

“SPANISH COURT GETS TOUGH WITH UNLICENSED EGAMING OPERATORS”

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A recent Madrid Court Order has summoned a number of online gambling operators to immediately stop (“cease and desist”) their activities in Spain. This Order was issued at the request of licensed online operators who successfully argued that the defendants had obtained an “unfair competitive advantage” by not paying domestic taxes and by not complying with local licensing regulations, including the posting of bonds or bank guarantees.

1. The new gambling regulatory framework.

After many years of a regulatory uncertainty due to a combination of poor regulations and of Spain’s quasi-federal structure (which de facto led to having 17 different laws depending on the region or Autonomous Community), the enactment of Law 13/2011 of 27 May on gambling regulation (the “Gambling Act”) was intended to finally get rid of the legal uncertainty in the Spanish gambling industry; in particular in connection with the emergence of new electronic communications services and the massive use of interactive gambling services via the Internet.

The traditional concept of gambling has recently changed in Spain as a result of the boom in on-line gaming, with the subsequent blurring of the territorial limits of traditional gambling activities, as well as the appearance of new agents in the market, like on-line betting websites or social networks.

In this new context, pre-existing legislation did not provide an appropriate regulatory response and sufficient protection for the industry in order to ensure the necessary legal certainty for both the operators and gambling users. This lack of adequate protection had become particularly sensitive with regard to those games played via electronic, computer, telematic and interactive media, in which physical presence is ancillary. Therefore, the risk of the spread of illegal operators and the abuse of standard gambling practices through Internet had become a greater and real danger for the industry. As a result of the foregoing, significant progress in communication services and their application to gambling activities, together with an outdated regulation providing ineffective protection had increased the lack of control regarding fraudulent or unlawful operation in the industry, which had likewise encouraged the need for a new regulation applicable to gambling operators in Spain.

This objective of providing the industry with an adequate legal response had been also reflected in several initiatives of the European Parliament and in resolutions issued by the European Court of Justice. Also, the 20th Additional Provision of Spanish Law 56/2007 of 28 December, on measures to promote the information society already established that “the

¹ Resolution 2008/245 (INI) of European Parliament of 10 March 2009 on the integrity of on-line gambling.

Government shall draft and submit a Proposal of Law in order to regulate gaming and betting activities; in particular the activities through interactive means based on electronic communications (...).”

An additional problem was that the Spanish Constitution establishes that law-making powers on gambling activities correspond to Spanish regions so the issue was how to have a single, coherent and unified “federal” regulatory framework. The massive access to Internet, thus to on-line gambling services through electronic means, has unavoidably led to a need to regulate nationally the operation and management of gambling activities, on behalf of a public interest, in order to meet the regulatory purposes of the national gambling industry, without prejudice to the full recognition of regional competences (i.e. the Gambling Act includes the collaboration of the regions and coordination plans in the exercise of state powers in relation to gambling activities).

For all of the above reasons, the new regulatory framework provided by the Gambling Act and its supplementary regulation (i.e. Royal Decree 1613/2011 of 14 November on technical requirements for gambling activities and Royal Decree 1614/2011 of 14 November concerning licenses, authorizations and gaming registers) is a very positive step forward in providing the necessary legal certainty demanded by the gambling industry.

2. The Madrid Commercial Court Order.

Although the application of the Gambling Act is still very recent in Spain, gambling companies which have been compliant with the legal requirements for years have now found a clear opportunity to try to stop non-licensed operators from taking this unfair advantage. For many years, the regulators had been very lenient precisely because of the murky and unclear regulatory status, which made it difficult to chase illegal operators for breach of laws, in addition to the fact that most of them operated from remote jurisdictions which entailed complex legal action.

Now that the regulations are clear and settled, licensed operators, who pay gambling taxes and incur other significant compliance costs, have decided to go to the commercial courts based on the unfair advantages obtained by their illegal competitors. Such actions are based on the Spanish Unfair Competition Law, under which any breach of legal provisions governing a regulatory activity (i.e. the Gambling Act) resulting in an unfair advantage can be treated as an act of unfair competition. Article 32 of the said law establishes the legal actions that a claimant is entitled to bring against those operators performing unfair acts including amongst others, the cessation of the unfair act, the prohibition to perform it or the removal of its effects.

Therefore, on the grounds of the referred provisions, CODERE brought an action against INTERNET OPPORTUNITY ENTERTAINMENT (SPORTS) LIMITED, INTERACTIVE SPORTS SPREAD YOUR WINGS LIMITED SPORTINGBET PLC, SPORTINGBET (MANAGEMENT SERVICES) LIMITED and SPORTINGBET SPAIN, S.A., in which it requested the Court to issue a cease and desist order by which the defendants would be barred from using any domain names with the ending “.es” and “miapuesta.es”, from advertising in Spain, and from contacting clients resident in Spain. Pending the full trial of the case, CODERE also requested injunctive relief and provisional measures.

On 15 December 2011, Commercial Court number 10 of Madrid fully endorsed CODERE's and another two Spanish operator's request for injunctive relief consisting of the immediate cessation and/or prohibition of illegal activities in Spain presumably performed by the defendants. With this interpretation, Spanish Courts are sending a clear message that they are ready to grant an overall protection of licensed gambling operators; this will clearly have an impact on the activities of non-licensed on-line gambling operators.

The Court also granted other requested precautionary measures, such as the use, disclosure and processing of personal data without the required consent of the data subject (as set forth in the Spanish applicable data protection legislation), and the prohibition and cessation of spam and massive commercial communications to clients whose contact details have been obtained by unlawful means.

3. Conclusions.

The new Gambling Act now offers great opportunities to do business in a country like Spain which has had a long tradition with sports betting and a passion for soccer. The regulatory framework is now clear and predictable for those who want to comply.

In addition, although the legal battle will continue and the application of the ECJ case law will raise interesting issues and controversies in the future, the Madrid Court Order is also sending a very clear message that the unfair competition gained by non-licensed online operators will not be tolerated in the future and has opened the door to registered operators to challenge abusive practices which were being unfairly used by their competitors and which had been tolerated in the past by the Spanish administration.
