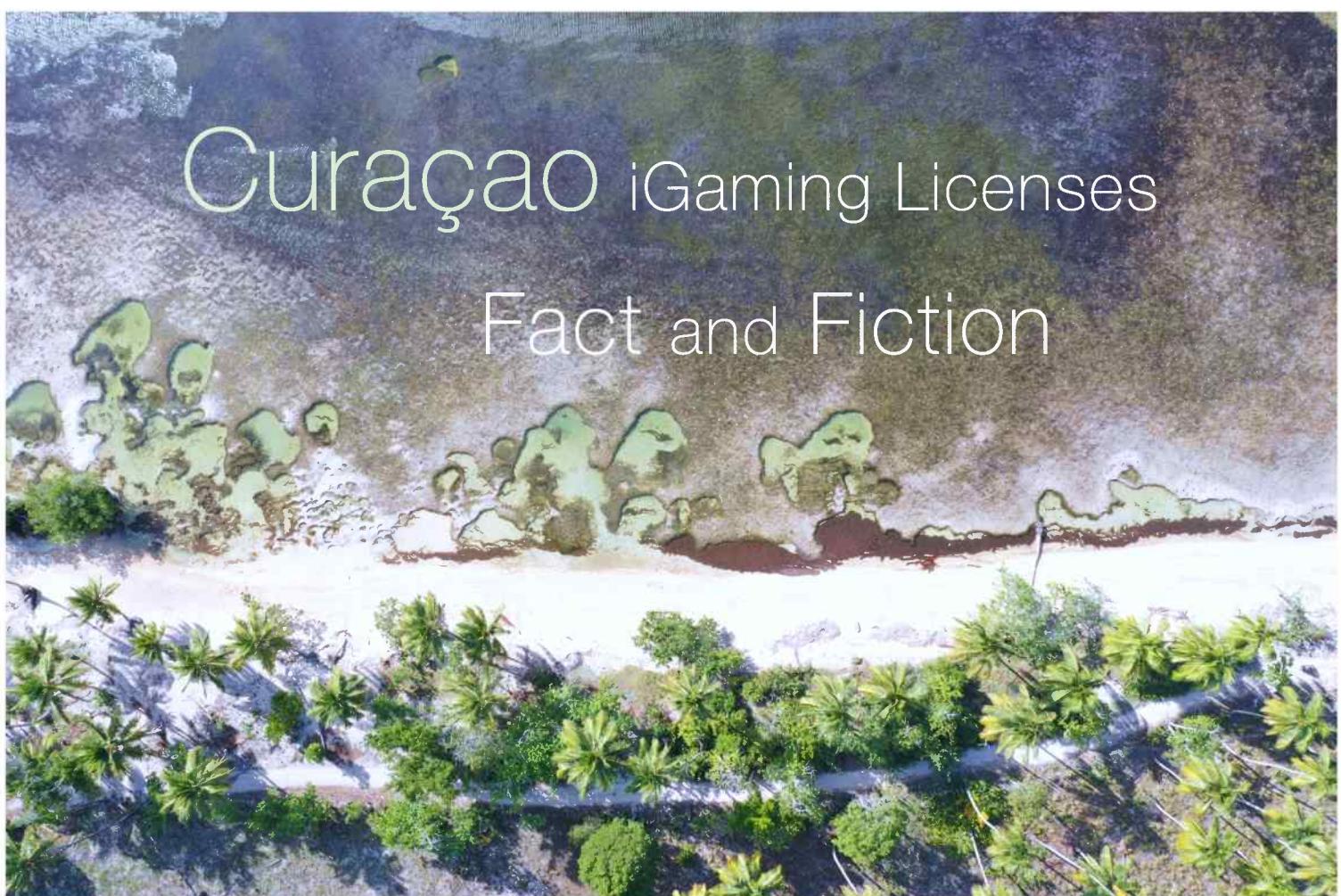


Curaçao iGaming Licenses

Fact and Fiction



Setting up your iGaming venture under a Curaçao iGaming license could provide online entrepreneurs with the best of both worlds. It is flexible and profitable. Without sufficient experience, however, such adventure might turn into a commercial nightmare. Some critics say that the Curaçao iGaming License is not even legal. Bas Jongmans, attorney at law (GLG Litigation) and Frederik van Eijk, consultant, provide clarity on what is fact and what is fiction.

