are confined within a single Member State, the Kingdom of Belgium, the applicant in the main proceedings is a Belgian national, has always resided in Belgium and has worked only in the territory of that Member State.
>
> 10. Accordingly, the reply to be given to the national court is that Articles 48(1) and 51 of the EEC Treaty and Regulation No. 1408/71 in particular Articles 3 and 84(4) thereof, do not apply to situations which are confined in all respects within a single Member State".

222. In his opinion Advocate General Lenz (ibid paragraphs 13-15) made the same point and emphasised that "*nationals may indeed rely on provisions of Community law where that situation involves a specifically Community aspect*" (emphasis added). He further added that for a national to be able to invoke Community law against his/her Member State there would need to be "*a transfrontier element*". He also referred to the observations of the European Commission to the Court that for a worker to be able to invoke free movement rights against the State there had to be a European aspect.

He also accepted that whether such a trans-frontier or European aspect arose was a question of fact.

223. There are three possible analyses of the relationship between the UK and Gibraltar. First, Gibraltar is part of the same Member State as the UK for the purpose of Article 56 TFEU. Secondly, Gibraltar is also a Member State but is a quite separate Member State from the United Kingdom. Thirdly, Gibraltar is a third territory which is legally and politically distinct from a Member State but which has a special relationship with a Member State. In this case the crux of the dispute is as between the first and third options.

224. There is some common ground between the parties here. The Secretary of State accepts that under domestic constitutional law and under public international law, Gibraltar does not form part of the United Kingdom of Great Britain and Northern Ireland. However the position of the Secretary of State was that this had no ultimate bearing upon how a particular territory was to be treated for the purposes of EU law.

225. The argument on the Claimant's side was advanced primarily by Lord Pannick QC on behalf of Her Majesty's Government of Gibraltar ("HMGoG"). He submitted that this was a complex issue of law of constitutional importance to HMGoG with significant potential consequences for the economy of Gibraltar and the persons employed in its territory. HMGoG did not wish to add anything to the other issues raised by the claim.

226. There are two questions I must address. First, what is the correct categorisation of the relationship between the UK and Gibraltar? The answer to this question is, however, really a precursor and provides context to the second question which asks whether, and if so when, restrictions applying to trade between the UK and Gibraltar can nonetheless exert collateral or indirect effects on trade between Member States.

227. Had this issue been determinative of the outcome of the claim for judicial review I would have referred this matter to the European Court of Justice. It is a matter of high constitutional importance and involves difficult questions of European law. However, given my conclusion on the substantive merits of the claim it is not necessary for me to make a reference to determine the outcome of the litigation as a whole.

228. Both parties have prayed in aid numerous decided cases. I propose to consider them chronologically before summarising the conclusions that I draw from that case law. Before turning to the jurisprudence it is necessary to set out the relevant legislative framework.

## P. Legislative framework

229. Gibraltar was ceded by the Kingdom of Spain to the British Crown by the Treaty of Utrecht of 13th July 1713 which was one of the Treaties bringing to an end the War of the Spanish Succession. Article X of the Treaty included an option granted to the Kingdom of Spain pursuant to which if the British Crown ever sought to grant, sell or by any means alienate the property of the town of Gibraltar then Spain would, in effect, have a right of first refusal.

230. Article 52(1) of the Treaty on European Union ("TEU") lists the Member States to which the Treaties apply. This includes the United Kingdom and it is agreed between

all concerned that Gibraltar is not in the United Kingdom. Article 52(2) provides that the territorial scope of the Treaties is specified in Article 355 TFEU. Article 355 TFEU addresses the territorial scope of EU law. It provides as follows:

> "In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:
>
> 1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.
>
> 2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.
>
> The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.
>
> 3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.
>
> 4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.
>
> 5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:
>
> (a) the Treaties shall not apply to the Faeroe Islands;
>
> (b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of [certain new Member States];
>
> (c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

> 6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission".

231. The extent to which EU law is therefore applicable to any one or more of the foreign territories associated with Member States is not uniform. It is common ground in this case that the relationship between Gibraltar and the United Kingdom is governed by Article 355(3). From this the following may be deduced. First, Gibraltar is a territory within Europe. Secondly, it is a territory for whose external relations the United Kingdom is responsible. Thirdly, in consequence the provisions of the Treaty apply to Gibraltar.

