

A NEW LEGISLATIVE FRAMEWORK FOR ONLINE GAMING IN SPAIN

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*En el juego se vive la esperanza de ganar,
pero esta se integra en un área muy distinta
cuando lo que se dilucida no es un hacer personal
sino la directa percepción dineraria como tal.*¹

I. INTRODUCTION²

The Spanish government has been working on online gambling legislation since December 2007, when the Parliament passed the *Society of Information Act*.³ The Act's objective is to stimulate the use of information technology and preserve Spanish citizens' rights.⁴ This Act followed the European Parliament's *Integrity of Online Gambling Resolution*⁵ and required the Spanish government to bring forward a Bill on e-gambling as soon as possible.⁶

After concluding the fairly quick, but complicated proceedings, the Parliament passed the *Gambling Act* in May 2011.⁷ Initially, the *Gambling Act* was supposed to only regulate online gambling, but it became a large, complex piece of legislation that addressed many aspects of gambling in Spain.⁸ The

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¹ José Javier López Jacoiste, *El Juego, Contexto Jurídico*, in ANUARIO DE DERECHO CIVIL 509, 514 (1996).

² All Spanish legislation cited in this article is freely available either through the website of the National Official Gazette, <http://www.boe.es>, or through one of Leggio company databases, <http://www.noticiasjuridicas.com>, which, in addition, offers the updated versions of laws and decrees. The main pieces of law and Administrative decisions, at the Spanish and European levels, have also been compiled in ALBERTO PALOMAR OLMEDA & RAFAEL ANDRÉS ALVEZ, CÓDIGO DEL JUEGO (Cizur Menor, Aranzadi, 2008).

³ See Medidas de Impulso de la Sociedad de la Información [Society of Information Act] (B.O.E. 2007, 22440) (Spain), available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2007-22440> (containing measures to boost Society of Information).

⁴ *Id.*

⁵ See generally Resolution on the Integrity of Online Gambling, EUR. PARL. DOC. 2215 (2008), available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2008/2215\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2008/2215(INI)).

⁶ Society of Information Act, *supra* note 3, at disposición adicional 20 (B.O.E. 2007, 22440) (Spain), available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2007-22440>.

⁷ Ley de Regulación del Juego [Gambling Regulation] (B.O.E. 2011, 9280) (Spain), available at <http://www.boe.es/boe/dias/2011/05/28/pdfs/BOE-A-2011-9280.pdf>.

⁸ *Id.* at I.

final *Gambling Act* is expected to transform and liberalize most sectors of the Spanish gambling market beginning in 2012.⁹

This article studies how this new statute affects gambling in Spain, both online and in traditional lotteries. First, this article examines the text of the *Gambling Act*¹⁰ and how it developed starting with the original preliminary papers. This examination reveals that the *Gambling Act* has been strongly contested since its introduction, particularly by traditional State Lottery vendors and sports operators. This conflict shaped the form and content of the *Gambling Act*, including the new substantive rules on gaming (from the general provisions to the new taxing system); the conflicting lobbying efforts; the absence of proper Public Hearings; the lack of concern for problem gamblers; and the complex structure of the final text, which contains several enabling provisions with successive layers of rules to be developed by different public authorities. Next, this article compares the Spanish *Gambling Act* to the novel French *Online Gambling Act*, which was passed the previous year and is already subject to *ex post* assessment. Finally, this article proposes useful conclusions about what we can learn from these different, but related, national systems of gaming in Europe.

II. THE LEGAL FRAMEWORK AND HISTORICAL BACKGROUND OF TRADITIONAL GAMING IN SPAIN

Gambling and law naturally have a close relationship. In Spain, as abroad, gaming has always been highly controlled.¹¹ However, Spanish Gaming Law has been heavily influenced by the long-time national gaming monopoly in the form of the *Lotería Nacional de España* (“National Lottery”).¹² The regulation of the National Lottery has only recently started to relax.¹³

Regardless, the history of the legal framework for the Spanish National Lottery reflects a remarkable disconnection between Parliament and society.¹⁴ Until recently, Spanish gaming law consisted mainly of outdated administrative

⁹ See Alberto Palomar Olmeda, *La delimitación de la actividad del juego y las actividades asimiladas. Régimen administrativo y distribución competencial*, in EL JUEGO ON LINE 303, 303 (Aranzadi ed., 2011).