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Introductory

The gaming regime of Curaçao has since its introduction in 1993 been a favorite of online operators, due to its highly lucrative taxation framework and its flexible regulators. [1] Nevertheless, the said regime is confronted with many sudden changes at this time.

A draft legislation was presented to Curaçao Parliament, in June 2018 and was rushed through parliament, scheduled to enter into force on 1 July 2018, two weeks later. Almost every favorable 'perk' of the regime was abolished. Transitional arrangements for existing ventures have almost been non-existent.

Questions have been asked in the Netherlands' parliament, whether or not the outsourcing of gaming rights by license holders to third parties lacks a legal basis. This article, by Bas Jongmans, attorney-at-law (GLG Litigation) and Frederik van Eijk, financial consultant (GLG Compliance) outlines in general the current legal status of the said regime. What is fact and what is fiction? The article kicks off with a cautionary tale.

Cautionary tale: "a rude awakening"

It was fall 2019. It was supposed to be the time that Charles [2] would embark on this great adventure. He had been operating a land-based casino in the Netherlands for years. However, since the introduction of the gaming tax on slot machines in 2008, profits were no longer 'all that'. He was not getting any younger too. His offspring was not particularly 'jumping' at the idea to take over the family business. Not 'as is' anyway.

He was looking to make a change. Soon, he found his deliverance, or so it seemed. A company from Israel, license traders, trading in one-stop-shop gaming licensing solutions. Specialized in everything, including gaming law and gambling law. Smart and slick. He met them at "ICE". The world-renowned gaming convention, held every year in the ExCeL International Exhibition Centre in London. Charles did not like to travel. Also, his English was not great. But he already took a raincheck last year. So, there he was. Legal gambling and legal gaming solutions, FX regulations, it all sounded very complicated but also very appealing.

These Israeli intermediaries told him that 'converting' his 'classic' business in the Netherlands to 'online' would be a piece of cake. They would take care of everything. This Curaçao license sounded almost too good to be true.

"There apparently were some caveats. The partners from Tel Aviv however seemed to grow agitated fast, when being asked too many questions."

No taxation, full access to European markets, not even a local company, apparently, was required. Just his positive input, his experience as an entrepreneur. And his funding, of course. A down payment of € 40,000 to a company in Cyprus would suffice. He would receive a so-called 'revenue share' with a minimum cost of € 5,000 per month. He did not have to worry about these costs. Imminent, out-of-the gate success of the operation was, almost, guaranteed. There apparently were some caveats. The partners from Tel Aviv however seemed to grow

agitated fast, when being asked too many questions. So, he decided to just move forward. After all, he did not want to seem ungrateful that he, Charles, was one of the 'happy few', selected by this young, international company to become their latest 'partner'.

The next month, a meeting was planned in Valletta, Malta. Such an impressive city. An even more impressive board room of the law firm that personally invited him. That building must have been at least a couple of hundred years old. Again, Charles was very impressed. They must know what they are doing. After all, they are successful. Obviously After a brief introduction by a room full of people who looked like lawyers and a slick PowerPoint presentation, it apparently was time to sign the papers.

His new partners read all of it on his behalf and he got the 'green light' from them to sign the paperwork. And so, he did. And he wired € 70,000.

Apparently, he had not considered that the total down payment would be 70k, not 40k. Six months of the monthly minimum costs in advance. How could he have slipped up? He felt unexperienced. But he had his pride and more important, he did not want to agitate his partners again, who seemed to grow more adversarial by the day with all of these questions by the 'older generation'.

He never heard from them again. Well, at least not before he received a 'notification of breach' six months later. Apparently, as per their contract, Charles was required to provide his 'creative input'. A month into the project, he realized that in retrospect no-one really had gone through the trouble to explain to him in detail, what was expected of him. His new 'friends' were very disappointed with them. As things were standing now, they had given up on him. He decided to leave it be and the project was terminated. He never visited Curaçao and never got around to speaking with any locals, as his former 'partners' at the time urged him to accept them as their one-stop-shop contact person.

