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Our ref: AGNI/16/079

Date: January 10 2017

*Dear Maurice,*

#### **Fixed Odds Betting Terminals**

We have previously discussed the question of the use of gaming machines commonly referred to as Fixed Odds Betting Terminals in bookmakers' premises and I had previously indicated orally that it is my view that the use of such machines on bookmakers' premises contravenes the provisions of the Betting, Gaming Lotteries and Amusements (NI) Order 1985. It might be helpful if I were to set out these views in writing which I now do.

#### Possible Criminal Offences under Northern Irish Law

The law in Northern Ireland concerning gaming machines is regulated by the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (the 1985 Order).

Article 32(5) of the 1985 Order provides:

*"Subject to paragraph (6) and Article 95(1)(b), A licensed office shall not be used for any purpose other than the effecting of betting transactions and no music, dancing or other entertainment, except any*

*entertainment which complies with the provisions of paragraph (3A), shall be provided or allowed, and no refreshment of any kind shall be served, in such an office.”*

Breach of this article is a criminal offence by virtue of Article 32(9).

Article 35 is made entirely subject to Article 95(1)(b). This is a provision which places a general restriction on the use of gaming machines except on certain specified premises including premises specified in Article 108(1) of the 1985 Order. Article 95(2) renders it a criminal offence to use any machine for gaming on premises in contravention of paragraph 1.

Article 108(1)(ba) which was inserted into Article 8 by the Betting and Gaming (Northern Ireland) Act 2004 (the 2004 Order) specifically includes as specified premises “*any licensed office*”, which is defined in the 1985 Order as any premises for which a bookmakers licence is in force.

It appears therefore that, since the coming into force of the 2004 Order the law has specifically permitted gaming machines to be installed and used on bookmakers’ premises provided that the use complies with the conditions set out in Article 108 of the 1985 Order.

So far as is relevant, Article 108 provides:

*“(4A) Not more than two gaming machines (or other such number as the Department may specify, by order subject to affirmative resolution) shall be made available for gaming on any licensed office.....*

*(6)The charge for playing a game once by means of the gaming machine shall be one or more coins inserted in the gaming machine of an amount or value not exceeding (or, if more than one, not in the aggregate exceeding),-.....*

*(b) £0.30 in respect of a gaming machine where the condition specified in paragraph (8) applies.....*

*(8) In respect of any one game played by means of a gaming machine installed on licensed premises such as or mentioned in paragraph 1(b) or on any licensed office, no player or person claiming under a player shall receive, or shall be entitled to receive, any article, benefit, or advantage other than a money prize delivered by the machine of an amount not exceeding £25.*

*...*

*(11) Where any of the provisions of this Article or of any regulations made under this Article is contravened,—*

*(a) in a case falling within paragraph (1)(a), (b),(ba), (c) or (ca), the holder of the bingo club licence or the holder of the licence for the sale of intoxicating liquor or the licensed bookmaker or the holder of the amusement permit, as the case may require,*

*(b) in a case falling within paragraph (1)(d) the person in charge of the gaming machine,*

*shall be guilty of an offence.....*

*(13) In any proceedings for an offence under paragraph (11) or (12) it shall be a defence for any person charged to prove—*

*(a) that the contravention occurred without his knowledge, and*

*(b) that he exercised all such care as was reasonable in the circumstances to secure that the provisions in question would not be contravened.*

*(14) Where any of the provisions of this Article or of any regulations made under this Article is contravened in relation to a gaming machine, then (without prejudice to any liability of any other person under paragraph (11) or (12)) any person who, knowing or having reasonable cause to suspect that the provision in question would be contravened in relation to the gaming machine, supplied the gaming machine shall be guilty of an offence.....*

*(16) The Department may, by order subject to affirmative resolution, substitute for any amount in this Article such other amount as may be specified in the order."*

It would appear therefore that where gaming machines are placed (and used) on licensed bookmakers' offices, the following restrictions apply:

- There must not be more than two machines on the premises (Art. 108(4A))
- The stake for playing a game once using the machine must be paid in coins and must not exceed £0.30 (Art. 108(6)(b) and Art. 108(8) )
- No benefit, article, or advantage must be paid out as a prize other than a prize in money which does not exceed £25. (Art. 108(8))

I note that the Department of Communities has a power to increase/decrease the maximum stakes and prize moneys by affirmative order but I am not aware of it having done so.

Where the use of a gaming machine on bookmakers premises contravenes these requirements, the licensed bookmaker will be guilty of an offence, subject only to the defence that the contravention occurred without his knowledge and that he had exercised such care as was reasonable in the circumstances to ensure that the provisions were not contravened. (Art. 108(13)) (In this regard it is clear that mere lack of knowledge of the law would not be sufficient to amount to a defence.)