¹⁰ It was first published in the Official State Gazette on May 28th. In December 2011, it was modified by a Royal Decree, which empowered it with the force of an Act. It was further modified by the Budget Act in June 2012.

¹¹ Tight links between gambling and administrative law existed in the Roman Empire and continue today in modern societies. See generally JOSÉ LUIS ZAMORA MANZANO, LA REGULACIÓN JURÍDICO-ADMINISTRATIVA DEL JUEGO EN EL DERECHO ROMANO Y SU PROYECCIÓN EN EL DERECHO MODERNO (S.L. Dykinson ed., 2011).

¹² Because the supply of gaming facilities is not a natural monopoly, public restrictions have always been justified in the light of public order. As such, European laws have tolerated them. See Enrique Arnaldo Alcubilla, *Monopolio de las loterías: compatibilidad con el derecho comunitario*, in RÉGIMEN LEGAL DEL JUEGO EN ESPAÑA 123, 123-37 (Consejo General Del Poder Judicial ed., 2004).

¹³ *Id.*

¹⁴ Gambling is a key activity in human development, but it has become politicized by capitalist reasoning. Because of this, it needs social control. See PILAR LÓPEZ RODRÍGUEZ, PARA UNA SOCIOLOGÍA DEL JUEGO 49 (Ediciones Olímpic ed., 1990). Surprisingly, this need for control did not appear in Spain’s legal framework until 2011. See *id.*

regulations regarding the National Lottery's fiscal monopoly.¹⁵ Those regulations were prepared by technical experts acting as agents of the executive branch and were not generally discussed by the Parliament.¹⁶

In 1763, Leopoldo de Gregorio, Chancellor of Finance, instituted the first lottery system in Spain,¹⁷ based on "choosing numbers" inspired by the Genoese *lotto* system.¹⁸ Each player bet on a number or a combination of five numbers drawn out of a possible 90.¹⁹ A player won if all of his numbers were chosen.²⁰ Payouts increased for riskier bets, but they were always calculated to favor the house.²¹ Winners were paid at predetermined odds after checking the amount of their bet in a lottery ledger where the bet was recorded on promissory notes printed by a central office.²² This office was also in charge of controlling bets and reducing risks for the Treasury.²³ At the time, people were suspicious of the Royal Treasury, which was one reason why prizes were specified in advance.²⁴ This specific form of gambling stopped in February of 1862 and it was permanently banned the following May under the *Budget Act* because betting was seen as a "national bad habit."²⁵

In 1811, inspired by the Dutch *Klassenlotterie*, the *Cádiz Cortes*²⁶ set up another lottery system based on tickets.²⁷ In this system, people bought printed lottery tickets for the chance to win increasing prizes in drawings over several

¹⁵ See generally LEGISLACIÓN SOBRE LOTERÍAS, JUEGOS Y APUESTAS (Civitas ed., 1993). At the time, legislation indexed orders and decrees that continue to exist today including 1935 (dog races), 1946 (sports bets), 1949 (raffles) or 1956, 1959, 1962, 1965, 1969, 1971 or 1977 (State Lottery). See *id.*

¹⁶ The manner in which the regulations were created causes an administrative tangle, hinders effective control of gambling, and leads to lawlessness. See José Ignacio Cases, *Prólogo*, in *EL JUEGO ON LINE 23* (Aranzadi ed., 2011).

¹⁷ D.R. Bellhouse, *The Genoese Lottery*, 6 *STAT. SCI.*, 141, 141 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Called *castelletto* in Italy, the notes were printed in a press named *torquio*. See generally JOSE ALTABELLA, *LA LOTERIA NACIONAL DE ESPAÑA 1763–1963* 42 (1962). All Italian structures and equipment were brought to Spain by the director of the *lotto* game in Naples at the time. See *id.*

²³ See Roberto Garvía, *Las loterías españolas desde una perspectiva comprada: unos datos y una hipótesis*, in 145-2/1998 *HACIENDA PUBLICA ESPAÑOLA*, 27, 35 (1998).

