THE LAW REVIEWS

The Gambling Law Review: Spain

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DLA Piper
07 June 2021

Overview

i Definitions

> According to the Spanish Act No. 13/2011, dated May 26, 2011 on gaming activities (the Gambling Act) a 'gambling activity', which consequently is subject to the provisions and requirements set forth in the Gambling Act, is understood to mean any activity that involves risking sums of money or economically assessable objects on future and uncertain results that depend to some degree on chance, and that grant prizes in cash or in kind. Therefore, the existence or absence of these three elements (participation fee, chance and prize) will determine whether a certain activity should be considered as a gambling activity (subject to obtaining prior authorisation or licence) or a pure 'gaming activity', which in most of the cases would not be subject to a prior licence or authorisation.

The scope of application of the Gambling Act excludes the following: (1) games or competitions played purely for fun, as a hobby or for recreational purposes, that constitute social uses, as long as they do not imply the payment of a prize and when they do not represent financial profit for the promoter or operators of any type; and (2) promotional draws with advertising or promotional aims.

Furthermore, 'lotteries' and 'betting' are defined in Article 3, Sections (b) and (c) of the Gambling Act as follows:

> b) Lotteries. Lotteries are defined as gaming activities in which prizes are awarded in cases where the number or combination of numbers or signs, expressed in the ticket, slip or electronic equivalent, agree in whole or in part with what is decided by a sweepstake or event held at a predetermined date or in a prior program, in the case of instant or pre-drawn games. Lotteries shall be marketed in tickets, slips or any other form of participation by material, computer, telematic, telephonic or interactive means.

> c) Betting. A bet is defined, whatever its type may be, as that gaming activity in which amounts of money are risked on the outcome of a predetermined event, the outcome of which is uncertain and outside the participants' control, the amount of the prize given being determined as a function of the amounts risked or other factors previously established in the regulation of the specific type of bet.

ii Gambling policy

> In Spain, betting products, poker, casino games (such as blackjack, roulette, baccarat or bingo) and lotteries are, in general terms, permitted, although subject to prior licence or authorisation. The regulatory framework and

licence or authorisation regime applicable to the above products varies depending on whether they are offered remotely or land-based.

In addition, lottery games (and as described in more detail) are an oligopoly in Spain, and currently only two operators (being one of them a state company) hold the corresponding licence.

When it comes to fantasy games and e-sports games, it should be noted that those are not specifically regulated in Spain.

State control and private enterprise

In Spain, the development of lottery games has been expressly reserved to two operators in the Gambling Act, one of them being a state-owned company.

The two operators that currently are authorised to offer lottery games in Spain are:

a. Organización Nacional de Ciegos Españoles (ONCE) and

b. Sociedad Estatal Loterías y Apuestas del Estado (SELAE).

It is, therefore, not permitted to commercialise lottery games in Spain that are not the ones organised by SELAE (a state-owned company) or ONCE (as it could be foreign lotteries), as it would be construed as infringing the exclusivity granted to SELAE or ONCE.

On the top of this, the Spanish authorities' interpretation is that betting on the outcome of lottery games, both lottery games organised by SELAE or ONCE, or foreign lottery games organised in other countries cannot be commercialised in Spain, as it will be considered as infringing the exclusivity granted to SELAE or ONCE. Therefore, commercialising and advertising these activities in Spain, or allowing players with a Spanish IP to participate in these activities, would be considered as an infraction of the Spanish regulations and, therefore, a subject to be sanctioned.

Territorial issues

Gambling matters are regulated in Spain on a national and subnational level, depending on the territorial scope of the gambling activity offered.

Spain is a country divided in to 17 autonomous regions, each with their own legal capacity to regulate certain local activities happening within their regional territories. As gambling regulation is a competence transferred to those autonomous regions, each of those regional governments is entitled to regulate gambling matters occurring within its regional territory.