232. It is in my view implicit in Article 355(3) that Gibraltar does not constitute the same Member State that assumes responsibility for it. Were it otherwise there would be no need to have a treaty provision governing the responsibility of the third territory for adherence to EU law; it would have been subject to the law upon the basis that it was part of "the" relevant Member State.

233. This conclusion was reflected in Declaration 55 to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (signed on 13th December 2007). The Declaration which was signed by the Kingdom of Spain and United Kingdom provides:

> "The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned".

## Q. Relevant case law

### *(i) EU jurisprudence*

234. I turn now to the cases which focus upon the categorisation of the relationship between Member States and territories covered by Article 355 TFEU. In Case C – 355/89 *DHSS v Barr* [1991] 1-3497 the Deputy High Bailiff's Court, Douglas (Isle of Man) referred a series of questions on the interpretation of Protocol No. 3 on the Channel Islands to the Act of Accession of the UK to the European Community. The reference arose in the context of criminal proceedings against the defendant who had taken up employment as a company lawyer without the necessary work permit demanded of persons who were not Isle of Man workers. The question arose as to whether this was an issue falling within the scope of European law. Advocate General Jacobs rejected the suggestion that relations between the Isle of Man and the UK were purely internal. He stated:

> "21. Before examining this argument, I must consider whether the situation with which the referring court is confronted falls within the scope of Community law. In Case 175/78 Saunders [1979] ECR 1129, paragraph 11, the Court stated that the

> provisions of the Treaty on the free movement of workers did not apply "to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law"...the instant case does not concern the rules laid down in Treaty on the free movement of persons for, as I have explained, those rules do not apply to the island. However, since it involves the right of a British national to take up employment in the Isle of Man, it might be thought that the provisions of Protocol No. 3 are also excluded here by reason of the situation being wholly internal to a Member State. Indeed the joint observations of the DHSS and the United Kingdom suggest that that may be so since the essential point at issue is the claim of a national of the United Kingdom to take employment in a territory for whose external relations the United Kingdom is responsible and in which the communities rules relating to the free movement of workers do not apply.
>
> 22. I do not think that suggestion can be accepted. Circumstances such as those at issue in these proceedings are not "wholly internal to a Member State", for, as I have explained, the Isle of Man is not part of the United Kingdom. Moreover, Article 4 of the Protocol in requiring the Isle of Man authorities to apply the same treatment to all natural and legal persons of the Community, manifestly applies in relation to the nationals of all the Member States including the United Kingdom. It cannot therefore be said, as the Court said in *Saunders*, that there is no factor connecting this case to any of the situations envisaged by Community law. The effect of *Saunders* is that a national of the United Kingdom may enjoy fewer rights vis-à-vis the United Kingdom than nationals of other Member States. However, there is no suggestion in Protocol No. 3 that nationals of the United Kingdom enjoy fewer rights under Community law vis-à-vis the Isle of Man than the nationals of other Member States. I conclude that the circumstances of this are not to be regarded as "wholly internal to a Member State" and that they therefore fall within the scope of Community law".

235. In giving judgment the Court did not articulate its conclusion with the same detail as did Advocate General Jacobs but it, nonetheless, broadly followed his reasoning: See paragraphs [17] – [20].

236. In Case C – 171/96 *Pereira Roque* [1998] ECR I-4636 the Court was concerned with the interpretation of Article 4 of Protocol 3 on the Channel Islands and the Isle of Man and related to a decision of the Lieutenant Governor of Jersey to deport Mr Roque. The position of the Channel Islands and the Isle of Man is different to that of Gibraltar; they fall within the scope of Article 355(5)(c) which provisions are said to apply notwithstanding the provisions of, inter alia, Article 355(3). This judgment is relied upon by the Secretary of State to support the proposition that relations between

the UK and Gibraltar are not to be treated as relations between two Member States, but rather are to be treated as a single Member State for these purposes. In paragraphs [40]-[42] the Court stated as follows:

> "40. Turning next to Mr Pereira Roque's argument that the requirement of equal treatment should nevertheless be applied between citizens of the United Kingdom who are not Channel Islanders and nationals of other Member States it is true that Protocol No. 3 distinguishes citizens of the United Kingdom having certain links with the Channel Islands from other citizens of the United Kingdom.
>
> 41. However, since Channel Islanders are British nationals, the distinction between them and other citizens of the United Kingdom cannot be likened to the difference in nationality between the nationals of two Member States.
>
> 42. Nor can relations between the Channel Islands and the United Kingdom be regarded as similar to those between two Member States because of other aspects of the status of those islands".