²⁴ *Id.*

²⁵ The concern of the Royal Order published in the Official Gazette on February 10 can be summarized by the following phrase: "players are risking their family fortunes on games with scarce chance of gain." This was a major concern for the Queen and government. See Real Decreto [Royal Order] (B.O.E. Feb. 10, 1862) (Spain), available at <http://www.boe.es/datos/pdfs/BOE/1862/041/A00001-00001.pdf>. The permanent cessation of the draws was ordered by Article 7 of the 1962 Budget Act. Presupuesto General [General Budget] (B.O.E. May. 7, 1862) (Spain), available at <http://www.boe.es/datos/pdfs/BOE/1862/127/A00001-00006.pdf>.

²⁶ The *Cortes* (Spanish Parliament) sat in the besieged city of Cádiz from 1810 to 1813, at the time of the invasion and partial occupation of the country by Napoleon's armies. It enacted sweeping reforms and a Constitution (1812).

²⁷ Orden sobre el establecimiento de una nueva lotería intitulada Nacional [Law establishing a new national lottery titled "National Lottery"] (B.O.E. Nov. 11, 1811) (Spain).

stages (*Klassen*), lasting for months.²⁸ Such lotteries were already a common means of raising revenue in central Europe,²⁹ and in Spain they were established as a state monopoly to generate public revenue to support charities – the profits originally aided patients in the town hospital.³⁰ The *Cádiz Cortes*, apparently following the Mexican practice, adapted the *Klassenlotterie* system³¹ to the National Lottery in a simpler way, by using a prompter running in a single *Klass*.³² In that system, prizes were awarded only once, but new drawings could be held more frequently.³³ The amount of the prizes to be awarded continued to be published in advance, so it was vital to sell the proper number of tickets before each drawing.³⁴ The current National Lottery evolved from this successful experiment.³⁵ The Lottery is still considered to be a powerful and emblematic symbol of national cohesion (particularly Christmas lotteries).³⁶ Traditional printed lottery tickets are even regarded as cultural heritage items.³⁷

Nevertheless, since 1812, national legislative bodies have rarely displayed an interest in the lottery.³⁸ Over time, laws regulating the lottery became clouded by regulations such as the 1949 Decree, which approved the General Instruction on Lotteries³⁹;⁴⁰ and the 1964 Decree, which organized the National

²⁸ C. L'ESTRANGE EWEN, *LOTTERIES AND SWEEPSTAKES: A [SIC] HISTORICAL, LEGAL, AND ETHICAL SURVEY OF THEIR INTRODUCTION, SUPPRESSION, AND RE-ESTABLISHMENT IN THE BRITISH ISLES* 28 (1932).

²⁹ Gerald Willmann, *The History of Lotteries 1–2* (Aug. 3, 1999) (unpublished manuscript), available at <http://www.willman.com/~gerald/history.pdf>.

³⁰ MARIA LOURDES RAMIS, *RÉGIMEN JURÍDICO DEL JUEGO* 33 (1992).

³¹ It started in 1770. See JOSÉ M. CORDONCILLO SAMADA, *HISTORIA DE LA REAL LOTERÍA EN NUEVA ESPAÑA (1770–1821)* 1 (Dirección General De Tributos Especiales Del Ministerio De Hacienda 1962).

³² ROBERTO GARVÍA, *LOTERÍAS: UN ESTUDIO DESDE LA NUEVA SOCIOLOGÍA ECONÓMICA* 41–45 (2008) (explaining how the *Klassen* lotteries were adapted to fit the Spanish economic and political situation); see Garvia *supra* note 23, at 37.

³³ ALTABELLA, *supra* note 22 at 70.

³⁴ Garvia, *supra* note 23 at 27, 36.

³⁵ At the beginning, the National Lottery only existed in Cádiz and San Fernando; its commercial expansion broke out as French troops retreated. Juan Francisco Pérez Gálvez, *La lotería nacional*, *REVISTA JURÍDICA DE NAVARRA*, 58, 62 (2005).