From a practical perspective, this means land-based gambling activities are subject to regional and local regulations, which vary from one autonomous region to another, and online gambling activities are regulated at a national level because they are offered in more than one regional territory.

Having said this, and besides the fact that the applicable legal regime varies quite a lot from one region to another, there are no particular regions or localities in Spain that favour the offering of gambling activities more than others.

Offshore gambling

Offshore operators are not allowed to offer gambling products in Spain based on foreign licences; however, offshore operators may be entitled to apply, and in many cases obtain, the corresponding Spanish licence or authorisation to offer gambling products in Spain. In other words, it is not always mandatory to incorporate a Spanish company in order to apply for and obtain gambling licences, being in most of the cases (especially in the online gambling field) sufficient to be a company based in the EU and equivalent to a Spanish public limited liability company.

In terms of enforcement, since the online gambling activities to be offered on a national level was regulated for the first time at the end of 2011 and the first licences were granted in June 2012, the Spanish authorities launched an ambitious enforcement programme in order to fight against the black market, which were considered to be those offshore operators offering online gambling activities to Spanish residents without having the corresponding mandatory licences. The Spanish authorities keep implementing this enforcement programme by carrying out random audits to verify whether offshore operators with no licence in Spain have IP blocking systems in order to impede Spanish residents from accessing to their platforms, as well as making deposits and playing.

The result of this enforcement programme is that several fines have been imposed on offshore operators. Even though not all of those fines have been collected (the enforceability could be challenging), it is important to highlight that some of those operators accepted the fines, and paid them in order to prevent being disqualified from applying for a Spanish online gambling licence. In this sense, it is interesting to know that having been sanctioned because of offering online gambling activities in Spain, directly or through a company within the same group of companies, can prevent an operator from obtaining a Spanish online gambling license.

Legal and regulatory framework

i Legislation and jurisprudence

The main laws and regulation of gambling matters on a national level are as follows.

General regulations

General regulations are:

a. Gambling Act No. 13/2011, dated May 26;

b. Royal Decree No. 1613/2011 of 14 November, establishing technical requirements for gaming activities;

c. Royal Decree No. 1614/2011, of 14 November, developing the regulatory regime set forth by the Gambling Act; and

d. Royal Decree No. 958/2020, of 3 November, regulating commercial communication of gambling activities.

Games regulations

Games regulations are:

a. Ministerial Order No. EHA/3080/2011 of 8 November, approving the basic regulations of fixed odds sports betting;

b. Ministerial Order No. EHA/3081/2011 of 8 November, approving the basic regulations of mutual sports betting;

c. Ministerial Order No. EHA/3079/2011 of 8 November, approving the basic regulations of other fixed odds betting;

d. Ministerial Order No. EHA/3082/2011 of 8 November, approving the basic regulations of fixed odds horse race betting;

e. Ministerial Order No. EHA/3083/2011 of 8 November, approving the basic regulations of mutual horse race betting;

f. Ministerial Order No. EHA/3085/2011 of 8 November, approving the basic regulations of the game of roulette;

g. Ministerial Order No. EHA/3086/2011 of 8 November, approving the basic regulations of the game of baccarat;

h. Ministerial Order No. EHA/3088/2011 of 8 November, approving the basic regulations of the game of black jack;

i. Ministerial Order No. EHA/3089/2011 of 8 November, approving the basic regulations of the game of poker;

j. Ministerial Order No. EHA/3087/2011 of 8 November, approving the basic regulations of the game of bingo;

k. Ministerial Order No. EHA/3090/2011, of 8 November, approving the basic regulations of the game of supplementary games;

l. Ministerial Order No. EHA/3084/2011, of 8 November, approving the basic regulations of contests;

m. Ministerial Order No. HAP/1369/2014 of 25 July, approving the basic regulations of export betting; and

n. Ministerial Order No. HAP/1370/2014 of 25 July, approving the basic regulations of the game of slots.

