

THE THREE QUESTIONS YOU SHOULD ASK ABOUT THE NEW SPANISH REGULATED MARKET

Albert Agustinoy Guilayn, Attorney, DLA Piper

In recent months there have been a large number of legal developments that have shaken the Spanish gambling market. On May 28, 2011 the long expected new Spanish Gambling Act came into force; the authorities are already drafting the secondary regulations that will shape up the new regulatory framework; and operators have been provided with an interim period for keeping in exploiting their Spanish businesses... as well as for starting to pay the corresponding taxes.

Taking into account the quick pace that legal issues have followed in connection with the Spanish online gaming industry, it would seem worth taking some time to analyze the new regulatory landscape that is being deployed in Spain and how this is going to evolve. In order to do so, there is nothing better than asking the classic questions: where do we come from?; where are we now?; and where are we going to? Below you may find the answers to these fundamental questions (at least in regards of the Spanish online gambling market).

1. WHERE DO WE COME FROM?

It is difficult to understand the current legal environment without making a quick review of the traditional legal framework that has applied until recent times to gambling services in Spain. This type of activity has always been under a very strict regime (as a matter of fact, the operation of gambling activities was not permitted in Spain until 1977). Hence, the regulatory framework which anteceded the new Gambling Act could be described as restrictive, tough and outdated. Indeed, under these previous regulations it was almost impossible for private companies to operate gambling activities at a national level. Moreover, the breach of said provisions could imply very severe sanctions which could even –theoretically- lead to imprisonment. As a final remark, those provisions were approved long before the emergence of the Internet and other IT developments, so they were clearly unfit for dealing with a dynamic reality such as the online gaming industry.

Regardless of this restrictive legal environment, the online gaming industry has flourished in the last years in Spain (having busted the Spanish market as one of the references in Europe for this type of activities). This paradoxical situation is explained at a great extent by the difficulties for the Spanish authorities to apply old-fashioned gaming regulations to the lively reality of online gaming and the obvious disconnection existing between said regulations and the growing demand for online games.

The result of this particular situation was an unpleasant situation where none of the actors was comfortable. Operators did not count with a reliable legal environment for the development of their activities; the authorities had to rely on inadequate legal instruments for dealing with an emerging reality; and consumers were unable to defend properly their rights.

2. WHERE ARE WE NOW?

The unsatisfactory legal situation described above started to change on 2007, where a parliamentary Act (namely, Act no. 56/2007) did set forth a duty for the Spanish authorities to file a Bill aimed at regulating the online gaming sector. It took quite a long time for the Spanish government to fulfill this obligation, but finally on January 2011 that bill was filed in the Parliament, giving place to an intense discussion of the provision of the piece of legislation that would become the key element for shaping up the new regulatory environment for the operation of online gaming activities in Spain.

After a few months (and a discussion of more than 200 amendments to the original bill), the bill was approved as Act no. 13/2011, dated May 27, on the Regulation of the Gambling Sector ("*Ley 13/2011 de Regulación del Sector del Juego*"). The main features of said Act could be summarized as follows:

- Gambling is defined as any activity where amounts of money or valuable goods are put at stake in connection with the results of future or uncertain events and depending, at a given level and regardless of the skills of the participants, on randomness and which may imply the awarding of prizes. This definition is complemented with the identification of a number of general categories of authorized games (basically lotteries; bets and "other games" an open category which may include any game which is approved by the Spanish authorities, including, for example, poker, bingo or casino games-).
- The operation of gambling activities is subject to previously obtaining the licenses set forth by the Act. In particular, any operator will be required to obtain a general license (covering the provision of a general category of game such as, for example, bets or "other games" and having a renewable 10-year term) as well as a singular license for each type of game it will be offering (so, for example, an operator aiming at offering fixed-odds bets should obtain a singular license for this type of betting; should it want to offer mutual bets, then another singular license should be obtained). Note that singular licenses will only be available in connection with types of games that have been previously approved and regulated by the Spanish authorities.
- Operators shall be required to fulfill a number of requirements in order to be entitled to apply for and operate their activities. Particularly, they will be required to fulfill a number of legal, technical and financial conditions that are to be defined by the secondary regulations developing the Act. Moreover, operators will be required to count with a permanent representative in Spain, who will act as the point of contact with the authorities.
- Advertising (including sponsoring) will only be possible for authorized operators, even though limitations will be defined in secondary regulations.
- Infringements of the provisions of the Act may lead to extremely tough monetary sanctions. Note, for example, that the operation of gambling activities in Spain without counting with the corresponding licenses will be deemed as a very severe infringement which may be sanctioned with fines ranging from €1Million up to €50Million. Moreover, advertising non-authorized gaming activities will be considered as a severe breach of the Act, leading to fines that may amount from €100,000 up to €1Million.