237. In the light of this, I agree with the Secretary of State that relations between the UK and Gibraltar should not be treated as relations between two separate Member States. But it does not necessarily follow that Gibraltar and the United Kingdom are to be treated as a single Member State since there is the *via media* of relations between a Member State and a third territory which is not a Member State. Nothing in the judgment in *Pereira Roque* treats the Channel Islands and the United Kingdom as a single Member State.

238. In Case C – 30/01 *Commission v United Kingdom* [2003] ECR I-9481 the Commission sought a declaration that by failing in respect of Gibraltar to adopt a series of Directives relating to the free movement of goods the United Kingdom was in breach of its obligations under those Directives. The question therefore arose as to the applicability of the Treaty provisions of free movement of goods to Gibraltar. This, in turn, involved an analysis of the relationship between the United Kingdom and Gibraltar. In fact it provides limited guidance because it is clear from Article 355(3) that the United Kingdom is responsible for the application of the Treaty in Gibraltar. The outcome of the case did not therefore depend upon a precise categorisation of the relationship between the United Kingdom and Gibraltar. At paragraph [47] the Court recorded that pursuant to Article 355(3) the United Kingdom was responsible for Gibraltar which was a "*Crown Colony*". However, under the Act of Accession the territory is excluded from the customs territory of the EU. It followed (cf paragraph [55]) that products originating in Gibraltar were not products "*originating in the Community*". Similarly, goods imported into Gibraltar were not considered to be in free circulation in a Member State (paragraph [57]). At paragraph [62] the Court observed that it was not disputed that the principal objective of the directives in issue was to remove barriers to trade "*...in goods between Member States*". However, since for the purposes of the free movement of goods Gibraltar was not in the EU non-transposition of the directives *in* Gibraltar was not a breach of the Treaty. Lord Pannick QC submitted that the ruling was based upon Gibraltar

being legally and politically *separate* from the Member State and with the exclusion of the free movement rules being explicable by reference to specific provisions in the accession arrangements which exclusion did not arise in the case of the freedom to provide services. He hence submitted that the provision of services from Gibraltar to the United Kingdom occurred between a third territory and the Member State, but was not therefore a purely internal matter. Mr Beal QC, to the contrary, submitted that this case showed that Gibraltar and the UK were "... *the same Member State for the purposes of Article 56*". I prefer Lord Pannick QC's analysis. The starting point for the Court was Article 355(3) which, on its face, distinguishes in law between the Member State and the territory within Europe for which it has responsibility. Mr Beal QC's analysis, which assumes that a territory for which the UK has responsibility necessarily forms part of the same Member State, is inconsistent with the language of the article which identifies a middle ground between a purely internal situation, and, trade between Member States. In my view Mr Beal QC's construction reads too much into paragraph [47] of the judgment on which he relied, which does no more that recite the effect of Article 355(3); it does not state that the third territory and the Member State are to be treated as a single Member State.

239. In Case C-293/02 *Jersey Produce Marketing Organisation Ltd v State of Jersey* [2005] EC R I-9580 the Court was concerned with domestic legislation which prohibited the export of potatoes from Jersey to the United Kingdom but which did not prevent exports to others Member States of the EU. Under Protocol No 3 attached to the UK Act of Accession, European rules on customs matters applied to the Channels Islands "... *under the same conditions as they apply to the United Kingdom*". The ban was challenged upon the basis that it violated the rules on free movement of goods. One issue arising was whether this was a purely internal restriction insofar as it concerned trade between Jersey and the United Kingdom.

240. The Court addressed this question in a section of its judgment headed: "*The question whether the territory of the United Kingdom, the Channel Islands and the Isle of Man can be treated as the territory of a single Member State for the purposes of the application of Articles 23 EC, 25EC, 28EC and 29EC.*" (ibid p I-9595). The Court recited the previous explanation given by the UK of its relationship with Jersey (in *Roque* (supra)). Jersey was a: "... *semi-autonomous dependency of the British Crown, which is represented on Jersey by the Lieutenant Governor. The United Kingdom, on behalf of the Crown, is responsible for defence and international relations*". The Court also recorded (paragraph [43]) that Jersey "...*does not form part of the United Kingdom*" but was a territory for whose external relations the Member State was responsible. In paragraph [45] the Court also referred to the position it had adopted in *Roque* to the effect that differences between Channel Islanders and citizens of the UK were not to be likened to differences in nationality between "*nationals of two Member States*". The Court then went on and held:

> "... neither, because of other aspects of the status of those Islands, can relations between the Channel Islands and the United Kingdom be regarded as similar to those between two Member States..."