Regional land based regulations

Some of the most relevant are as follows:

a. Madrid:
- Law 6/2001, of 3 July 2001, on gambling in the Community of Madrid;

b. Canary Islands
- Law 8/2010 of 15 July 2010 on Gambling and Betting in the Canary Islands; and
- Law 2/2020 of 14 October on the suspension of licences for new premises and other complementary measures in the field of gambling and betting;

c. Andalusia:
- Law 2/1986, of 19 April 1986, on gambling and betting, of the Autonomous Community of Andalusia;

d. Balearic Islands:

- Law 8/2014, of 1 August, on gambling and betting in the Balearic Islands;

e. Catalonia:

- Law 15/1984 of 20 March 1984 on gambling in Catalonia Region; and

f. Valencia:

- Law 1/2020, of 11 June, of the Generalitat, on the regulation of gambling and the prevention of pathological gambling in the Valencian Community.

The regulator

The body that was created in Spain by means of the Gambling Act to regulate online gambling activities on a national level in Spain is the so called General Directorate for the Regulation of Gaming Activities (DGOJ). It is the only national body entitled to: (1) adopt secondary regulations developing the main gaming regulations; (2) control and inspect the operation of gaming activities; (3) prosecute illegal gaming activities; (4) decide on the claims filed against operators; and (5) collaborate with other Spanish authorities (such as the financial and criminal authorities) in the enforcement of anti-money laundering legislation. The DGOJ is a body which depends on the Ministry of Consumer Affairs which is entitled to regulate, authorise, monitor, control and sanction gaming activities on a national level, including advertising and commercial communications.

Remote and land-based gambling

The offering of online gambling activities on a national level was first regulated in Spain in 2011 by means of the Gambling Act, which sets forth a very strict licence regime. As a general and basic duty, remote gambling operators are requested to obtain from the Spanish national authorities gambling licences for the development of the games. Furthermore, not all types of remote game can be offered, but only those games specifically approved and regulated (more details on the type of games that can be offered as well as on the licensing process are described in following Sections).

Land-based gambling

As previously mentioned, land based gambling matters is a competence of each of the 17 autonomous regions of Spain; therefore the legal regime in each region varies significantly. In general terms, the primary venues for land based gambling in Spain among all the regions are basically: casinos, bingo halls, arcades and betting shops.

Furthermore, each autonomous region has a gambling catalogue with the games authorised to be offered in that certain region. Furthermore, and depending on the specific games to be offered, a different type of premises or venue (e.g., casino, arcade, bingo hall, etc.) will be required. Generally, the

games permitted in each type of premises are as follows. In casinos the games permitted are roulette, blackjack, baccarat, poker, thirty and forty, dice or craps, chemin de fer, and type C slot machines. In bingo salons, generally only bingo games and short limited number of type B slots machines are permitted. In betting shops, only sports and social betting can only be offered, and in gambling arcades only slot machines types A and B are allowed.

Also lottery shops or kiosks are available, but the legal regime is very specific as the number of licences is limited and depends on the authorisation from the two lottery operators licensed (SELAE and ONCE).

Remote gambling

Remote gambling activities offered by Spanish licensed operators must be addressed to Spanish citizens or residents only, meaning that IP geo-localisation shall be implemented in order to avoid non Spanish residents accessing to the games. Moreover, offshore operators without Spanish licences must use an IP geo-localization system in order to impede Spanish residents accessing to their platforms. This means that Spanish residents should only have access to remote gambling platforms managed by operators that have the corresponding Spanish licence.

In order to apply and obtain the corresponding remote gambling licences, it is mainly necessary to be an EU-based company equivalent to the Spanish *sociedad anónima* (Spanish limited liability company), as well as to count with a technical platform duly certified by a recognised testing lab and a .es website. Furthermore, Operators with Spanish remote gambling licences must have their internal control unit (main server) located in Spain, so the DGOJ has access to it for monitoring and control purposes.