- Operators will be obliged to pay a gambling tax which taxable base, in most of the cases, will correspond to gross profits and will have a tax rate of 25% (which, theoretically, could be augmented with an additional regional rate applying on those profits obtained in the Spanish region where the representative of the operator resides).

The new Gambling Act entered into force on May 28, 2011. Nevertheless, an interim period was established in order to avoid an undesirable black-out situation. Hence, the application of the sanctioning regime as well as of the provisions related advertising and sponsorship has been suspended until the earlier of the following dates: the date where the first licenses are granted; or January 1, 2012. As a consequence of this interim period, the operation of all type of online gambling activities in Spain is being permitted. Nonetheless, all those companies operating in Spain during said period will be obliged to pay the respective gambling taxes as contemplated in the Act.

3. WHERE ARE WE GOING?

As mentioned above, the final shape of the new regulatory framework will be defined at a great extent in the regulations that the Spanish authorities should be approving in the next weeks. Pursuant to the statements made at this respect, it would seem that the Spanish regulator's objective is to have the first set of licenses granted by mid-December (quite an ambitious plan taking into account the complexities of these regulations and the short term for drafting and approving them).

In spite of the fact that no official draft version of those regulations has been published yet, there are already a number of elements which have been announced by the Spanish authorities:

- First games to be approved: According to the public statements made by the Spanish regulator the following games will be likely approved in first instance: sport, horse-racing and "social" bets (on a mutual and fixed-odds basis); poker; bingo; roulette; baccarat; black jack; and "supplementary games" (i.e. popular games that, in spite of having a component of randomness, are essentially aimed at entertaining). Other games (such as virtual slot machines or exchange betting) should be approved in a later stage.
- Legal requirements: Applicants will be required to have the legal form of a Spanish *sociedad anónima* (a public limited liability company as regulated by Spanish law) or of an equivalent corporation existing under the law of another jurisdiction belonging to the European Economic Area. Moreover, applicants shall be required to have as their unique corporate object the operation of gambling activities as well as to have fulfilled all their tax and social security duties.
- Lack of international liquidity: In the initial stages of the new regulated market, the operators will not be allowed to offer international liquidity to their players. Another thing is that, in the medium term, the Spanish authorities allow the operators to connect their clients with those from other jurisdiction with which authorities the Spanish regulator has executed an agreement of cooperation/mutual recognition.
- Financial requirements: Applicants will be required to count with a corporate share capital of at least €100,000. Moreover, they will be required to count with a Spanish bank account and to file financial guarantees still to be defined.
- Costs associated with the application: Any operator aiming at entering into the new regulated Spanish market shall be required to face a number of costs which could be summarized as follows:

(i) Administrative fees: The applicants shall be required to pay the administrative fees contemplated by law. Hence, for example, they shall be required to pay €2,500 for being inscribed in the public registry of licensed operators as well as €10,000 per application filed before the authorities.

(ii) Financial guarantees: The operators when filing each application for a general license shall be required to file a financial guarantee amounting €2 Million. It is important to bear in mind that, pursuant to the applicable provisions, such guarantee must be issued by a bank, insurance or financial entity which is authorized to do business in Spain.

(iii) Technical certification: The operators shall be required to prove that their technical platforms have been certified by accredited laboratories, a process which is going to have an obvious economic impact on the entrants in this new market.

- Technical requirements: Operators shall be obliged to use an .ES domain name in connection with their Spanish online activities. In addition, they will be required ensure a secure identification of players and to allow remote and live monitoring of their operations by the Spanish authorities (likely through the use of a secured database). It seems probable that Spanish authorities may require locating a small part of their technology (the so-called "Safe" element of their internal control unit) within the territory of Spain, even though this remains as an issue to be confirmed. Finally, operators will be obliged to pass periodical security audits on their systems.

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