Fit and Proper?

A generic wisdom would be - this has not much to do with gaming prospects, but rather with having 'common sense' - that one should not dare enter into a business without having established a clear goal, a thought-through vision. One always needs to understand a business in order for it to be successful. Especially when there are significant risks involved. Playing one's saxophone on Dam Square in Amsterdam to earn a few extra bucks

does not seem potentially harmful (unless one, perhaps, is a very bad saxophone player, Dutch people seem to be rather unforgiving in this field). Offering to replace an incapacitated pilot to fly 300 people to the Caribbean without any flying experience whatsoever probably is not such a good idea. The latter would also be illegal, hence the necessity to license activities that might potentially be harmful to the public or oneself.

In other words, one has to show proof of being "fit and proper". One has not much need for obtaining a building license if one does not know how to build. However, that is where the 'middleman' comes in. You might not be able to build that dormer yourself. However, you know a 'guy', who happens to be your neighbor. You have seen him built his own dormer. It looks great and after all these years it never fell down. So, one obtains the license, the dormer is constructed by a peer on your behalf. It is a win-win situation.

But now, suppose that your neighbor knows a guy who knows a guy? Can you still move forward safely? You do know your neighbor. You have seen the dormer. Granted, you have not been able to establish who actually built that dormer. However, finding a solution for this problem seems easy enough. After all, you trust your neighbor, you have known him for a long time, and he is the proud owner of a high-quality dormer. One could say that the neighbor has vouched for, certified, the builder responsible, personally licensed him if you will.

"Seeing the pilot wear a uniform and no evidence of him or her being intoxicated, is enough for the most of us to get on board."

But now, let's suppose that your neighbor knows a guy who knows a guy who knows a guy? This is where it gets complicated, as too many variables have been introduced. You will never be able to get a reliable verification on these variables by using information that is already known to you. As services rendered that might be harmful to the public are being rendered to us all the time, by people that we do not know or we do not have a connection with whatsoever, there is a need for voicing, certification by someone vested with legal, public authority to do so.

Without licensing certain services could never be rendered. No passengers in

their right mind will challenge the pilot who is flying the plane to their holiday destinations to provide to them personally, proof of being "fit and proper". Instead, we assume that the pilot, who is obviously employed by an airline of good standing, shall be properly certified to fly a plane, in accordance with the guidelines of the International Civil Aviation Organization, whatever those guidelines may be. Seeing the pilot wear a uniform and no evidence of him or her being intoxicated, is enough for the most of us to get on board. Strangely enough, we hardly know who this person is. Nevertheless we are prepared to board the plane that this person shall be flying on your behalf.

An infamous example has been the Germanwings flight 4U 9525 that crashed into a mountain on March 24th, 2015, caused by a pilot who was properly certified but however ended up having severe mental problems, causing him to become suicidal. [3]

The conclusion is that the process of licensing shall never be 'ironclad'. All that one can do is to not bluntly rely on the licensor. Let alone if there would be a 'middleman' involved. Also, it is important to always verify what the aim of the licensing process is. Is it designed, for example, to protect the rights of other license holders, as is the case in the matter of distribution of fishing rights within the European Union? Is it meant to protect the public, as would be the case with passengers relying on having a safe flight experience? Or both?

The difference in reliability between onshore and offshore gaming licenses

Onshore and offshore licenses are very different products. The license holder (the "licensee") of an onshore license is traditionally allowed to operate within the resident country only. The license has been issued by a local authority, as the local population might become affected by the services that are locally being rendered by the licensee, the aim of the license is usually to protect the interests of the local community. As, for example, would be the case with a land-based casino usually connected to a hotel or resort, with the idea in mind behind this rule, that more tourists than local population shall visit those places. Let us refer to this type of licensing as a "resident license" or a "Licentia Brevis Manu", meaning a licensing with the short hand, between licensor and licensee, without the intervention of anyone else.