Ancillary matters

In terms of equipment homologation, when it comes to land-based gambling, roulette wheels and slots machines have to be homologated as per the applicable regional rules. Moreover, when it comes to remote gambling activities, the technical platform has to be certified and homologated from both a functionality and security perspective. This certification has to be made by a recognised testing lab, and has to be based on the specific technical requirements set forth in the Spanish regulations, it not being to use the certifications issued for other jurisdictions.

In terms of individuals holding relevant positions within the share capital of the operators, or being directors, or personnel directly involved in the operation of the games, there is no need for them to hold a personal licence approved by the regulator. However, they need to identified before the Spanish authorities, including the UBO (ultimate beneficial owner).

Financial payment mechanisms

There are no specific restrictions of payment mechanism for gambling, although, cryptocurrencies and bitcoins are not permitted. The main requirements that shall be taken into account in terms of payment methods when it comes to remote gambling are the following two:

a. the integration of the operator platform and the payment services provider has to be certified in order to guarantee the security and traceability, and

b. it is completely forbidden for the gambling operators to provide credit or financial support to players.

The licensing process

i Application and renewal

Entering into the Spanish regulated online gambling market is only allowed when the DGOJ launches a call for tender, allowing interested operators to file the corresponding licence applications. Since the entry into force of the Gambling Act, only three calls for tenders have been opened in Spain: (1) the first one was on November 2011 and lasted one month; (2) a second one on October 2014, which also lasted one month; and (3) the third and last one was published in December 2017 and lasted one year.

During the calls for tenders, operators are allowed to apply for a general licence, a type of licence that covers general categories of games and that implies the fulfilment of a number of legal, technical and financial requirements aimed at ensuring the full capacity of the corresponding holder to operate online gaming activities properly. A general licence allows the licensed operator to request singular licences that covering the operation the various games that have been approved and regulated by the Spanish authorities – at any time during the term of validity of the general licence.

Currently, there exist four types of general licence, which pertain to the following general categories of games: (1) betting; (2) other games (covering allowed casino games and other relevant ones such as slots, poker or bingo); (3) raffles; and (4) contests. From an online gaming perspective, betting and other games' general licences are the most relevant ones. In connection with the singular licences there exist fourteen types referred to the following games: (1) fixed-odds sports betting; (2) mutual sports betting; (3) other fixed-odds betting; (4) exchange betting; (5) fixed-odds horse racing betting; (6) mutual horse race betting; (7) contests, (8) roulette, (9) baccarat, (10) blackjack, (11) complementary games, (12) slots, (13) poker, and (14) bingo.

All four categories of general licence have a validity time period of 10 years since initially granted on a provisional basis. Singular licences have a validity term of three or five years depending on the specific licence. Furthermore, all licences, both general and singular ones, can be renewed for identical time periods as the ones that were initially granted. Renewal requests have to be submitted no later than four months before the expiration of the initial validity time period.

In order to apply for remote gambling licences, several pieces of legal, financial and technical documentation shall be submitted to the DGOJ, which has a maximum term of six months to review the application and grant or deny the requested licence. There is no limit on the number of licences to be granted; therefore, in principle, all operators that meet the technical, financial and legal requirements will be granted the corresponding licence. It should be highlighted that in terms of financial requirements, one of the most relevant ones is the need to provide a financial guarantee of €2 million per general licence as well as to open a bank account at a Spanish bank in which all the deposits, prizes and money from players shall be deposited.

Sanctions for non-compliance

Offences of the Gambling Act are catalogued as very serious, serious and minor, subject to the following sanctions:

a. minor offences, are subject to written warning and fines up to €100,000;

b. serious offences are subject to fines from €100,001 to €1 million and suspension of activity in Spain for a maximum period of six months; and

c. very serious offences are subject to fines up to €50 million and penalties that can include the withdrawal of the operating licence, disqualification from performing online gambling activities for a maximum four-year period, or denying access to the information society services that support the gaming activities.

