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The OECD's impact on the Curaçao gaming regime: A storm is coming

The Government of Curaçao, an island situated within the southern Caribbean Sea, also referred to as the 'Dutch Caribbean,' just off the north coast of Venezuela, has moved to implement Base Erosion and Profit Shifting ('BEPS') principles defined by the Organization for Economic Cooperation and Development ('OECD') coupled with transparency provisions coming out of Europe's Fourth Anti-Money Laundering Directive. Although arrival of such changes was imminent and marks a healthy step forward, local service providers that cater to the Curaçao offshore gaming industry, highly favoured by gaming operators worldwide, might have a hard time adapting to the regulatory winds of change. In this article, tax experts Bas Jongmans of Gaming Legal Group, Peter Muller of Muller & Associates, and Frederik van Eijk of GLG Compliance, discuss the changes taking place, the options available and the likely eventualities.

Bon Bini

The gaming regime of Curaçao, since its introduction in 1993¹ has been a favourite of online gambling operators due to its highly lucrative tax framework and its flexible regulators. Everything seemed possible² within this former Dutch colony, which became independent from the Dutch mainland on 10/10/10, whilst retaining its status as part of the Kingdom of the Netherlands.

Since 1993, offshore gaming companies residing in a Curaçao e-zone have enjoyed a comfortable 2% tax on their profits and, in principle, benefit from a participation exemption from capital gains or dividends. There were no import duties, no turnover tax and there were tax free benefits for employees with expatriate status. Requesting access to

the e-zone was also relatively easy, the manager of the e-zone filed an access request on the operator's behalf with the Department of Economic Affairs. Setting up a Curaçao gaming license benefitted from an average processing time of just a couple of weeks and was both fast and cheap. Local corporate director services provided for a low-cost board of directors, getting paid an average of USD 2,500 on a yearly basis, catering to thousands. In addition, balance sheets that were filed with the annual tax return did not require publication.

One did not even have to set foot on the island, which, by the way, would not feel like a punishment. Sunny skies, palm trees and pina coladas. Thousands of Dutch officials fly in from the European mainland every year, business class. After

all, the island might be independent, but that does not mean that it should be left deprived of all the 'advice' that the visiting civil servants have to offer. A true "Bon Bini" for non-residents at the "dushi" island of Curaçao, locals would say. A tidy arrangement between the private and public sector.

The regulatory winds of change

However, foreign clouds on the horizon, blown over by the OECD's regulatory winds of change might soon devour much of the perks that have made the Curaçao gaming regime desirable for all these years³. Nevertheless, it does not seem that these changes have motivated local service providers to prepare. It seems that it is business as usual. The local community, most of whom are employed outside of the lucrative

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services sector, does not benefit from the industry and as a consequence does not have a reason to care. Why would they? Since 10/10/10, prices have continued to rise, for most residents without any possibility of change. Unemployment rates remain at an all time high too.

The authorities are likely to move forward quickly, in order to prevent OECD clawbacks, which would influence the economic sphere of Curaçao in its entirety and as result would, unlike the amendments targeting only the services sector, have serious potential ramifications. Draft legislation was presented to the Curaçao Parliament around 14 June 2018 and was originally scheduled to enter into force on 1 July 2018.

Calls for transparency and substance

The legislative proposal basically calls for the enhancement of substance and transparency, instigated by the OECD's rules designed to counter BEPS⁴. BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax locations. Under this inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle the problem. Some of the most noticeable changes proposed are:

- Only income from intellectual property in Curaçao may be subject to an exemption if it is derived from assets that have been researched and developed under the responsibility

of a local Curaçao tax resident.

Whether or not this is the case will be decided by the Agency for the Intellectual Property of Curaçao, which will certify such assets.

- The e-zone in its current form, a free zone that allows the unmolested provision of services to the gaming sector is to be abolished. The amended e-zone shall be limited to the trade, packing and storing of commercial goods, although storage shall be restricted to the location of the e-zone. This will *de facto* discontinue the digital servicing potential of e-zones completely.
- Additional substance requirements call for a real presence in Curaçao. Companies will need to task a substantial number of employees on site, educated and suitable for the job, who should have causality to corporate income. Operational costs should equal the local substance. In other words, no "cherry picking" of corporate income and expenses will be allowed.
- Awarded benefits may be at any time withdrawn retrospectively, facts permitting.
- Ultimate beneficial owners conditionally may for tax purposes be directly tied to offshore company income.

Changes will not only be of a pure financial nature, but will also include measures designed to combat criminal behaviour. This category of current and proposed measures is mostly derived from Europe's Fourth Anti-Money Laundering Directive ('4AMLD')⁵.

Article 14 of 4AMLD speaks for itself:

'The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. Member States should therefore ensure that entities incorporated within their territory in accordance with national law obtain and hold adequate, accurate and current information on their beneficial ownership, in addition to basic information such as the company name and address and proof of incorporation and legal ownership.

With a view to enhancing transparency in order to combat the misuse of legal entities, Member States should ensure that beneficial ownership information is stored in a central register located outside the company, in full compliance with Union law. Member States can, for that purpose, use a central database which collects beneficial ownership information, or the business register, or another central register.

Member States may decide that obliged entities are responsible for filling in the register. Member States should make sure that in all cases that information is made available to competent authorities and FIUs and is provided to obliged entities when the latter take customer due diligence measures.

