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**Is there “gold in them thar hills” for  
non-US operators in 2012?**

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### **Happy New Year?**

On 23 December 2011, the Office of Legal Counsel of the US Department of Justice wrote to the New York State Division of the Lottery in terms which were as far-reaching as they were unexpected. Their letter was in reply to a letter dating back to December 2009 relating to concerns arising out of the transmission of State lottery transaction data across State lines by wire and the internet, so it was hardly a hasty or ill-considered response. The US Department of Justice stated that it had analysed the scope of the federal Wire Act 1961 and concluded that it was limited only to sports betting. At the time of writing, the implications of this stunning reversal of the Department of Justice's long held interpretation of the Wire Act (that it is not limited to sports betting and can be applied to other forms of interstate gambling) are still being assessed, but the early indications are that it will act as a further catalyst for the legalisation and regulation of online gaming on a State by State basis and undermine the case for federal legislation, at least in the short to medium term.

The legalisation of online gambling in the US has been something of a holy grail for the industry and each year begins with wildly varying predictions of the timeline. However, 2012 may finally be the year when the industry is able to celebrate the opening of the US market in at least one US State, with strategically important States such as Nevada, California and New Jersey being amongst the leading contenders. Even before the Scrooge like repentance by the Department of Justice in fear of Christmas yet to come, there had been a convergence of factors increasing the likelihood of legalisation. These included a difficult economic climate, the lack of opportunities for growth in the land-based casino sector, greater consolidation and higher levels of regulation and social responsibility in the international online sector and the wider trend towards technological integration of gambling products. Indeed, the gaming industry as a whole now recognises the potential synergies, opportunities and even necessity of working together to their mutual advantage and, as evidenced by transactions involving BwinParty and Boyd Gaming/MGM Resorts and Caesars Entertainment and 888, partnerships and joint ventures are the obvious vehicle. For the purposes of this article, we will move quickly on from the aborted alliance between Wynn Resorts and Poker Stars.

Against this background, it is more important than ever that international online operators prepare themselves for the opening of the US market and, if they hope to do a strategic deal, take time to view the transaction from the US perspective. At the risk of pouring a little cold water on the potential opportunities for non-US companies in the exciting year ahead, it is also important to consider the harsh realities for international operators of doing business in any fledgling online gambling markets in the US States. The key challenges, however, will apply equally whether the market opens up this year or in ten years.

## Partnerships

With very few exceptions, the only immediate B2C opportunities arising out of the legalisation and regulation of online gambling in the US will be for local operators. It is simply inconceivable that any US State will open up in a way which places international operators on a level playing field with local operators, let alone favours such operators to reflect their greater knowledge and experience of the business - there is of course no European style freedom to provide services argument available in these potentially lucrative new markets!

However, whilst US companies may understand the market, have the customer databases, brand awareness and regulatory approvals, they have no substantial experience of running online gambling businesses and will need to acquire operational and technological expertise from international operators. They also recognise the time and cost involved in research and development required to start from scratch with their own product. Partnerships and joint ventures will therefore enable US companies to hit the ground running as and when the laws change and it is this avenue which will afford international operators their best opportunity to share in the action.

Internationally, US companies are keen to acquire their own operational experience in preparation for the opening of the US market, regarding Europe in particular as an "Off-Broadway" production. Whilst it would not be right to say that "What happens in Europe, stays in Europe", it is undoubtedly better for US operators to make any mistakes in Europe rather than the US. What US operators bring to the partnership party is, again, potential future access to the US market and of course investment. So far investment has been relatively modest, but expect it to increase this year as legislation in the US becomes more imminent. Whatever opportunities the international operator can offer in regulated markets outside the US will be one of the bargaining chips available to the international operator in negotiating the best deal in relation to the US market.

## What are US land-based operators looking for in international partners?

In a nutshell, the US land-based industry will be looking for international partners with technological and operational expertise, with an emphasis on poker as this is likely to be the first online product to be regulated in most US States. Critically, however, it will only be interested in dealing with foreign companies which are likely to obtain regulatory approval on a federal and/or state level when online gambling is legalised. There remain considerable public concerns in the US relating to online gambling and regulators will wish to demonstrate that the fitness and propriety of operators has been thoroughly investigated, that they are "whiter than white" and that there has been intensive scrutiny of applications. International operators need to be aware that the level of detail and intrusiveness of Nevada and other US State regulators is significantly greater than in other gambling jurisdictions, involving public hearings, lengthy investigative interviews and even home visits and it is not unusual for investigations to take longer than a year.