Where the use of a machine contravenes a provision of Article 108, any person who supplied the gaming machine knowing or having reasonable cause to believe that the provision would be contravened is also guilty of an offence. (Art. 108(14))

Assuming that a relevant machine therefore satisfies the requirement of being a “gaming machine” (which I consider below) it appears that a B2 machine (as categorised under the law of England and Wales) will inevitably contravene the restrictions in Art. 108 of the 1985 Order, as amended, if used upon bookmakers premises (or indeed other premises). This is because the maximum charge for use of a B2 machine is £100 and B2 machines are defined in terms of not falling within the definition of categories A,C or D or the other sub-categories of category B. All of the other English categories of gaming machines (apart from category A which is unlimited and can in England and Wales only be lawfully used at a regional casino) have a maximum charge to play which does not exceed does not exceed £5. Therefore a machine categorised as a B2 machine will inevitably breach the restrictions in Article 108.

The use of such a machine on bookmakers premises would therefore amount to an offence committed by the bookmaker, subject to the statutory defence, and also an offence for any supplier who supplied the machine subject to that person having the requisite knowledge, or reasonable cause to believe, that the use would breach a provision of Article 108.

It appears therefore that the use of Fixed Odds Betting Terminals on bookmakers’ premises will be unlawful as long as such machines can be defined as “gaming machines.”

#### Gaming Machines in Northern Ireland law

Article 2 of the 1985 Order defines “gaming machine” thus:

*“gaming machine means any machine which-*

*(a) Is constructed or adapted for playing a game of chance by means of it; and*

*(b) Has a slot or other aperture for the insertion of money in the form of cash or tokens"*

Game of chance is defined by Art. 2 as including a game of chance and skill combined and a pretended game of chance or of chance and skill combined. Although the definition specifically excludes any athletic game or sport, this would appear to imply an extremely broad definition of "gaming."

Art. 2(8) of the 1985 Order also provides:

*"(8) For the purposes of this Order in relation to a gaming machine, playing a game of chance by means of a machine includes playing a game of chance by means of a machine and partly by other means if (but only if) the element of chance in the game is provided by means of the machine."*

I understand that one argument which may be deployed in the context of any prosecution is that the machines in question are not "gaming machines" but are simply betting machines. However, Art. 2 of the 1985 Order which defines the term "bet" provides that "*Bet does not include any bet made or stake hazarded in the course of, or incidentally to, any gaming.*"

What can be drawn from this is that, if a machine is both a betting and a gaming machine, then it will be treated, for the purposes of the 1985 Order, as a gaming machine. However, in order to satisfy a court that a machine is a gaming machine, it will still be necessary to establish that the service, or services, which the machine provides can properly be described as games and that the machine satisfies the requirement of having a slot or aperture for the insertion of money in cash or tokens.

Taking first the requirement of an aperture, it appears that a machine would not be a "gaming machine" if payment could be made otherwise than via the terminal itself. I have not however been made aware, and I do not believe that this is an issue in relation to Fixed Odds Betting Terminals.

It is useful to consider the description of Fixed Odds Betting Terminals was given by Rimer LJ in the Court of Appeal in the case of *HMRC v Rank Group Plc.* (This case was subsequently appealed to the Supreme Court, as will be discussed later.) At paragraph 47 of his judgment he quotes HMRC guidance issued in 2005:

*"FOBTs look like traditional gaming machines and can be played for cash. They allow a variety of simulated games to be played on them including roulette, virtual horse and dog racing, gold and number games. A central feature of their operation is that the terminal is connected to a remote server, which contains a random number generator (RNG). It is this RNG that creates the chance element of the games. The FOBT itself contains the visualisation software. They are located at bookmakers premises.....*

*Because the element of chance is not provided by the terminals themselves, but by a RNG which is outside the machine, both bookmakers FOBTs and section 16 and section 21 terminals cannot be treated as gaming machines. Consequently, if the terminals offer the facilities for the placing of bets or for playing any games of chance, they will be exempt from VAT under Schedule 9, Group 4, Item 1 of the VAT Act 1994."*

This reasoning did not however survive the appeal to the Supreme Court. (*HMRC v The Rank Group* [2015] UKSC 48). As Lord Carnwath said at paragraph 31 of the Supreme Court judgment:

*"Here what determines the outcome of the game is the pressing of a button (or pulling a lever) on the terminal. The pressing of a lever is a*

more sophisticated equivalent of a player rolling a dice. In that context, it can fairly be said, the winning number is produced "by means of" the player's action in throwing the dice. So here the RNG produces a pre-programmed sequence of numbers which changes very rapidly. The element of chance in any game is produced "by means of" the action of the particular player in pressing the button and so interrupting that ever changing sequence at a particular moment. The terminal is not simply communicating information from the RNG but is the active means by which the winning or losing combination is generated. The RNG is a necessary part of that process, but its response (wherever situated) is entirely automatic. In those circumstances, it is a fair use of language in my view, and consistent with the apparent policy of the legislation, to describe the element of chance as provided "by means of" the terminal."