³⁶ In this extraordinary Christmas draw, winning tickets are selected using two huge lottery wheels. Tickets are randomly drawn with one wheel while a second wheel gives the value of the prize to be awarded. It is a tradition for Spaniards to follow the draw on December 22nd and to share tickets among friends, colleagues, families, etc. GARVÍA, *supra* note 32.

³⁷ The front of the ticket contains a vignette evoking social folklore, cultural events, sport venues, or pieces of art, depending on the draw. The continuous series of tickets, printed since 1812, illustrate perfectly how Spanish ordinary life has changed, and Spaniards' interest in showing graphic arts evolution. The back of the ticket is stamped with the lottery ledge mark, marked with the commercial name of the vendor, and indicates the town where it was purchased. This identifying information has led to an entire culture of trekking around in search for 'lucky places,' which explains why it is so popular to buy tickets (especially for Christmas draws) when on holidays or business trips.

³⁸ See generally ALTABELLA, *supra* note 22 at 362–63.

³⁹ "General Instruction on Lotteries" is a regulatory measure setting out the powers and duties of franchise holders.

⁴⁰ See Orden de 27 de julio de 1949 por la que se aprueba la instrucción para la celebración de rifas [Order dated July 27, 1949 approving new lottery instructions], (B.O.E. Aug. 7, 1949, 219) (Spain), available at <http://www.boe.es/datos/pdfs/BOE/1949/219/A03521->

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Lottery Service.⁴¹ Under these new laws, tickets could be distributed only by authorized vendors, which were bonded to the Gaming Administration by a public franchise that allowed the vendors to exercise public powers.⁴² A special power, indeed, tied to essential revenues for public accounts: vendors were responsible for payment certifications and collected national income as a voluntary tax.⁴³

Other than the National Lottery, gambling was an underground activity. During some periods, gambling was specifically criminalized but continued anyway, sometimes with implicit acquiescence from the authorities.⁴⁴ Occasionally, certain raffles and games of chance were authorized when criminal legislation became more tolerant.⁴⁵ Other forms of illegal gambling continued as well.⁴⁶ Given the situation, it came as no surprise that gambling was partially legalized during the transition to democracy in 1977⁴⁷ for social, juridical, and economic reasons.⁴⁸ The new laws regulated various penal, administrative, and fiscal aspects of gambling.⁴⁹ The decriminalization of gambling culminated on June 25th in Organic Law 8/1983, which modified the

03522.pdf; *see also* Decreto de 23 de marzo de 1965 por el que se modifica la Instrucción General de Lotería [Decree dated March 23, 1965 modifying lottery instructions], (B.O.E. Apr. 22, 1956, 113), *available at* <http://www.boe.es/datos/pdfs/BOE/1956/113/A02634-02652.pdf>; *see also* Decreto 255/1962, de 1 de febrero, sobre modificación del Régimen de finanzas de las Administraciones de Lotería [Decree 255/1962 dated Feb. 1, modifying lottery instructions] (B.O.E., Feb. 16, 1962, 41), *available at* <http://www.boe.es/boe/dias/1962/02/16/pdfs/A02341-02342.pdf>; *see also* Decreto 1643/1962, de 5 de julio, sobre procedimientos de sorteo de la Lotería Nacional [Decree 1643/1962, dated July 5, modifying lottery instructions], (B.O.E. Jun. 24, 1962), *available at* <http://www.boe.es/boe/dias/1962/07/14/pdfs/A09808-09810.pdf>; *see also* Decreto 1712/1965, de 24 de junio, sobre pago de premios de la Lotería Nacional [Decree 1712/1965, dated June 24 modifying lottery instructions], (B.O.E. Jul. 3 1965, 158), *available at* <http://www.boe.es/boe/dias/1965/07/03/pdfs/A09415-09417.pdf>; *see also*, Decreto 2429/1966, de 13 de agosto, sobre fianzas y cuentas de los Administradores de Loterías y sobre expedición de participaciones de la Lotería Nacional [Decree 2465, dated Aug. 13, modifying lottery instructions], (B.O.E. Sep. 29, 1966, 233). Current updated version of the instruction, *available at* <http://www.meh.es/Documentacion/Publico/NormativaDoctrina/Loterias%20y%20apuestas%20del%20Estado/INSTR56%20extracto.pdf>.