Offshore licensing traditionally allows a license holder to operate only on an international basis, which usually prohibits such licensee from

establishing any business activities in the jurisdiction of establishment itself. Let us refer to this type of licensing as a "non-resident license" or as "*Licentia Longa Manu*", meaning a licensing with the long hand, with limited reliability in which foreign regulators might also get involved.

The purpose of such license is usually aimed at hosting Business-to-Business ("B2B") Services for purposes of enhancing the local economy. Think of taxation and/or employment opportunities. It offers limited or no protection to consumers of such services (within the Business-to Consumer or "B2C") environment, as these are not residents of the resident country. It also does not entitle the licensee, in principle, to render services that are already being licensed *Brevi Manu* by that other country. In between there exists a large, grey area. The Markets in Financial Instruments Directive ("MiFID II") [4] for example, allows holders of a financial license to freely offer their services within the European hemisphere, which is something that the resident regulators have trouble with getting used to, as for example is the case with so-called "binary options". [5]

There has also been great debate on the legality of imposing penalties on those using their EU freedoms to render services in other EU Member states without holding a 'resident' license. For example, to date October 27, 2011, Attorney-General Cruz Villalón delivered his opinion in joined Cases C-72/10 and C-77/10 (Costa cs).

Judgment of the EU Court in this matter was delivered on February 16, 2012. The EU Court concluded that article 49 of the Treaty on the Functioning of the European Union ("TFEU") precludes imposing a penalty on an operator that was excluded from earlier tendering procedures, which would be in breach of EU law. [6]

How does the Curaçao iGaming License compare?

If one compares the National Lottery Ordinance 1949 (*Brevi Manu*) to the National Ordinance Offshore Hazard Games (*Longa Manu*), the difference is indeed the same. The land lottery focuses on the protection of local society, acting as a "guardian of morality", so to speak.

With regard to foreigners, in particular tourists, who are guests in the territory of Curaçao, the legislator has not formulated a legislative responsibility to act in a regulatory manner, as their gambling 'appetite' would not have any social consequences. After all, they are not part of society. Tourists who participate in games of chance are primarily seen as potential sources of income and employment and should be encouraged to participate in various games of chance.

Consequently, provisions were included in the National Ordinance in 1948 on the exploitation of so-called hazard games to promote tourism. Only persons in possession of a tourist card could play games of

chance in (deemed) competent and specially equipped hotels. [7]

In 1975, these powers were transferred to the island governments, which in the years 1981-1992 enacted various regulations to implement the offering of hazard games, which eventually led to the introduction of the offshore license in 1992-1993 that allowed operators to - in this pre-internet society- offer services via phone service lines. That proposal did not originate from the government itself but from parliament. The brief explanatory memorandum was signed by a Member of Parliament and, again, does not deal with matters such as the effect on the local market, the effect abroad and the moral character of "*longa manu*" gaming. Not a word is said about the risks of participating by consumers in offshore gambling.

That is not surprising. After all, it can be assumed that the local residents (for whom participating would be illegal) shall be shielded from this type of activity. The 1948 Hazard Games National Ordinance on Tourism Promotion was adopted and then transferred to the island territory.

New regulations did not only remove the criminal qualification of such activities, but also created the possibility for regulation and control for such activities with regard to offshore hazard games. The regulations were aimed to prevent damage to the name of Curaçao on the international "telecommunications market".



"There has also been great debate on the legality of imposing penalties on those using their EU freedoms"

As such, it can be concluded that also in Curaçao, legislation in connection with land-based, onshore casino's is aimed at protecting the local population, while legislation that regulates the offering of games of chance in which only non-residents participate (tourists regarding land-based and online visitors regarding online) does not have the aim to protect participants but rather the reputation of the country and its economic interests.

About the original Curaçao iGaming License

The Curaçao Online Gaming Licenses are issued nowadays by the Minister of Finance. However, in practice, "offshore" parties would not qualify to apply for such a license that is informally called a "master license". Instead, those "offshore" parties opt to participate with a licensor that holds the "original" license, for which they request dispensation. In our view that makes sense, as technical developments within the field of gaming move faster than legislation will ever be able to.