From the entry into force of the sanctioning regime stipulated in the Gambling Act the development of remote gambling activities in Spain without having obtained the corresponding general and singular licences is forbidden and may lead to very serious sanctions (with fines amounting up to €50 million). Furthermore, licensed operators face sanctioning procedures from time to time. In most of the cases, those sectioning procedures are because of having offered a game not permitted, not having properly ascertained the identity of the player in order to avoid minors or self-excluded persons accessing the games or having carried out advertising or marketing activities that are not permitted.

Wrongdoing

The legal regime for the prevention of money laundering and terrorist financing (AML) currently in force in Spain establishes certain categories of persons and entities that, due to their activity, hold the status of 'obliged subject'. According to Spanish provisions, gambling operators are obliged subjects from an AML perspective. This implies that the corresponding obligations set forth in the Spanish Law 10/2010 of 28 April on the prevention of money laundering and terrorist financing (the AML Law) and to those laid down in its Regulation, approved by Royal Decree 304/2014 of 5 May, and other prescripts developing shall be applicable to gambling operators (both remote and land-based).

Taxation

Advertising and marketing

Among other things, these obligations include: (1) the need to apply the corresponding due intelligence measures and internal control measures that as a main requirement set forth the need to identify its customers (therefore, only properly identified customers are entitled to participate in the games); (2) report to SEPBLAC (the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences) those transactions revealing an obvious inconsistency with the nature, volume of activity or customer operating history, provided that after the special review, have no economic, professional or business appreciable justification for the execution of those transactions; (3) report on a monthly basis to SEPBLAC certain transactions; (4) adopt in writing and implement adequate policies and procedures of customer due diligence, information, record keeping, internal control, risk assessment and management, compliance ensuring, reporting and customer acceptance in order to prevent and forestall transactions related to money laundering or terrorist financing; (5) appoint a director or senior manager residing in Spain to act as a representative to SEPBLAC; (6) adopt an appropriate manual for the prevention of money laundering and terrorist financing; (7) have the internal controls adopted by obliged subjects subject to an annual examination by an external expert; and (8) take appropriate measures to ensure that their employees are aware of the requirements of the AML Law.

All online gambling operators are required to pay gaming tax on a quarterly basis. The taxable event is the authorisation, celebration or organisation of games, raffles, contests, bets and random combinations at the state level, the taxable person being whoever authorises, celebrates or organises the gaming activities.

The taxable base for the vast majority of games comprises the net income, defined as the total amount devoted to play and any other income that may be obtained directly from organising or celebrating games, once the prizes awarded by the operator to the players are deducted. In the case of crossed bets or games in which the taxpayers do not gain the amounts placed as own income, but simply transfer them to winning players (i.e., poker), the taxable base shall comprise the commission, as well as any other sums whatsoever, for services related to the gaming activities, no matter their type, that the players pay to the taxpayer.

On 5 December 2019, the Spanish tax authorities published a ruling (No. V3347/2019) interpreting this rule, which concluded that:

a. 'amounts devoted to play' includes all registered bets, whether made with money deposited by the player or with bonuses and all amounts obtained for the organisation or celebration of the games (i.e., contribution to the jackpot).

b. 'prizes awarded by the operator to the players' includes any reward given to players for the success of a game, whether with real money or bonuses. Therefore, amounts placed by the players and eventually returned to them do not qualify as prizes for the purpose of reducing the taxable base; and

c. in the case of poker games, when the operator receives a commission from the participants but also guarantees a given prize, the taxable base will be made up of the amount resulting from deducting the guaranteed and paid prizes from the gross gaming revenue. In addition, in case of a 'poker deficit', whereby

the guaranteed prize is higher than the gaming revenue, the net income derived from the organisation of the game is negative and can be deducted from the taxable base.