241. In paragraph [46] the Court stated that under the relevant Protocol the Community customs rules were to apply in the Channels Island "*under the same conditions as they apply to the United Kingdom*". This is important because it is the essential context

to an understanding of paragraph [47], relied upon heavily by the Mr Beal QC for the Secretary of State, which provides:

> "Such wording suggests that, for the purposes of the application of those Community rules, the United Kingdom and the Islands are, as a rule, to be regarded as a single Member State."

242. The conclusion of the Court was accordingly a consequence of the express provisions of the Protocol which equated conditions in Jersey with those in the United Kingdom. This point is made clear by paragraph [49] which states that the conclusion in paragraph [47] is based upon the "*construction*" of the Protocol. Lord Pannick QC submitted that all that this showed was that for the purposes of the customs union the Protocol "regarded" Chanel Islands and the UK as a single Member State; but that this was a very limited conclusion which flowed from Article 355(5)(c) and from the Protocol and could not be transposed to the position of Gibraltar for which there was no equivalent of Article 355(5)(c) and no express provision such as was found in the Protocol.

243. Mr Beal QC argued that Article 335(3) might be argued to be equivalent to the Protocol in that it states that the "*provisions of the Treaties shall apply*". I can see the force of this point. However, on balance I do not think that the conclusion is correct. First, the Protocol was explicit in applying the customs rules to Jersey "*under the same conditions as they apply to the United Kingdom*" – by its terms it created a legal functional equivalence. There is no such equivalence created by Article 355(3) which simply and very broadly obligates the responsible Member State to apply EU law in its dependant territory. Secondly, the Protocol was an express provision dealing with the application of a particular set of rules to the particular relationship between a Member State and a third territory. Again, there is no equivalent express provision (or *lex specialis*) arising in respect of the provision of services from Gibraltar and the UK. In Case C384/09 *Prunus* [2011] ECR I-3357 at paragraph [30] (addressed below) the Court of Justice treated as significant the absence of the existence of "*express*" provisions relating to particular free movement rules when coming to the conclusion that the free movement rules applied to the relationship between an OCT and a Member State.

244. In Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7961 the Court was concerned with the extension to citizens of Gibraltar of voting rights to the European Parliament following the judgment of the European Court of Human Rights in *Mathews v United Kingdom* No 24833 [1999] EHRR –12 (18 February 1999). One issue concerned the interpretation of Article 17(2) EC which provided that: "*Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby*". In this context the Court stated of the status of Gibraltar (at paragraph [15]):

> "Gibraltar is currently a British Crown Colony. It does not form part of the United Kingdom"

245. The Court continued (paragraph [19]) to affirm that in Community law "*Gibraltar is a European territory for whose external relations a Member State is responsible*" under Article 355(3). However, due to certain provisions of the accession arrangements certain parts of EU law did not apply. At paragraph [54] the Court stated that the

rights conferred by Article 17(2) were not confined to EU citizens "alone". The Court recorded the submissions of the UK that the Treaty conferred rights upon persons who were not citizens and could be extended "*by a Member State to third country nationals*". The Court essentially accepted the submissions of the UK that citizens of Gibraltar were not citizens of a Member State but were nonetheless persons entitled to exercise democratic rights to vote. Mr Beal QC submitted that the references in the judgments to Gibraltar not forming part of the United Kingdom were no more than the Court reflecting in its judgment the internal position in the United Kingdom and he submitted that EU law took an independent view of whether, for the purpose of its law, two territories formed part of the same Member State. On my reading of the judgment the Court started with the premise that, in EU law (as well as domestic law), Gibraltar was not part of the same Member State as the UK but concluded, nonetheless, that this was not determinative and that the electorate of Gibraltar nonetheless had rights under EU law. This actually reflects the submissions of the UK to the Strasbourg Court (see paragraph [250] below).