⁴¹ Servicio Nacional de Loterías [National Service of Lottery] (B.O.E. 1962, 54) (Spain), *available at* <http://www.boe.es/buscar/doc.php?id=BOE-A-1964-482>.

⁴² *Id.*

⁴³ Juan Francisco Martí Basterrechea, *Instituto de estudios fiscales, presupuesto y gasto público, in* PRESUPUESTOS Y GASTOS PUBLICOS (1979).

⁴⁴ *See* GERARDO LANDROVE DÍAZ, LOS JUEGOS ILÍCITOS 49 (1971). There has always been a slight double standard regarding gambling in Spain – some gambling is considered almost righteous, but forbidden, while others are deemed almost devilish. *See* LUIS GONZÁLEZ SERNA, EL LABERINTO DE LA FORTUNA: JUEGO, TRABAJO Y OCIO EN LA SOCIEDAD ESPAÑOLA 13 (1998).

⁴⁵ *See* MARIA LOURDES RAMIS, RÉGIMEN JURÍDICO DEL JUEGO 17–70 (1992).

⁴⁶ *See* MIGUEL MAZÓN HERNÁNDEZ, ANÁLISIS ECONÓMICO, JURÍDICO Y FISCAL DEL JUEGO 15–32 (2007).

⁴⁷ Juan Martín Queralt, *La fiscalidad del juego y la construcción del derecho público*, TRIBUNA FISCAL, Feb. 1993, at 53.

⁴⁸ *Id.* The decision to discipline such a controversial sector has a bearing on the whole construction of juridical sciences from a fiscal point of view. *See id.*

⁴⁹ *See* FRANCISCO L. HERNÁNDEZ GONZÁLEZ, LA REGULACIÓN DE LOS JUEGOS DE AZAR 31–45 (1996).

Criminal Code.⁵⁰ The amendment was based on the principle of minimal intervention of Criminal Law⁵¹ and left the matter entirely within the purview of administrative regulations and tax legislation.⁵²

The Spanish Constitution of 1978 entirely ignored matters of gambling. As such, with the implicit support of article 149.3,⁵³ Autonomous Regions began to assume command of “casinos, gamble and betting,” and regional Parliaments began to produce their own legislation.⁵⁴ These laws became quite ambitious and complex because they established taxes and a service of inspection, instituted standards for gaming employees,⁵⁵ listed permitted games, and set forth the conditions of the establishments where they are played, among other things.⁵⁶ Generally speaking, however, these regional laws do not specifically address electronic forms of gambling.⁵⁷ The central State continued to produce a range of gaming regulations, heterogeneous in rank and ambitions, though mainly focused on administrative aspects of its monopoly on the

⁵⁰ See Cándido Conde-Pumpido Tourón, *El derecho penal Como ultima ratio: principio de intervención mínima*, in RÉGIMEN LEGAL DEL JUEGO EN ESPAÑA 45–76 (2004).

⁵¹ See *id.*

⁵² See Angel Vallo Alegre and Zabala Rodríguez-Fornos, *Crónica de jurisprudencia sobre el juego*, in 2 PALAU 14 REVISITA VALENCIANA DE HACIENDA PUBLICA 127–62 (MAY/AUGUST 1987). For an early record of gaming case law in Spain see Luis Rodríguez Ramos, *El juego ilegal: ¿delito de contrabando o delito fiscal?*, in RÉGIMEN LEGAL DEL JUEGO EN ESPAÑA 113–21 (2004). Since then, there have been only a few attempts to apply criminal law to illegal gambling activities, particularly through special provisions applicable to smuggling, but these criminal laws are not exempt from controversy.

⁵³ Matters not expressly assigned to the State (i.e., national government) by the Constitution may fall under the jurisdiction of the Autonomous Regions by virtue of their Statutes of Autonomy.