Those operators who continued to accept US play post UIGEA 2006 will have a hard time, particularly in the aftermath of Black Friday, and this is not limited to sports betting operators. It is surely questionable as to whether US State regulators will approve international gaming operators which flouted the law as it was consistently

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interpreted and applied by the criminal division of the US Department of Justice between 2006 and 2011, regardless of the subsequent change of position. As highlighted above, individual States will not be going out of their way to assist foreign companies, save to the extent to which local operators are dependent upon the expertise they can provide, and there will surely be sufficient international operators with blemish free records post 2006 to fulfil this role. Indeed, practically speaking, US operators are likely to be reluctant to invest any significant time or resources in negotiating deals with operators which have taken US play post UIGEA 2006 in light of the obvious uncertainty.

Those operators who only accepted US play pre UIGEA 2006 should in principle be capable of being licensed in the US, although there still remain serious issues around sports betting. The extent to which the likes of BwinParty are ahead of the others in the light of their "Non-Prosecution Agreement" with the Department of Justice is a moot point given that the Department of Justice is no longer arguing that the Wire Act 1961 extends beyond sports betting. These questions will hopefully be answered this year, in Nevada at least, in the light of BwinParty's deals with MGM and Boyd in relation to future US poker opportunities, both of which are subject to approval of Bwin Party by the regulatory authorities. Indeed, BwinParty have already indicated their intention to apply to the Nevada Gaming Commission for a preliminary finding of suitability.

Perhaps the most interesting issue, however, will be the attitude of US State regulators towards operators who accept, or have accepted, play from "grey" jurisdictions in Europe. As history in this industry relates, the US takes a more extra-territorial approach than most other jurisdictions and certainly the UK. It is therefore by no means certain that such operators will be approved in every US State. At present the consensus appears to be that US operators cannot accept play from unregulated markets, even in jurisdictions where the legality is clear such as Sweden. It is important to bear in mind, however, that US regulators, with the possible exception of Nevada, are at the beginning of a very steep learning curve as far as online gambling is concerned. As US regulators acquire greater industry knowledge and expertise through their investigation of overseas applicants and their businesses, they are perhaps more likely to recognise the nuances of EU law arguments deployed by international operators in those "grey" markets, not least for practical reasons. Otherwise, there is the risk of the overwhelming majority of reputable European operators being excluded from the market. Nevertheless, it is quite conceivable that some State regulators may take a different approach in relation to, say, Spain, where the authorities have adopted a liberal approach to the acceptance of bets from Spanish residents, than say Holland where the governmental authorities were both vociferous and litigious in their opposition to such operators.

These regulatory issues, in tandem with the prospect of a patchwork quilt of State and tribal rules and regulations are why the major US operators would prefer to see legalisation and regulation on a federal, rather than a State level. These operators have witnessed the shambles in Europe, with the emergence of national licensing regimes and will not relish the prospect of competing with local operators for a limited number of licences in particular States, complying with differing application processes and technical standards, varying tax regimes and relying upon agreements between States to boost liquidity of poker players. Unfortunately, from their perspective, the recent letter from the Department of Justice appears to make federal legislation less likely in the short term. With States able to get on with their own legislative and regulatory

systems, the imperative for a federal system in a Presidential election year is reduced considerably.

**“Déjà vu” – as operators say in France!**

The opening of any new markets in the US, whether in 2012 or beyond, will be welcomed enthusiastically by online gaming operators, as reflected in the recent share price increases as a result of the Department of Justice’s change of heart. However, European operators, in particular, will be only too well aware that this is just the beginning and long term, profitable success will only be achieved with courage, perseverance and patience. If, as is now looking more likely than ever, the US heads down a path of legislation and regulation on a State-by-State basis, European operators should be prepared for all the same old obstacles they have experienced at home, including unrealistic expectations of tax revenues, heavy regulation with a view to minimising the risk of public controversy, expensive testing requirements, ineffective measures in relation to unlicensed operators, liquidity issues in all but the largest States and conflict with elements of the land based sector. Indeed, is there any jurisdiction in Europe which may be held out as a template to the US States?

**Conclusion**

Experienced industry observers will not be surprised if the apparent Christmas present from the Department of Justice proves to be yet another false dawn ahead of the surely inevitable opening of the US online gaming market. On any view, however, legislation, at least on a State-by-State basis, appears tantalisingly closer than any operators could have imagined as recently as Black Friday on 15 April 2011. The downside for international operators wishing to break into the US market is that the only B2C opportunities in the short term are likely to be for US operators. The upside is that US operators simply do not have the operational and technological expertise to exploit the US market to its full potential. There are therefore deals to be done and commercial tie ups with US operators are essential. International operators will need to take considerable advantage of the regulatory expertise and relationships of their US partners if they are to find the gold their shareholders are expecting and, if there is to be a rush, how historically appropriate for it to begin in California?!

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