This trend is seen not only in Curaçao, but for example also in the Netherlands, as this country has been preparing to make the offering of online gaming legal. As the technique kept surpassing the initiatives of the legislator, it was decided to leave large aspects of the legislation unattended, to be completed by the regulator itself at a later time. Strictly speaking, these third parties do not obtain an independent, public license.

Is Curaçao "sublicensing" legal?

In recent history, it has been implied that Curaçao gaming operators are operating illegal ventures, since their operations are based on a gaming "sublicense" and that this form of cooperation does not hold legal merit. We may for example refer to formal questions of an MP, Ronald van Raak, in the Netherlands that were asked in his capacity as a Member of the Parliament of the Netherlands to the Minister of the Interior and Kingdom Relations:

MP Question: "Is it accurate that the construction of master- and sublicenses that is used by the Curaçao gambling industry has no legal basis?"

As this question has been structured in the negative, one may conclude that the MP was only seeking confirmation from the Government of Curaçao, the appropriate and highest authority in this matter, that this practice would indeed have no legal basis. The formal response to the said question was

presented in the form of a letter by the hand of the Prime Minister of Curaçao himself, his excellency, Mr. Eugene P. Rhuggenaath MBA/MBI, who has been exceptionally outspoken and forthcoming in the matter:

"According to the National Ordinance on Offshore Hazard Games, the license to operate hazard games is non-transferable. The National Ordinance precludes the transfer of these rights however not the economic operation of the license in cooperation with others than the license holder. This cooperation with others is designated in practice as sublicensing. Although the definitions of master- and sublicensing have not been codified, one cannot take the position that this practice lacks any legal basis." [8]

As the Curaçao legislator himself (Prime Minister of Curaçao) has issued a formal statement on the matter, confirming the legality of the practice, that has remained uncodified, it is unlikely that the said practice shall be deemed illegal in the future and remarks to the contrary might be even considered slanderous.

As previously discussed in this article, the offering of B2C Services to Curaçao non-residents via websites is conditionally allowed to licensors, as meant in article 1, section 1 of the Ordinance P.B. 1993, 63. At the same time, it is precluded by the Government of Curaçao to receive any income derived from online gaming via any onshore bank on the island of Curaçao. Because of this, the original licensors tend to refrain from offering B2C-Services themselves and have opted to offer B2B-Services to international Operators instead, who then will be offering the B2C-Services to End Users under several strict conditions.

One of the said conditions includes a pledge of the Operator to provide the licensor with any information ("Non-Personal Data") that is required for the licensor to verify if the Operator is in full compliance with legislation, regulations and if it is honoring its agreements with third Parties such as game providers and payment service providers. These and other pledges have been included in an Information Provider Agreement (the: "IP-Agreement") in which the Operator (the: "Information Provider") commits to provide the licensor (the: "Information Aggregator") with all the necessary information necessary to safeguard the interests of end users, such as however not limited to the implementation standards of responsible gaming and the implementation of the right to voluntary self-exclusion, as well as non-voluntary exclusion.

"Although the definitions of master- and sublicensing have not been codified, one cannot take the position that this practice lacks any legal basis."

Such information pledge is also meant to safeguard that the Operator shall comply with all international rules regarding Anti-Money-Laundering ("AML"), such as however not limited to the Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (the "Fifth Anti Money Laundering Directive" or: "5AMLD").

Under these conditions, the Curaçao legal framework allows the aggregator to conditionally grant on a non-exclusive basis the rights to offer B2C-Services to another party that has its corporate seat within the insular territory of Curaçao.

May a Curaçao iGaming Sublicense be held by a company that is not resident in Curaçao?

No. The rules on this are clear. A non-resident company would not meet the substance requirements as formulated by Curaçao law of 2018, as inspired by the Organization for Economic Co-operation and Development ("OECD"), a group of 34 member countries that discuss and develop economic and social policy. [9]

Are Curaçao operators exempt from regularly paying corporate income tax?