The tax rate depends on the sort of game and, at the same time, will determine the taxable base applicable as follows:

a. betting, raffles, contests and other games: 20 per cent over the net income referred to above;

b. sport betting organised at a state level: 22 per cent over the gross income, defined as the total amount spent on the participation in the game, as well as any other income that may be obtained from its organisation or celebration; and

c. random combinations for advertising purposes: 10 per cent of the market value of the prizes offered or advantages granted to participants.

In this regard, a 50 per cent reduction in the applicable gambling tax rates (except for sports betting organised at a state level) is available for operators with tax residence and actually established in the autonomous cities of Ceuta or Melilla. Note that Spanish law also foresees tax benefits in other taxes for companies resident and actually established in the autonomous cities.

In addition, online gambling operators are subject to gambling duty, with six taxable events and different payable amount for each one. In the case of the gambling duty corresponding to regulatory actions performed by the regulator, it is 0.75 per mille of the gross operating income that is accrued at 31 December each year.

Gambling operators resident in Spanish territory would be subject to corporate income tax on their worldwide income at a 25 per cent general tax rate. The taxable base is the result of the profit and loss account with certain adjustments.

No withholding on account of the player's personal income tax shall be made, except with regards to lotteries organised at a state or regional level, by the Spanish Red Cross, the National Organisation of Blind People and similar entities, which are subject to a 20 per cent withholding on amounts exceeding €40,000. Gambling winnings shall be declared by players in their final personal income tax return at the general tax rates (except in the case of the above-mentioned lotteries, which are subject to the 20 per cent withholding as final payment), with the possibility of offsetting gambling losses (except in the case of the above-mentioned lotteries), only up to the limit of those winnings.

The online gambling business is a value added tax-exempt activity.

In Spain, gambling operators that have with the corresponding licence are entitle to advertise their activities, although they need to comply with certain regulations.

The year in review

Outlook

Since the publication of the Gambling Act at the end of 2011 it was a pending matter the approval of a Royal Decree regulating the advertising of gambling activities, specially of the remote gambling activities offered on a national level, as in terms of regional land based gambling there already were several regulations. Royal Decree 958/2020 on commercial communications of gambling matters (Royal Decree 958/2020) was finally published in December 2020. Before its publication, advertising of remote gambling activities matters was regulated by means of a Self-Regulation Code on Advertising developed by AUTOCONTROL, which was signed by almost all remote gambling licensed operators, as well as the media.

Royal Decree 958/2020 has limited the type and scope of advertising and commercial activities that licensed operators can carry out. Some examples are that sponsorship on T-shirts or sports equipment will not be permitted. Neither will be the sponsorship of sports venues (i.e., stadiums). Broadcasting commercial communications in audiovisual media is only permitted between 1:00 and 5:00 am, and commercial communications within information society services (including banner advertising and offers) are generally prohibited, except in very specific cases.

New regulation on gambling advertising matters is the current hot topic in Spain. It has taken the authorities almost 10 years to approve a Royal Decree regulating these matters, and the final version passed is much more restrictive than was initially expected.

The fact that sports teams sponsorships have been forbidden for next season, and that the times when advertisements can be broadcast on TV and radio have been limited to a point at which they will almost disappear, means that the incomes because of advertising matters of various stakeholders such as football teams or radios or TV will be significantly reduced. This is something that will certainly have a relevant impact in the market that will have to be followed closely, especially taking into account the possibility that this Royal Decree could end up being revoked as it has been appealed by several stakeholders, such as the Spanish Professional Football League.

Protecting players from compulsive behaviour is the main objective of the Spanish authorities nowadays. For this purpose, they are working on n a new draft Royal Decree that will be published soon (during 2021 or the beginning of 2022), regulating in more detail the obligations of gambling operators, and especially remote gambling operators, to make sure that the licensed gambling activities are a sustainable entertainment offer.

It is most likely that this new draft Royal Decree will require operators to monitor players' behaviour and implement protocols and policies to prevent compulsive behaviour as well as better protect minors and players who are addicted to the games.

Footnotes

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