⁵⁴ See Alejandro Nieto Garcia, *Competencias estatales y autonómicas en material de casinos, juegos y apuestas*, in LIBRO HOMENAJE A F. GARRIDO FALLA: ACTUALIDAD Y PERSPECTIVAS DEL DERECHO PÚBLICO A FINES DEL SIGLO XX 725 (Vol. I, 1992). To learn more about the distribution of legislative authority over gambling, see MARIA LUIS RAMIS, RÉGIMEN JURÍDICO DEL JUEGO 105–40 (1992); Pedro González Trevijano, *Distribución de competencias entre el estado y las comunidades autónomas en materia de juego*, in RÉGIMEN LEGAL DEL JUEGO EN ESPAÑA 29–44 (2004); Alberto Palomar Olmeda, *La ordenación legal del juego en España. El papel de las administraciones públicas en materia de juego*, in RÉGIMEN DEL JUEGO EN ESPAÑA 77 (2006).

⁵⁵ ‘Instituted standards for gaming employees’ refers to specific rules regarding hiring requirements (e.g., respect to morality, criminal records, employment standards, industrial relations, ethics, and discipline.) See e.g., Decreto por el que se aprueba el reglamento de los juegos colectivos de dinero y azar en la comunidad de Madrid [Decree approving gaming in Madrid] (June 24, 2004, 105) (Madrid, Spain), available at <http://www.eqa-eclu.es/EQA/doc/Decreto%20105-2004.pdf>.

⁵⁶ See ISABEL BENZO SAINZ, RÉGIMEN DE DISTRIBUCIÓN DE COMPETENCIAS ENTRE EL ESTADO Y LAS COMUNIDADES AUTÓNOMAS. JUEGO (1991).

⁵⁷ See Aitor Uriarte Unzalu, *Las apuestas deportivas en euskadi*, in OCIO Y JUEGOS DE AZAR 146–47 (2010) (discussing how technological advances are occasionally considered, for instance to facilitate software inspections).

National Lottery.⁵⁸ As a result, online gaming was left in no-man's land, which created increasing problems for customers.⁵⁹

Today, all the Statutes of Autonomies confer both legislative and executive authority on gaming questions to each Autonomous Region.⁶⁰ However, the central State still plays a role by regulating general interests.⁶¹ The central State legislators exercised this role⁶² to clarify the uncertainty surrounding online gaming by adopting the *Gambling Act*, while looking at the French experience out of the corner of their eyes. Indeed, the central government and Parliament had little choice but to legislate on the subject of betting activities carried out through interactive communications. This legislation was first specified in the *Society of Information Act*⁶³ and was later confirmed by the European Parliament through its Resolution of 10 March 2009 on the integrity of online gambling.

⁵⁸ See e.g., Real Decreto por el que se regula la clasificación, provisión, funcionamiento, traslado, transmisión y supresión de las administraciones de la Lotería Nacional [Royal Decree regulating the classification, maintenance, transfer, and suspension of the National Lottery's administrative offices] (B.O.E. June 11, 1985, 1082) (Spain); see e.g., Real Decreto por el que se regulan determinados aspectos administrativos y económicos del Organismo Nacional y Apuestas del Estado [Royal Decree regulating certain administrative and economic aspects of the National Organism of Lotteries and Bets of the State] (B.O.E. Dec. 11 1992, 1511) (Spain); see e.g., Real Decreto por el que se aprueba el Estatuto de la entidad pública empresarial Loterías y Apuestas del Estado. [Royal Decree approving the public entity *Loterías y Apuestas del Estado*] (B.O.E. Dec. 30, 1999, 2069) (Spain).

⁵⁹ See e.g., E. Santos Pascual, *Actualidad y análisis jurídico de los juegos de azar y apuestas deportivas*, in CONSUMIDORES Y USUARIOS ANTE LAS NUEVAS TECNOLOGÍAS (L. Cotino Huedo coordinator, 2008); see e.g., JA Maestre Rodríguez, *Los juegos de azar en Internet*, in CONSUMIDORES Y USUARIOS ANTE LAS NUEVAS TECNOLOGÍAS (L. Cotino Huedo coordinator, 2008).