Although the *Rank* case did not directly concern Fixed Odds Betting Terminals (although they were discussed), it is clear that this reasoning applies to Fixed Odds Betting Terminals.

Pausing there, I am aware that when the police attempted to instigate a prosecution in or about 2012 in relation to a Fixed Odds Betting Terminal, the PPS refused to prosecute. I have had sight of the relevant PPS decision which states

*"There is no admissible evidence that would satisfy a court beyond all reasonable doubt that the machine in question-the Fixed Odds Betting Terminal-satisfies the definition of a "gaming machine" within the meaning of article 2, in particular Article 2(8) of the Betting, Gaming, Lotteries and Amusements (NI) Order 1985...."*

Article 2(8) provides as follows:

*"(8) For the purposes of this Order in relation to a gaming machine, playing a game of chance by means of a machine includes playing a game of chance by means of a machine and partly by other means if*

*(but only if) the element of chance in the game is provided by means of the machine."*

It appears clear from the above that the reason why the PPS refused to prosecute the offence was not that the games played on the machine were thought not to constitute games, but that it was thought that the element of chance was provided by means external to the machine itself. If this was in fact the sole reason, this has now been entirely superseded by the decision of the Supreme Court in *HMRC v The Rank Group PLC*. [2015] UKSC 48 and that, following the Supreme Court in that case, it is clear that the element of chance can be said to be provided by means of the machine.

It is interesting to note that, at the Court of Appeal stage in the *HMRC v Rank* case, HMRC maintained their former position that Fixed Odds Betting Terminals were VAT exempt. They abandoned the external Random Number Generator argument, but took the view that these machines were not used for games of chance but for betting.

It is difficult to agree with HMRC's categorisation of what takes place in relation to a Fixed Odds Betting Terminal as betting. Firstly, there is no external event upon which bets are placed. There are no individual odds attributed to any individual "bet". (The odds in a FOBT game are pre-determined in accordance with whatever the computer has programmed them to be.)

Essentially, what the customer does is to insert money and push a button/ pull a lever and gambles that, at the instant that he pushes the button, the most recent number generated will be a winning combination. It is difficult to envisage any real difference in substance between this and roulette which has long been considered to be a game of chance when played at casinos.

I note the case of *IFX Investment Co Ltd and Others v HMRC* [2016] EWCA Civ 436. This was a case concerning the issue of whether a Spot the Ball competition was a “game of chance” and therefore exempt from VAT under the provision of the Value Added Tax Act 1994. In that case, and consistently with a broad interpretation of the term “game of chance”, I note that the court found that there is no hard and fast rule or presumption that, in order to be a game, inter player participation, is required. This is entirely consistent with a broad interpretation of the term “game of chance.” It is also entirely consistent with the commonly held understanding of some card games as being “games”, for example solitaire, which can be played by one player alone. I would add to this that the definition of gaming machine in the 1985 Order appears designed to encompass, or certainly not to exclude, such machines as are playable by one person alone at a particular time. If this were sufficient to exclude Fixed odds betting Terminals from the definition “gaming machine” as defined in article 2 of the 1985 Order, this would exclude not only FOBTs but also any other category of machine which are currently understood to be gaming machines under Northern Ireland law.

Furthermore Art. 2(6) of the 1985 Order specifically envisages games playable by one person alone being considered to be “games” for the purposes of the order as it provides:

*“In determining for the purposes of this Order whether a game which is played otherwise than against 1 or more other players is a game of chance and skill combined, the possibility of superlative skill eliminating the element of chance shall be disregarded.”*

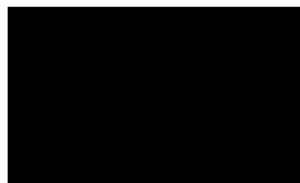
In this context, it is apparent, having regard to the nature of the machines in question, that it cannot properly be argued that the games playable by means of them are not games “of chance”. These games present no opportunity for the element of chance to be defeated by superior skill. Even if some element of skill were involved, game of

chance, as defined by the 1985 Order includes a game of chance and skill combined. (Art. 2 of the 1985 Order)

It appears from a review of the authorities concerning games of chance that the elements of participation, communication between the player and the machine and there being a beginning and an end to the game are all present. Furthermore, insofar as it is relevant that a player be present in a certain place and at a certain time, this is also fulfilled in relation to the games played on FOBTs.

In conclusion, I think it highly likely that a court would find that such machines are "*gaming machines*" within the meaning of the 1985 Order. It follows from this that the use of such a machine on bookmakers premises, exceeding the maximum limits in terms of stake and payout prescribed by the 1985 Order, would not be lawful under the present legislation and indeed it is my understanding that the PSNI are currently seeking to pursue a prosecution in respect of at least one individual with regard to such an offence..

I am happy to discuss this matter further if you should consider this useful.



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