246. In Case C384/09 *Prunus* [2011] ECR I-3357 the Court concluded that for the purposes of the free movement of capital provisions in Article 63 TFEU, overseas countries or territories ("OCTs") were to be treated as third countries, and not parts of a Member State. The Court held:

> "28. It is necessary to determine, first, whether, for the purposes of the application of the Treaty provisions on free movement of capital, OCTs are to be treated as Member States or non-Member States.
>
> 29. The Court has already held that the OCTs are subject to the special association arrangements set out in Part Four of the Treaty, with the result that, failing express reference, the general provisions of the Treaty, whose territorial scope is in principle confined to the Member States, do not apply to them (see Case C-260/90 *Leplat* [1992] ECR I-643, paragraph 10; Case C-181/97 *van der Kooy* [1999] ECR I-483, paragraph 37; Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 49; and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 46). OCTs therefore benefit from the provisions of European Union law in a similar manner to the Member States only when European Union law expressly provides that OCTs and Member States are to be treated in such a manner.
>
> 30. It should be noted that the EU and FEU Treaties do not contain any express reference to movements of capital between Member States and OCTs.
>
> 31. It follows that OCTs benefit from the liberalisation of the movement of capital provided for in Article 63 TFEU in their capacity as non-Member States".

247. On its face this judgment supports the submissions of HMGoG. Mr Beal QC however seeks to distinguish the conclusion of the Court that OCTs are not to be equated with

Member States because on the facts of the case the movement of capital was between one Member State (France) and the British Virgin Islands which was an OCT of another Member State (the UK). However, this was not the basis of the Court's conclusion which concerned the status of OCTs generically in relation to the rules on the free movement of capital. Lord Pannick QC argued that this authority was applicable equally to the position of Gibraltar and the rules relating to the free movement of services. Ostensibly this seems correct.

248. In Joined Cases C-24/12 and C-27/12 *XBV and TBG* (5 June 2014) the Court was concerned with a similar issue viz., whether the rules on free movement of capital applied in relation to flows between a Member State (Netherlands) and the OCT of a Member State (Netherlands Antilles). The case arose by way of reference from the *Hoge Raad* against the ruling of the *Gerechtshof te Amsterdam* which had held that restrictions on capital flows between the Netherlands and the Netherlands Antilles were an "*internal situation*" (see paragraph [16]). A question referred included whether in relation to the rules on free movement of capital: "*...can an own OCT be regarded as a third state, in which case it would be possible to rely on [the Treaty] in respect of the movement of capital between a Member State and the own OCT?*" (see paragraph [17]). Advocate General Jääskinen adopted a view consistent with that of the Court in *Prunus*. His Opinion makes three points of general relevance to the present case all of which are supportive of the view advanced by HMGoG. First, he confirms my view that the principle in *Prunus* is one of general application and not based upon the facts of the case. Secondly, he places the principle in a wider context making clear that many provisions of EU law (such as the competition provisions) are capable of exerting extra-territorial effects and thereby he undermined the submission that this was a purely internal matter. Thirdly, he sought to define purely internal matters as arising where there was no material geographical division between a Member State (such as between England and Scotland) and that this also militated against a conclusion that Netherlands Antilles and Netherlands were the same Member State:

> "42. Moreover, as was pointed out by the Commission at the hearing, if an exceptional rule were created for dealings between a Member State and its own OCT, a distortion would result in the EU internal market. This is so because Member States would not have to respect the same rules with regard to their own OCTs as the other Member States.
>
> 43. This argument, I would add, is supported by the judgment of the Court in *Prunus*, in which the Court approached the dispute by noting that it was 'necessary to determine, first, whether, for the purposes of the application of the Treaty provisions on free movement of capital, OCTs are to be treated as Member States or non-Member States.' In other words, nothing turned on the fact that problem in issue in *Prunus* concerned capital movements between France and a United Kingdom OCT, namely the British Virgin Islands.
>
> 44. Furthermore, in my opinion, the territorial scope of application of EU law in general is a separate legal question from the scope of individual rules of EU law, particularly when

the latter contain specific clauses bringing third country activities within their rubric.

45. As I have already mentioned, the territories in which EU law is 'valid' law are specified in Article 299(1) and (2) EC. This does not mean, however, that any individual rule of EU law which, by its nature, may have certain extra-territorial effects, is inapplicable to the OCTs. The classic example of this arose in the consideration of anti-competitive conduct taking place outside of the European Union in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission*, but it can happen whenever the subject matter regulated by EU law necessarily encapsulates conduct or legal relations occurring outside the borders of the European Union.

46. Thus, with respect to the fundamental freedoms, purely internal situations arise when there is no relevant geographical division between two parts of a Member State under EU law governing the matter. This is the case, for example, with respect to capital movements between England and Scotland. On the other hand, and to take another example, the movements of goods between a Member State and its territory outside EU customs and/or fiscal territory in terms of free movement of goods are not purely internal situations because there is a geographical division defined by EU law.