⁶⁰ See ISABEL BENZO SAINZ, RÉGIMEN DE DISTRIBUCIÓN DE COMPETENCIAS ENTRE EL ESTADO Y LAS COMUNIDADES AUTÓNOMAS. JUEGO 14–15 (1991). According to the first versions of the statutes, there were several levels of authority in gambling issues depending on the different aspirations of each Autonomous Region, some of them did not even mention gambling as a whole. See e.g., Alberto Palomar Olmeda, *La delimitación de la actividad del juego y las actividades asimiladas. Régimen administrativo y distribución competencial*, in EL JUEGO ON LINE 265–88 (2011). Nevertheless, as time went by, those statutes were amended and the authority of the Autonomous Regions to regulate gaming seems to have acquired basic similarities. The power of the Autonomous Regions is particularly accentuated in the case of Catalonia, Valencia, the Balearic Islands, Andalusia, Aragon, Castile y León and Extremadura.

⁶¹ See J.T.S., June 25, 1994, (B.O.E. n. 51 supp.) (Spain); José Manuel Sala Arquer, *Liberalización del monopolio de loterías y competencias sobre el juego*, in REVISTA ESPAÑOLA DE DERECHO ADMINISTRATIVO 519–37 (2003); J.T.S., May 26, 1994 (B.O.E. n. 164 supp.) (Spain); J.T.S., Feb. 16, 1995 (B.O.E. n. 49 supp.) (Spain); J.T.S. July 23, 1998, (B.O.E. n. 171) (Spain); J.T.S., Oct. 31, 2002, (B.O.E. n. 204 supp.) (Spain).

⁶² In particular, the central government is empowered to legislate questions regarding gaming in articles 149.1.6 (exclusive competence over commercial, criminal, and penitentiary legislation); 149.1.11 (monetary system); 149.1.13 (basic rules and coordination of general economic planning); 149.1.14 (general financial affairs and State Debt); and 149.1.21 (telecommunications). Gambling Regulation, *supra* note 7, at art. 149.1.6, 149.1.11, 149.1.13, 149.1.14.

⁶³ Society of Information Act, *supra* note 3, at *provisión adicional* 20.

III. PATTERNS FOR THE NEW LAW

The *Society of Information Act* required the Spanish Government to propose a bill on gaming, specifically, one to regulate online gaming. The order was vast as it expressly intended to deal with all aspects of gaming. However, most provisions referred to interactive betting; only the following provisions focused on so-called *e-gaming*.⁶⁴ The future bill's parameters on *e-gaming* required: (1) full compatibility with any other applicable statute, especially those that protect minors, youth, vulnerable groups of citizens, and customers; (2) consistency with EU principles and rules; (3) due respect to security and equity in the market, safeguarding free competition for operators licensed by other Member States' authorities; (4) distribution of taxing incomes among National Administration and Autonomous Regions; (5) compulsory submission to an administrative procedure of licensing, under which, any non-authorized gambling activity (even advertising) would be considered smuggling, and (6) complete authority of the National Administration on nationwide online gaming issues and those issues covering more than one Autonomous Region.⁶⁵

In the *Integrity of the Online Gambling Resolution*, the European Parliament highlighted that Member States must regulate and control, with the utmost urgency, their gaming markets in order to protect consumers against addiction, fraud, money laundering, and match fixing in sports.⁶⁶ The Resolution stated that it was imperative to protect the culturally-built funding structures that finance sports activities and other social causes.⁶⁷ It further stressed that gambling services should be considered a special kind of economic activity due to the social, public, and health care effects of gambling.⁶⁸

First, the European Parliament invited the European Council to continue formal discussions seeking a political solution for how to define and address problems with online gaming.⁶⁹ Second, the Parliament invited the European Commission to support this process by carrying out studies and making proposals to attain common objectives related to online gaming.⁷⁰ Third, the Parliament invited Member States to cooperate closely to solve the social and public order problems arising from cross-border online gaming.⁷¹ Additionally, the Parliament invited Member States to fight from a desirable common position, with the support of Commission, Europol, and other national and international

⁶⁴ This was consistent with the aim of Law 56/2007, as it focused on stimulating the use of information technology while preserving citizens' rights.

