

....and finally Spain has a new Gambling law!

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On May 28, the long awaited Gambling Law was finally published in the Spanish Official Gazette, and came into force the next day.

The new Law (13/2011), dated May 27, on Gambling Regulation ("Law") is the starting point from which the Spanish gambling legal framework will now be constructed.

I. Scope

Historically, the gambling regime in Spain has been overseen by the 17 autonomous regions. The main aim of the new legislation, as stated in its explanatory memorandum, is to harmonise the regulation of online gambling in Spain, an activity which clearly transcends regional boundaries. However, under the new Law the autonomous regions will carry on determining most gambling regulations and policies within their respective territories.

The new regime will regulate **national gambling**, in particular, "*gaming operations through electronic, interactive and technological means*" which includes the internet, television, mobile phones, land lines and any other interactive communication system where physical means have an ancillary role. The Law also regulates the provision of games by the incumbent monopoly lottery operators ONCE and LAE, regardless of the channel through which those games are provided. Regional gambling will continue to be regulated by the autonomous regions.

Advertising, promotion and sponsorship concerning gambling activities are also included in the scope of the Law. In particular, the Law prohibits advertising, sponsorship or endorsement, in any form, of gambling activities as well as advertising or promotion of gambling operators who do not hold the relevant licences. The Act states that advertising, sponsorship and promotion activities carried out by media operators regarding gambling activities or gambling operators are subject to an additional authorisation regime in terms to be detailed in the forthcoming implementing regulations.

For the purpose of the Law, **gambling comprises** lotteries, betting, raffles, contests, occasional games and transnational games (including those organised by companies outside Spain but targeted at Spanish

residents), as well as any other activity in which amounts of money or other financial consideration may be transferred between the participants, regardless of whether skill or chance is primarily involved. **Any kind of gambling not expressly regulated by the Law or by future regulations will remain prohibited.**

The following types of gambling activities are regulated by the Law: sports pool betting; fixed odds sports betting; sports betting exchanges; horserace pool betting; fixed odds horserace betting; other forms of pool betting; other forms of fixed odds betting; other forms of exchange betting; raffles; competitions; other games¹; and random combination games.

It should be noted that live in-play betting and bingo games have not been expressly mentioned in the Law and consequently, in principle, are not allowed, based on their supposed addictive effects (an argument mainly promoted by LAE). This contrasts with the regulation in force in some autonomous regions where both live in-play betting and bingo are permitted and operated legally, but only within the territory of the region (e.g. the Autonomous Region of Madrid).

In particular, the lack of definition of bingo games is likely to benefit the monopoly lottery operators ONCE and LAE, provided that they can successfully argue that bingo falls within the scope of their lottery licence.

The Law sets out different treatment of different gaming categories characterised by different access conditions, exclusive rights for certain kinds of activities and different tax regimes.

One of the issues raised by the Law is that the incumbent monopoly lottery operators, ONCE and LAE (both currently government-owned organisations), will not be subject to the same taxes or licensing conditions as other new entrants into the market. On the contrary, these companies have been granted rights to offer some games online without any requirement to obtain a separate licence for a limited time while a new regulatory framework is put in place. In addition, the monopoly operators are exempt from the application of the taxation regime for lottery games at a national level. The Spanish Competition Authority raised concerns about the compliance of these provisions with EU State aid law given their potential impact on future competition within the gambling sector and recommended that the provisions be reconsidered, particularly given that 30% of LAE's share capital will be soon owned by private investors.

II. Access to the market

The Law establishes certain **licensing categories and entitlement procedures**. Operators providing services to the Spanish territory will be required to obtain the relevant licence or authorisation, granted by the National Gambling Commission.

There are two categories of licences, general licences and single licences as well as a permit for occasional gambling. Licences are not transferable and their grant implies payment of administrative taxes.

¹ "Other games" are defined as games not defined elsewhere in the regulation but which imply a chance or risk over money or other valuable consideration. This wide definition is likely to be the subject of considerable debate and will probably be clarified in the implementing regulations. The Law expressly mentions, as an example of this definition, poker and roulette games.

A) General licences are a prerequisite to entering the market and are required for the operation of betting games, raffles, competitions and other gambling games. These licences are to be granted for ten years, renewable for an additional ten years through an administrative procedure which will be available only every eighteen months. The administrative procedure will be subject to specifications to be approved by the Economy and Treasury Ministry. Specifications may include as criteria that should be taken into account: the experience of operators, their economic solvency and means at their disposal to operate the licence. Specifications will also set the minimum registered capital, as well as the total and paid-up capital. Along with the request to participate, the applicant must submit an operational plan that takes into account the principles of responsible gaming, training of employees, distribution channels, game design and other aspects of their activity that may be established by future regulations.

The **number of general licences to be granted is, in principle, unlimited**. However, the National Gambling Commission will have the power to limit the grant of general licences to certain types of game, based solely on reasons of public interest protection, child protection and prevention of gambling addiction. In this case, the general licences granted will not be automatically renewable.