47. Finally, I would like to point out that the situation considered by the Court in *Eman and Sevinger*, is distinguishable from the cases to hand. *Eman and Sevinger* concerned the scope of the rights of EU citizens, part of the *acquis communautaire*, but the territorial application of which is not delimited, either in the EU Treaties or elsewhere. For example, there is no express rule obliging the Member States to preclude their nationals who are resident in OCTs from EU citizenship law, and the rights and obligations that it entails. The Court held that 'persons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty.

48. Thus, movements of capital between the Netherlands and the Netherlands Antilles, in other words two territories having a different status with regard to the applicability of EU law, do not represent a purely internal situation. Therefore Article 56(1) EC is applicable and the Netherlands Antilles has to be considered as being in the same position in relation to the Netherlands as third countries".

249. It is right to record that the Court did not address this issue; it made clear in paragraph [54] that there was no "*need*" for it to do so upon the basis of the reasoning that it adopted to resolve the case (and on which it did not follow the Advocate General). Mr Beal QC submitted that it remained an "*open question*" whether the treatment of an OCT as a third country would be applied as between a Member State and its own OCT. In my view the question is not fully "open". The combined effect of *Prunus* and the opinion of Advocate General Jääskinen go quite a long way in pushing the door shut, even if perhaps not all of the way. Admittedly, both were concerned with OCTs, the position of which is addressed under Article 355(2), not Article 355(3). But I can see no obvious reason why the same principles should not apply to the position of a territory covered by Article 353(3) TFEU.

250. Finally, it is of some relevance to note that before the European Court of Human Rights and before the European Court of Justice the United Kingdom has itself submitted that Gibraltar is not part of the same Member State whether as a matter or national law, international law or, critically for present purposes, Community law. In *Mathews v United Kingdom* No 24833 [1999] EHRR –12 (18 February 1999), before the European Court of Human Rights, the UK Government argued that Gibraltar was not part of the UK for European law purposes. It was there accepted that although Gibraltar was not separately named in Community directives and other measures which were applicable to it:

> "It cannot be inferred from this fact that Gibraltar, is as a matter of Community law, part of the United Kingdom".

251. The UK argued that although it was responsible for the implementation of Community law in Gibraltar this did not mean that it was a part of the same Member State:

> "To accept that the United Kingdom is responsible for the implementation of Community law in Gibraltar does not in any way imply acceptance of the false proposition that Community law considers Gibraltar to be part of the United Kingdom of Great Britain and Northern Ireland".

252. In a state aid case Joined Cases T-211/04 and T-215/04 *Gibraltar and the United Kingdom v Commission* [2008] ECR II-3745 at [51] the ECJ recorded the submission of the UK that "*Gibraltar is not part of the United Kingdom under national law, international law or Community law*". I view these submissions as indicative; they do not *per se* prove the point but they do suggest that the position universally accepted as correct in domestic and international law is one which the Union has also endorsed and is one that the UK itself has seen fit to advance.

253. I have come to the conclusion that relations between the UK and Gibraltar are to be treated as relations between a Member State and a third country or territory. I acknowledge that this is a finely balanced conclusion. I also acknowledge that this would have been, *par excellence,* a question for the Court of Justice had it been necessary for it to be resolved in order to determine the application as a whole. I would summarise my conclusions as follows.

254. First, the language of Article 355(3) TFEU implies that the Member State and the territory for which it takes responsibility are to be treated as separate legal and political entities.

255. Secondly, the balance of case law suggests that in relation to territories governed by Article 355(3) the foreign state or territory is not to be equated with the Member State which has responsibility for it.

256. Thirdly, Article 355(3) does not however mean that the third territory is a Member State in its own right.

257. Fourthly, this reflects the position adopted in domestic law and in public international law which is that Gibraltar is not part of the United Kingdom. This is the position that the UK has advanced to the Court of Justice, which has never challenged its correctness, and also to the European Court of Human Rights.

258. Fifthly, an exception to the above conclusion arises where there is some specific provision (a *lex specialis*) which expressly provides that the law in question is to apply in the foreign territory in the same way as it is to the responsible Member State in which case the third territory is "regarded" as part of the same Member State but only for the specific function of the rule in question. This does not arise in the present case.