No. As of 1 January 2020, the foreign profit exemption has lapsed, and shall operators, in principle, be required to pay 22% corporate income tax on all earnings. Under very strict circumstances there might be exceptions, however these shall never apply to third parties which are not resident in Curaçao, as they would never meet the necessary substance requirements.

What should a Curaçao Online Gaming Sublicense cost me?

The average setup would set third parties back with approximately

€ 10,000. These are costs, typically made to ensure that third parties shall operate in full compliance with the "original" license. The setup of a basic local company should not cost more than € 5,000.

Although these costs are extremely low in comparison with for example a Malta B2C license, those contemplating setting up a Curaçao license shall require lots of experience to keep the company compliant and in good standing. Proper guidance by for financial and technical professionals is required. Furthermore, additional costs may be expected as licensors are introducing the Money Laundering Reporting Officer ("MLRO"), in compliance with 5AML.

Is it wise to let a foreign intermediary take charge of setting up your iGaming structure in Curaçao?

In our opinion, under no circumstances invest in foreign intermediaries (with perhaps the exception of a specialized attorney) as the regulations are far too complicated for such intermediaries to properly advise and recommend. Such parties are usually found to only add a very large percentage to the setup costs. Any decisions on setup are usually left to a local party anyway.

Parties that elect to set up a local structure should at all times be fit and proper themselves. Always contact a local professional party in Curaçao to assist with setting up a structure properly. Below we mention several tasks that should be left to a local professional: (i) Company formation (oprichtingsakte); (ii) The opening of an offshore corporate bank account in combination with the setup of a payment processor (usually in Cyprus); (iii) The vetting of shareholders (aandeelhouders); (iv) Registration of the company with the local authorities, such as with the Curaçao Chamber of Commerce and Industry (Curaçao Kamer van Koophandel en Industrie).

Am I required to set up an office in Curaçao?

Although we are aware that such setup is demanded by certain corporate service providers, it shall in our opinion not be beneficial to meeting any substance requirements, as this shall depend on the available knowledge and experience that your company itself has to offer.

Can I use a so-called "nominee" Ultimate Beneficial Owner?

A nominee Ultimate Beneficial Owner ("UBO") is, simplified, a shareholder who is being paid to hold the shares on

behalf of someone else. This is considered not legal under 5AML. Also, the use of nominees is outdated as a person easily gets blacklisted, as they are holding shares into countless of companies, which interests tend to shift from company to company. Service providers, especially those in the payment services industry, are particularly aware of these practices.

Can a Curaçao structure be formed within only a few days?

No, this would mean that no serious Know-Your-Customer ("KYC") diligence has been executed on the key individuals within the structure. As "serious" setup should take a minimum of two weeks, with four weeks on the outside.



Red flags

What lessons can be learned from 'Charles' in our cautionary tale that we started our article with? There are a few simple guidelines that can assist the entrepreneur, distinguishing fact from fiction. Below we included a Red Flag 'top ten'.

1. You are approached by an intermediary that is referencing heavily to personal relationships with people of alleged importance, to which they claim to be of influence. For this influence it is then suggested that you should pay a markup. Buyer beware, always establish if such intermediary is affiliated to an official licensor. Always

check if intermediaries are personally known with legal and technical details of the proposed structure. Those incompetent, 9 out of 10 times, shall not be able to tell you anything concrete.

2. You are being told that Curaçao operators do not have to pay tax or they are largely exempt. This promise can never be kept in general by any intermediary, as it would heavily depend on the circumstances of your setup. Standard, a 22% corporate income tax rate applies.

3. You are being told that the tax base may be brought down with license payments. It is not possible to reduce your tax base with (for example brand) license payments.

4. You have been 'chosen' to represent a specific operator in your resident country and they will take care of everything. For this, you are proposed a revenue share. Chances are that you have been selected to become a "bucket-holder". This is a person usually selected for his or her lack of experience who is awarded a position with maximum exposure in case a usually high-risk enterprise goes south.

5. You have been invited to participate in the setup of a unique gaming company in which you will be provided with a lucrative opportunity to generate lots of profit, on the condition that you will be able to recruit other peers that shall themselves also profit from introducing their peers. Such as setup would qualify as a "Pyramid Scheme". This is not to be confused with affiliates, individuals and companies that are being paid to generate attention for a product from a marketing perspective, which in principle is a legal and very different practice.