Member States should also ensure that other persons who are able to demonstrate a legitimate interest with

1. LANDSVERORDENING van de 8ste juni 1993 houdende bepalingen betreffende het exploiteren van hazardspelen op de internationale markt middels servicelijndiensten en tot wijziging van het Wetboek van Strafrecht van de Nederlandse Antillen.
2. Toelichting op de Nota van Wijziging op de begroting van Curaçao voor het dienstjaar 2018, http://www.minfin.cw/files/Begroting_en_toelichting_op_nota_van_wijziging/00-1.TOELICHTING_NvW_begroting_2018_na_RvA.pdf
3. P.E. Muller, Practical European Tax Strategies 2011, Tax planning opportunities in Curaçao: linking Spanish ETVE and a Curaçao NABV.
4. <http://www.oecd.org/tax/beps/>
5. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament.
6. P.E. Muller, Forfaitair Magazine, 2002, Aantekeningen bij de Algemene Landsverordening Landsbelastingen, edited article on formal tax law previously published in the Antilles law review.
7. \Article 69, subsection 2, Algemene Wet Rijksbelastingen.
8. Letter of the Dutch Minister of Finance, 24 October 2017, <https://www.rijksoverheid.nl/documenten/kamerstukken/2017/10/24/kamerbrief-over-trustkantoren>

respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud, are granted access to beneficial ownership information, in accordance with data protection rules. The persons who are able to demonstrate a legitimate interest should have access to information on the nature and extent of the beneficial interest held consisting of its approximate weight.'

Corporate service directors in particular should take note, if they have not yet done so already, to Articles 16 and 17 4AMLD:

'Timely access to information on beneficial ownership should be ensured in ways which avoid any risk of tipping off the company concerned.

In order to ensure a level playing field among the different types of legal forms, trustees should also be required to obtain, hold and provide beneficial ownership information to obliged entities taking customer due diligence measures and to communicate that information to a central register or a central database and they should disclose their status to obliged entities. Legal entities such as foundations and legal arrangements similar to trusts should be subject to equivalent requirements.'

Covert clawbacks

The principles as described above, should not be taken lightly. Introduction is imminent. The real danger in the implementation of these principles for those who might have been sloppy in the past does not primarily lie in the possibility of swift enforcement by the local Curaçao authorities. Whenever change is demanded, Curaçao has a saying "Poko Poko," which roughly translates to "Take it easy⁶." That is not a bad thing, some "sleight of hand" might improve willingness to change for the better. However, dealing with non-local

officials, Poko Poko usually gets lost in translation. Another Dutch saying, which for the purpose of this article also tends to lose some of its grammatical appeal is "Een jager met een nieuw geweer ziet in alles een konijn," which roughly translates to "A hunter who has just bought himself a new gun sees a rabbit in every object."

For the purposes of these new requirements and the mandates for foreign authorities to locally intervene via fines, indictments or even travel bans for service professionals and ultimate beneficial owners, the definition of a crime can become pretty arbitrary. For example, failing to properly file a Dutch (mainland) corporate income tax return could have serious ramifications, past, present and future, even for Curaçao residents. If Curaçao resident companies, for example, are factually led from the Netherlands but do not report this on a local Dutch tax return, this could in extreme cases put all ultimate beneficial owners and their paid corporate services directors in jail for a maximum of six years⁷. Retrospectively that is, after these proposed measures enter into force.

Now multiply the number of companies that are being managed by these corporate services directors with a factor of a thousand and include all connected service professionals, accountants, and tax advisors, who might have earned good money in assisting these corporate service directors for all these years. Even if these service providers, in principle, reasonably might not have seen any evidence of wrongdoing, failure to call in unusual financial transactions may retrospectively lead to personal liability. Trust service providers should furthermore keep in mind that tasking most matters of compliance to external professional advisors might become impossible all together⁸. This will make the blame game a purely internal matter. In other words, responsibility will not be able to be transferred to external parties.

It is expected that these changes will continue to put additional pressure on the 'Big Four' accounting firms. Service providers who have been relying all these years on entities such as the local 'Stichting Particulier Fonds' to be included in company structures, with reference to Article 17 4AMLD, which will not prevent the retrospective positioning of ultimate beneficial owners in the floodlights after all. How can one revisit such a house of cards without ramifications?

10/10/10

Touching on Curaçao Independence Day one more time, a tool that service professionals could use to rapidly check themselves was invented by Suzy Welch, a business writer for publications such as *Bloomberg Businessweek*. It is called 10/10/10. The tool is easily applied. Three timeframes provide an elegant way of forcing the user to take a step back and ponder the future: (1) How will we feel about it 10 minutes from now? (2) How about 10 months from now?(3) How about 10 years from now? Curaçao might be situated outside of Hurricane Alley but this storm seems unavoidable. In the end, however, it will provide the necessary changes.

These changes are required to restore and upgrade the great potential of the professional services industry and with it the Curaçao gaming regime. When the cards are played right, it will bring financial prosperity for the local population. As a result, all will benefit, as the legislation of 1993 was intended. Furthermore, there might still be some time before the changes are implemented. The deadline of 1 July 2018 was not met. So, who knows? Service providers who are willing to "study up" and respond to the regulatory winds of change will see their professional life expectancy increased, which will invite new business opportunities. Others will see it diminished significantly.