***(ii) Domestic jurisprudence***

259. The issue in relation to freedom to provide services has not squarely been addressed in domestic case law. In *Anne Fisher v HMRC* [2014] UKFIT at paragraph [825] – [838] the First tier Tribunal was concerned with the application of the tax anti-avoidance code on transfer of assets abroad legislation (section 739 Income and Corporation Taxes Act 1988) to the transfer of the tele-betting business to a Gibraltarian resident company and the income which subsequently arose to that company. One issue was whether the EU rules on free movement of capital and establishment applied to the relevant UK transfer of assets legislation. One subset of this point was framed in the following way (ibid [4(2)[) "*One sub-issue raised in the context of the European law issues is how if at all the freedom to establish and move capital apply to transfers between the United Kingdom and Gibraltar given Gibraltar's particular status under the Treaty as a territory for whose external relations a Member State (the UK) is responsible for rather than as a Member State ("the Gibraltar issue").*" *The* conclusion the Tribunal was in the following terms:

> "11. As for the European law issues it was not necessary to construe the UK tax charge differently or disapply it because the EU freedoms did not apply as between the UK and Gibraltar, given the particular treatment of that territory under the relevant European legislation, and the situation was therefore one which was to be regarded as wholly internal to the Member State (the UK). In relation to the Gibraltar issue we declined to make a reference to the CJEU. The fact that the Gibraltar company provided services to other Member States, that it had employees from other Member States, or that Peter Fisher had lived in Spain for a period while setting up the

> operation in Gibraltar did not provide a sufficient foreign connection for the purposes of EU law to engage the relevant EU freedoms."

260. The reasoning was set out in paragraphs [798] – [805] of the judgment. The Tribunal examined the case law but stated that it was of little assistance by way of guidance. It did reject the argument of HMGoG that Gibraltar should be equated with a separate Member State such that the free movement of capital and establishment rules could apply: See paragraphs [837] and [838]. There is, however, no detailed analysis of the possibility that even if there was no flow between Member States there could nonetheless be collateral or indirect effects. There is also no detailed discussion of the case law on the application of the freedoms to relations between a Member State and a territory for which it is responsible.

## R. The evidential dimension: What sorts of facts will be sufficient to engage Article 56 TFEU in relation to the provision of services between Gibraltar and the UK?

261. It is important to record that the conclusion that I have arrived at does not mean that Article 56 TFEU is, without more, applicable to a restriction on the provision of a service from Gibraltar to the UK. I have not found that the restriction applies between Member States; I have found only that it applies between a Member State and a third territory. For Article 56 TFEU to be engaged that restriction, in so far as it applies to operators in Gibraltar, must in addition exert collateral or incidental effects upon trade with a third Member State. Lord Pannick QC submitted that Article 56 TFEU could apply to services between a Member State "*...and a distinct legal and geographical entity such as Gibraltar where there is an indirect effect on the EU market*", which he submitted was shown on the facts of this case.

262. As a matter of law the Court has confirmed that in relation to restrictions on free movement which apply between a third country and a Member State there can, in principle, be an inter-Member State effect. This in my view is clearly exemplified in the judgment of the Court in *Petit* (see paragraph [221] – [222] above), relied upon by the Secretary of State. In Case C-163/90 *Legros* [1992] ECR I-4625 the Court addressed the legality of dues payable on importation into Reunion (the French dependant territory) of goods exported from, inter alia, Germany into France and then sent to Reunion. The Court held that even though the charge was applicable in a third territory it was still capable of affecting inter-state trade and was hence prohibited: See paragraphs [16]-[18]. A similar conclusion was arrived at in Joined Cases C-363/93 and C-407-411/93 *Rene Lancry* [1994] ECR I-3957 paragraphs [29] and [30] where the Court said that the situation might have been different where "*all the components are wholly confined to one Member State*" in which case the situation would be "*...a purely internal situation only*" (ibid paragraph [30]). In Case C-293/02 *Jersey Produce Marketing Organisation* [2005] ECR I-9543 a restriction on importation into the UK from Jersey which did not apply on exports from Jersey to other Member States was still unlawful because the law did not rule out the possibility ("*...is certainly conceivable*") that produce might be re-exported from the UK to other Member States. The Court so concluded even though the Channel Islands and the Isle of Man and the UK were to be "*treated as one Member State*" (ibid paragraph [54]):

> "65 In this case, it must be observed, first, that, in view particularly of the conclusion reached in paragraph 54 of this