6. You are being told that the Curaçao license provides free access to most local markets. This cannot be claimed in such a general, unspecific way.

7. You are asked to make a large investment, a deposit, a revenue share, or a retainer that exceeds the amount of € 20,000. A standard setup including services of a corporate services provider should (worst-case) never exceed the amount of € 20,000.

8. You are asked to transfer or leave behind a small percentage of your shares to a service provider. Never go along with such a proposal, as it is a known measure in order to prevent you from being able to fire your service provider if you are unhappy with their services or fees. At the first sign of trouble, they might keep your shares 'hostage'.

9. You are being told by a third party that they can hook you up with a license that shall be provided by the Government of Curaçao or the Curaçao Gaming Control Board. Although this may change in the future, this is currently not the practice in Curaçao, as the practice of structure setups has organically grown during the years to always setup in cooperation with one of the original license holders.

10. You are being provided with the opportunity to setup a product that focuses on the financial markets as a game. Readers should be especially aware of the great risks with such a proposal, that are known to have originated with intermediaries that have their residency in Israel. Any references to trade, stock markets, exchanges and financial markets are strictly prohibited, as this based on MiFID II will trigger jurisdiction of financial regulators to intervene (which means prosecute) any parties involved in such a setup.

"Parties that elect to set up a local structure should at all times be fit and proper themselves."

Conclusion

The Curaçao regulatory regime can be of great value for those with experience, a clear business plan and a clear goal. Never take shortcuts by accepting partnerships with those who promise to deliver easy profit to your doorstep. Intermediaries who can actually be beneficial to your setup are extremely rare.

Never forego asking questions, as a truly skilled professional will easily be able as well as be prepared to happily explain to you in great detail his or her opinion, without referencing to opinions of others, on the legality of the license and details on the imposition of corporate income tax. The not so skilled professional will just get adversarial or grow weary of questions.

Should you move forward and invest in a Curaçao structure. The answer has to be, it really depends on your individual circumstances. Do you have the capital? Do you have the experience and stamina to proceed? Are you willing to travel? Those who can answers these questions with "yes" can safely invest in the process of obtaining a Curaçao iGaming license. [10]

Endnotes

[1] LANDSVERORDENING van de 8ste juni 1993 houdende bepalingen betreffende het exploiteren van hazardspelen op de internationale markt middels service lijndiensten en tot wijziging van het Wetboek van Strafrecht van de Nederlandse Antillen.

[2] The name of this individual has been altered as he or she, who was not retained by us as a client, has allowed us to share his or her story, under the condition that his or her identity shall remain anonymous.

[3] 'Germanwings crash: What happened in the final 30 minutes', source: <https://www.bbc.com/news/world-europe-32072218>

[4] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[5] B. Jongmans, Esq. and H. Bais, Esq., Forcing the regulator's hand on binary options in the Netherlands, Online Gambling Lawyer, November 2016.

[6] Judgment of the Court (Fourth Chamber), 16 February 2012, ECLI:EU:C:2012:80.

[7] F.B.M. Kunneman, A.B. van Rijn, B. Schranteree and J. Sybesma, Tourism and regulations on Curacao: a research into the legal implications of the Masterplan for Tourism Development in the field of regulation, 1994, CTDB.

[8] Netherlands parliamentary enclosure 24.557, nr. 151, reference 2018/042408+2018/037925, published to date February 5, 2019.

[9] B. Jongmans, Esq. F.W. van Eijk, 'Cliffhanger: Caribbean corporate service providers prepare for OECD's lasting impact on the Curaçao gaming regime', Online Gambling Lawyer, July 2018.

[10] Disclaimer: The authors cannot accept responsibility for any lack of accuracy in the contents of the article. The reader should keep in mind that case law evolves on a day-to-day basis. One should always retain a professional consultant in his or her field and who is familiar with the local rules and regulations within the country that you are a resident of, prior to making any investment decision. The contents of this article are copyright protected and may not be copied or used without reference to the author.

