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## THE “DISCIPLINARY MORATORIUM” OF THE GAMBLING ACT: WHAT’S NEXT FOR ON-LINE GAMBLING PORTALS PENDING LICENSE APPROVAL?

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According to Spanish Law 13/2001, regulating gaming (*Ley de Regulación del Juego*, LRJ), companies that offer online gaming, both from Spain and to Spain, are required to apply for and obtain a double license: a general one, for each game modality and a specific one, for each of the types of the game modality. The Act contains a general regulation of gaming -requirements, prohibitions, obligations, taxes- and refers to subsequent orders regarding the basic regulations for the development of each game modality.

In the Official Gazette of 17 November, 2011 the ministerial orders were published establishing the basic rules for most of the game types included in the scope of the LRJ: various forms of bets, poker games, bingo, roulette, blackjack and baccarat, state contests and the so-called complementary games.

The first call for state gaming licenses was held by Order published in the Official Gazette of 18 November, 2011, passing the bidding terms and calling the interested parties to submit the application requests<sup>1</sup>. The deadline for submitting the applications was 14 December. More than 300 licenses for the different types of games under the call have been requested.

The deadline for resolving the general license applications is within six months of

submission, but they are many complex requirements and required documents, particularly technical, so extensions and interruptions are likely to delay the decision.

But what is the status of online gaming activities until such licences are granted?

The LRJ does not deal with this clearly. The eighth transitory provision merely postpones the entry into force of the disciplinary regime to “the date of publication of the resolution of the first procedure for granting the licenses referred to in Article 10 of this Act or 1 January, 2012 if the resolution has not been published before that date”.

It is certainly a particular transition provision, since instead of establishing a deadline for the entry into force of the new Act, in the usual way, it postpones the application of its disciplinary regime, so that the other precepts of the rule are effective but a breach is not deemed to be an infraction during the period of “disciplinary moratorium”.

This particular transitory regime of the Act has the clear goal of enabling gaming companies to have a period to regularise their situation; to adapt to the new regulations and obtain the appropriate license when the call is convened and resolved so that they can, meanwhile, continue operating legally but,

<sup>1</sup> In the same Official Gazette it was published a Resolution of 16 November, 2011 of the Directorate General of Game laying down the procedure for requesting and granting the singular, which can be requested at the same time as the general license.

paying the taxes referred to in Chapter VIII of LRJ.

In the case of advertising and sponsorship contracts “agreed prior to 1 January, 2011”, the ninth transition provision of the LRJ granted them temporarily “validity” for the same period.

These transitory provisions that postpone the application of the disciplinary regime and extend the duration of advertising and sponsorship contracts have just been extended by a period of six months, until 30 June, 2012 or until the resolution of the licensing procedure, whichever it is earlier. The amendment was introduced by Royal Decree-Law 20/2011 of 30 December (Official Gazette of 31 December) for urgent measures on budget, tax and financial issues for the correction of the deficit (in two final provisions that due to material error, are identical: the seventh and eleventh).

The justification for this extension leaves no doubt about the willingness to allow companies that offer online games or advertise them, to continue operating whilst they obtain the appropriate license. The General Provisions of Royal Decree-Law read the following: “Law 13/2011 of 27 May, on gaming regulation, is amended in order to establish an extension regarding the entry into force of the disciplinary regime of the Act, to enable the Directorate General for Gaming to resolve certain license applications, as otherwise some entities might be affected by that entry into force during the processing of such requests”.

These transition provisions have not prevented certain traditional gaming sectors however, from filing complaints against online gaming companies because they felt threatened by tough competition from the most powerful international operators.

What is disturbing is that following one of these complaints, a Commercial Court has provisionally prohibited a number of companies from continuing to operating through the online betting websites that offer gaming and betting services that are available in Spain if “they do not have the required authorisation”, considering that there is sufficient evidence that this activity may violate rights protected under antitrust law.

This is the Order of the Commercial Court # 10 in Madrid, of 15 December, 2011 (procedure MCP: 658/11) which granted an interim injunction against defendant online gaming companies sued by Spanish gaming multinational Codere to stop the activities of the websites [miapuesta.es](http://miapuesta.es) and [miapuesta.com](http://miapuesta.com) in Spain. The order also prohibits the advertising of gaming activities of these domains, the collection, use or transfer of personal data obtained through online activities and an injunction against sending communications via e-mail on these gaming activities.

These injunctions were granted because the Court considered that under the provisions of Article 733 of the Civil Procedure Act, the preliminary hearing could endanger the success of the measure. The justification given was not so much in the main argument, the question of “an ongoing activity”, but in the following: “future sued parties operate from at least three different tax havens (...) which could mean a facility to be located beyond Spanish and foreign laws”.

The adoption of this injunction completely ignores the transition provisions of the LRJ that allow, as has been stated, companies that offer online games or advertising to continue operating legally in Spain until the established deadline. During this transition period, companies are due to adapt themselves to

the new national gambling legislation and to obtain the appropriate license but without breaching its rules for unauthorised operating or any other regulatory breaches.

It is, therefore, a legal absurdity to say, as the Order does, that there is *fumus boni iuris* (a *prima facie* case) in an antitrust act against the sued companies for breaching the Gaming Regulation Act because "it is clear from the facts that the sued companies do not have an authorising title" to operate in Spain, but they were companies that had applied for the license and were awaiting the resolution of their applications.

The lack of legal basis for the injunction is clear, so an appeal against the Order should be allowed and this situation should not be repeated in other cases, especially after the recent extension of the moratorium period and for the companies operating under a domain.es, who always satisfy their tax obligations and that have requested the appropriate licenses in the call. The legal uncertainty in the online gaming industry in Spain is still however, important both for the operators and the players themselves, who are wondering whether to make online cash as soon as possible.

Summarising, we can conclude that:

- The procedure for the resolution of applications for licenses continues and, according to the extension of the moratorium passed by Royal Decree-Law 20/2011, the online gaming companies can legally continue operating via the gaming websites if they have applied for a license; it can be expected that, if there are complaints from competitors, no

measures such as the ones in the explained Order will be granted, according to the transition measures of the LRJ.

- This "temporary legality" situation will finish when the resolution of the procedure for licensing is published. The eighth transition provision of the LRJ seems to be made for a unique public procedure for all applications when it comes to "the date of publication of the resolution" but, as the Order of call has chosen a different procedure for each application, the date of the first application resolution to be published on the website of the Directorate General for Gaming will be the one to be taken into account.
- License applications must be resolved, in principle, within six months so that, all should be resolved by 14 June, 2012. The LRJ provides, however, the possibility of extending this period if there are extensions or interruptions, in which case the "disciplinary moratorium" will end –unless additional legal extension– on 30 June. Upon the moratorium deadline all online gaming activities that do not have a license will become illegal and should cease or be closed down and sanctioned.
- The current change of government adds further uncertainty to this legal landscape, as it may want to make a change to the regulation of online gaming. In that case, it could be expected that, for the sake of the principle of legal certainty the changes will not affect the current authorisation procedure, but if it happened the affected companies would be entitled to be compensated for the damages caused.