> judgment, a contribution such as that in issue in this case which is calculated by the PEMB by reference to the quantities of potatoes produced by the party concerned and exported from Jersey to the United Kingdom certainly constitutes a charge imposed on goods despatched from one region to another in the same Member State. Second, it must be added that even though the 2001 Act covers, according to its wording, only potatoes despatched to the United Kingdom for consumption there, that does not rule out the possibility that such potatoes, once within the United Kingdom, might then be re-exported to other Member States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member States.
>
> 66 In this case, the possible development of such a pattern of re-exports from the United Kingdom to the other Member States is certainly conceivable given that, as appears from the information provided to the Court, almost all the Jersey Royal potatoes grown on Jersey are traditionally exported to the United Kingdom."

263. Proving a collateral or indirect effect on trade between Member States is considerably easier in relation to a restriction which hinders the importation or trade in goods because by their nature they can be re-exported to third states and an inter-Member State effect established. In the present case the Gibraltar operators target customers in the UK to whom they provide services which are then consumed *in* the UK. By the very nature of the service it is inherently less likely that a restriction upon the provision of a service from a third territory *to* the UK will exert incidental or collateral effects on third territories. However, the important point is that the possibility is not in principle excluded; it is ultimately a question of fact.

264. The Claimant adduced evidence to support the argument that there was in fact an indirect effect upon trade between Member States. In paragraphs 38 and 39 of the Witness Statement of Mr Charles Pink-Howitt (the Chief Executive of the Claimant) an attempt was made to demonstrate the existence of such an effect. The arguments are advanced at a high level. A summary of the points made is as follows: (i) The Claimant's members operate in or have group companies in a range of other Member States of the EU; (ii) the restrictions on the provision of services into the UK "*may impact upon the ability to attract customers in other Member States*"; (iii) this may arise in relation to the impact of the advertisements which are placed in the UK media or on-line which are accessed by customers in other Member States; (iv) to the extent that the new regime impacts upon the profitability of the new regime it has the potential to impact upon members' business plans elsewhere including in the EU; (v) the potential impact upon Yggdrasil in Malta which provides B2B services to customers in Malta which then provides them to consumers shows an inter-Member State effect. Yggdrasil may have to obtain a licence from the GC but it would be very difficult for it to comply with the terms of such a licence (in relation to the reporting of customer activity). It is said that the obstacle placed in front of Yggdrasil by the new regime could have the unintended effect of deterring it from expanding its activities in Malta and Gibraltar; (vi) Gibraltar based companies procure many

component parts, software and hardware from other Member States and employ personnel from other Member States (such as Spain).

265. The Secretary of State and the GC dispute that there will be any unreasonable or material burdens on operators and dispute that any burdens that arise in relation to the Gibraltar operators could or would be such as to give rise to third country effects. In relation to Yggdrasil the Secretary of State explained that it would require a remote operating licence but that burdens which might prove difficult or impossible to comply with (such as the provision of information about customers) may be mitigated by measures agreed with the GC.

266. I have considered whether I should make definitive findings about these statements. I have decided not to. Some are, in my view, very weak and hypothetical. Others would require serious elucidation before they could be assessed. I am taking the view that the exceptional urgency with which this case has had to be determined has limited the ability of the Claimant to adduce other than this relatively broad brush evidence. Hickinbottom J considered that the points were arguable. As matters stand I am sceptical; but I do not feel that I have enough information to form a clear view on this. Moreover, and critically, I do not need to determine whether the restrictions are even capable of exerting any incidental or collateral effects such as to create an inter-Member State effect because I am quite clear that irrespective of how I decide this issue the claim fails on the substantive merits and there is therefore no need for me to undertake any detailed analysis in this regard.

267. There are two final observations I would make. First, although I have held that the relationship between Gibraltar and the UK is not intra-Member State, even if I had held that it was a purely internal matter operating within a single Member State it would still, at least in theory, have been open to the Claimant to argue that there were spill-over or indirect effects on trade between Member States. The case law shows that the simple fact that the parties are in one Member State, and that this is where the restriction primarily bites, is not conclusive. Ultimately, whether this is so or not is a question of fact, as the authorities that I have cited above demonstrate. Secondly, for the avoidance of doubt my conclusions have been arrived at in the context of the relationship between the UK and Gibraltar. I have not therefore addressed the position as between Gibraltar and other Member States.

## CONCLUSION

268. This claim for judicial review does not succeed.