Operators willing to obtain a general licence **must apply in advance for provisional registration in the General Register of Gambling Licences**, under the terms to be established by future regulation.

Furthermore, **operators awarded a general licence will be required to operate through a dot.es website and to redirect to this specific website all connections made from locations in Spain or using Spanish user accounts** to non-dot.es websites owned or controlled by the gambling operator, or any member of its group.

Another important aspect is that only legal entities structured as a Spanish public limited company ("*sociedad anónima*") for the sole purpose of being gambling operators, may apply for a licence. Additionally, **undertakings resident in an EU member state must have at least one permanent representative/agent in Spain**. The latter is likely to be the subject of considerable debate given that a "permanent representative/agent" might be understood as implying "permanent establishment" for tax purposes under Spanish law.

Furthermore, the Law establishes **control over the solvency of the operators**, prohibiting the granting of licences or authorisations to those who fall within certain categories of illegality or non-compliance with tax or social security obligations. The holding of equity, directly or indirectly, by non-EU companies will be subject to the provisions of legislation in force on foreign investments in Spain.

Operators granted a general licence must **provide a guarantee** in the terms to be established by future regulations. Similarly, additional guarantees may be linked to single licences regarding the fulfilment of specific obligations for the payment of prizes and the specific development of each form of gambling.

Finally, as mentioned above, **the award of general licences will be conditional upon operators being up-to-date with the payment of tax obligations**. As explained below, tax obligations became enforceable from the Law's entry into force.

B) Single licences are required for each type of gambling game to be offered and have a duration of between one and five years. The withdrawal of a general licence implies the withdrawal of all single licences linked to it.

Future regulations will specify the procedure by which the National Gambling Commission may accept the documents already submitted by EU licensed operators in other EU countries for the purpose of obtaining the corresponding licences.

C) Permits may also be granted for the provision of occasional gaming activities.

III. Approval and location of electronic gambling equipment

Electronic gambling **equipment must be approved** by the National Gambling Commission. In principle, the Law does not oblige operators to have servers based in Spain.

The Law only requires gambling operators to have a **Gambling Central Unit** (i.e. a game server) ("*Unidad Central de Juegos*") which can be monitored from Spain by the National Gambling Commission, regardless of its location. However, eventually, the National Gambling Commission may require **secondary units** (i.e. copies of the game server/s) to be located in Spain for the purpose of verification and control.

To this extent, it must be borne in mind that under Spanish law, **servers might be considered as a permanent establishment for tax purposes**, based on the fact that the Spanish Tax Agency applies the criteria of "relevant economic presence of the operator in the State", which means that if more than a minimum volume of transactions per year are placed through the servers, then the operator might be regarded as having a permanent establishment even if its main operations, facilities and personnel are all outside Spain.

IV. Taxation

The level of taxation to be imposed on online gambling operators has been one of the most controversial aspects of the new regime. Earlier plans to tax all forms of online gambling at five per cent of turnover or more were heavily criticised by the industry. However, in a significant turnaround by the Spanish

authorities and Parliamentary groups, most forms of online gambling will now be subject to a gross profit tax instead.

The Law sets **different taxation structures for different types of gambling**. Most forms of online gambling will face a **gross profit tax**. The percentage of the different taxes imposed ranges between 10% and 25%. Fixed odds horserace betting will bear a 25% gross profit tax as well as other fixed odds games and exchange betting. **Turnover taxes** remain for sports pool betting (22%), as well as for horseracing pool and pari-mutuel bets (15%).

The **autonomous regions may raise by as much as 20 percent the taxable rate** for activities carried out by operators with tax residence in their territory. This increase will exclusively be applied on the amount wagered by those who have their tax residence in the corresponding autonomous community territory. This provision has been strongly criticised by the industry.

Gambling activities subject to a tax on gambling are exempt from VAT ("*Impuesto al Valor Agregado*"). However, this exemption does not extend to management services and other operations ancillary or complementary which are not subject to gambling tax, with the exception of management services for land-based bingo.

A controversial **administrative fee of 1% of an operator's turnover** has also been established by the Law for the financing of the National Gambling Commission's regulatory activities. This fee will be payable on an annual basis.

It is worth highlighting that from May 29, 2011, **all gambling operators providing services to the Spanish territory will be required to pay the taxes and administrative fees set by the Law** as if they already had a licence.

For the payment of the relevant taxes, operators must make the declaration and self-assessment of the tax due on a quarterly basis within a month following the end of each quarter. The public entity in charge of collecting the corresponding taxes from operators will be the Spanish Tax Administration Agency ("*Agencia Estatal de Administración Tributaria*"). By regulation, the Minister of Finance will determine the place, terms and the corresponding self-assessment and payment forms as well as the cases in which the payment must be made online.

It should be noted that, in general, the following will be **jointly liable for the payment of tax obligations**: (i) those offering, by any means, gambling activities for consumers with tax residence in Spain, and (ii) those making profits from the operation of gambling activities, regardless of the territory from where the gambling operator is providing services, provided that the gambling operators are not licensed; as well as (iii) Internet access and information society service providers (ISPs and ISSs) where they should have reasonably assumed that such infrastructure or services are being used or specially dedicated to the

provision of the gambling activities regulated by the Law, provided again that the gambling operators are not licensed.

The National Gambling Commission will make available for these purposes a **public online registry** where entities may verify at any time if certain operator has been granted the relevant licences.

V. Regulators of the gambling industry

The Law also establishes the jurisdiction of three main regulatory authorities over the gambling industry: (i) the Economy and Treasury Ministry; (ii) the National Gambling Commission; and (iii) the Gambling Policy Council.

The **Economy and Treasury Ministry** will be in charge of, inter alia, issuing the rules for each game following the criteria established by the Gambling Policy Council.

The role of the **National Gambling Commission** will be to grant licences as well as to regulate the proper functioning of the market, resolving disputes between operators and guaranteeing the protection of general interests. The National Gambling Commission will be in charge of sanctioning operators when infringements occur. For example, the provision of services without a licence may be subject to an economic sanction in the range of between €1m and €50m and may also include revocation of licences, disqualification for a maximum period of four years, or the closure of the platform used for the provision of the service. The National Gambling Commission had been awarded further powers under previous drafts but in order to allow participation of the country's autonomous regions through the Gambling Policy Council, the role of the National Gambling Commission has been limited.

The National Gambling Commission will also therefore liaise with the **Gambling Policy Council**, which will coordinate the national and autonomous regions' policies. The Gambling Policy Council will be a forum for the discussion of gambling policy and will provide guidance on such policies.

VI. Transition period

The Law sets a **transition period** from its entry into force to the moment the first general licences are granted.

This will apply (i) to **sport sponsorship and advertising or promotion deals** signed before January 1, 2011, which will remain valid until the conclusion of the first licensing procedure or until January 1, 2012 at the latest and (ii) to **operators currently providing services to the Spanish market**, suspending the sanctions regime until the conclusion of the first licensing procedure or until January 1, 2012 at the latest.

Until the effective establishment of the National Gambling Commission (in principle, six months after the Law's entry into force) its tasks will be exercised by the General Directorate of Gambling ("*Dirección General de Ordenación del Juego*"), which is part of the Economy and Treasury Ministry.

VII. Main changes introduced by the Law 13/2011 from previous drafts of the Bill.

The Law includes some important changes from the draft passed by the Spanish cabinet to the Spanish Congress on February 4, 2011, some of which have been warmly welcomed by the industry. The changes proposed by the different parliamentary groups and approved by the Spanish Congress in the draft document dated 12 April are mainly the following: (i) the change from a tender process to an administrative procedure for the award of general licences under which a potentially unlimited number of operators may obtain a licence provided that all requirements are met²; (ii) the requirement to operate through a dot.es website; (iii) the inclusion of poker and roulette games in the scope of the Law, leaving other games, however, in a legal limbo, in particular bingo and live in-play betting; (iv) a transition period applicable to sport sponsorship and advertising or promotion deals signed before January 1, 2011; (v) the entry into force of the Law the day after its publication in the Spanish Official Gazette; (vi) football clubs may receive part of the gambling tax revenue (not defined, however, is the exact percentage and the clubs who will benefit from this); and (vii) the eventual validation of regional licences at national level (though this is not further developed by the Law).

In the Senate, in its session on 4 May, further amendments were made, in particular, (i) inclusion of a transitional period for operators currently providing services to the Spanish market, which basically suspends the sanctions regime until the first licensing procedure is finalised or until January 1, 2012 at the latest; (ii) the award of general licences will now be conditional upon operators being up-to-date with the payment of tax obligations; and (iii) a definition of those who will be jointly liable for the payment of tax obligations (which now excludes media companies unlike previous versions of the Bill).

VIII. Final remarks

Clearly, there are many gaps which have been left for future regulations to complete. Consequently, there is still a long way to go before we can have a full overview of what will be the Spanish legal framework.

The first implementing regulations are expected by September 2011 and the first licensing process by December 2011, so that the first licences will only be granted by the beginning of 2012. However, as previously mentioned, it must be borne in mind that taxation is already in force and applicable to those operators already providing services within Spain.

Key issues that remain to be clarified include (i) the proceedings that the regulatory authorities will use to enforce ISPs' and ISSs' responsibilities under this Act, (ii) the way regional and national regulations will

² Under the previous draft only five (5) general licences were intended to be granted after a public tender process. This system was strongly criticised by the Spanish Competition Authority as it will limit effective competition in the newly liberalised sector.

compete to attract operators to their territories, (iii) and the implications that secondary servers may have for tax purposes.

Spanish gambling is a very attractive market in terms of turnover but there are still some critical unresolved issues that go directly to the potential viability of new entrants' businesses.



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The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.

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