⁶⁵ See José Luis Ruiz-Navarro Pinar, *La libre prestación de servicios de juegos de azar: la normativa europea y reflexiones sobre la futura legislación española del juego online*, in 19 ASAMBLEA: REVISTA PARLAMENTARIA DE LA ASAMBLEA DE MADRID 213, 257–59 (Asamblea de Madrid ed., 2008) (explaining how the 20th additional provision of law 56/2007, regarding forthcoming gaming regulation, was conceived and designed).

⁶⁶ Resolution on the Integrity of Online Gambling, EUR. PARL. DOC. P6 TA 0097 (2009), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EN>.

⁶⁷ *Id.*

⁶⁸ *Id.* The Resolution on the integrity of online gambling was adopted by the European Parliament with 544 votes for, 36 votes against, and 66 abstentions. *Id.* at para. 3.

⁶⁹ *Id.*

⁷⁰ *Id.* at paras. 3, 28-31.

⁷¹ *Id.* at para. 4.

institutions, against all unauthorized or illegal online gambling services, so as to protect consumers and prevent fraud.⁷² The Parliament also encouraged the industry to develop Codes of Conduct, which it saw as a complement to government regulation, to stay on top of technological and other changes in the online gaming industry.⁷³

IV. DRAFT BILLS, REACTIONS, AND BILL REFERRED TO PARLIAMENT

As mentioned above, the *Society of Information Act* first noted the need to update Spanish gambling laws in 2007.⁷⁴ In 2010, an advance draft of what will become the Gambling Act Bill, was leaked, producing a heated debate in the sector and almost caused a riot.⁷⁵

Tensions between traditional National Lottery vendors and public gaming sector authorities had already erupted because authorities were encouraging vendors to abandon their public status as administrative concessions holders and instead contract privately.⁷⁶ In this atmosphere, the Draft Bill was seen as a first step towards the wholesale privatization of lotteries, which caused a great deal of controversy and even led to shutting down lottery outlets for several days.⁷⁷ Yet, the Draft Bill did not specifically state that the public monopoly on State Lotteries would be opened to the private sector.⁷⁸ Nevertheless, the

⁷² *Id.* at paras. 6-10.

⁷³ *Id.* at paras. 24-26.

⁷⁴ Society of Information Act, *supra* note 3, at *provisión adicional* 20.

⁷⁵ See Carlos Lalanda Fernández, *Los juegos online: aspectos legales 2008*, in 40 Ocio Y JUEGOS DE AZAR 119, 134-35 (Manuel Cuenca Cabeza & Magdalena Izaguirre Casado eds., 2010) (discussing the different interests involved and the wishful but futile attempts to channel the dialogue on a sectorial gambling conference).

⁷⁶ Ley de Presupuestos Generales del Estado para el año 2010 [Budget Act for 2010], at *provisión adicional* 34 (B.O.E. 2009, 20765) (Spain), available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20765>.

⁷⁷ This mobilization, the first in the history of the profession, took place during the months of April and June 2010. The first strike day was wildly criticized on by the mass media. See, e.g., Manuel V. Gómez, *Los loteros llaman al cierre contra los planes de hacienda*, EL PAÍS (Spain), Apr. 19, 2010, http://elpais.com/diario/2010/04/19/economia/1271628007_850215.html; *Loterios en huelga*, EL MUNDO (Spain), Apr. 21, 2010, <http://www.elmundo.es/elmundo/2010/04/21/espana/1271836106.html>; *Huelga loteros es secundada por 70% administraciones Valencia y Castellón*, ABC (Spain), Apr. 21, 2010, <http://www.abc.es/agencias/noticia.asp?noticia=354791>; *La mitad de los loteros irá hoy a la huelga, según los convocantes*, CINCO DÍAS (Spain), Apr. 21, 2010, http://www.cincodias.com/articulo/empresas/mitad-loterios-ira-hoy-huelga-convocantes/20100421cdscdiemp_24/; *Los loteros hacen huelga por los planes de privatización*, EXPANSIÓN (Spain), Apr. 21, 2010, <http://www.expansion.com/2010/04/21/economia-politica/1271831536.html>. But the official tracking figures were quite poor. Comunicado Prensa [Press Release], Gabinete de Comunicación [Dept. of Communication], En Respuesta a la Convocatoria de Cierre Patronal Realizada por Tres Asociaciones Minoritarias de Administraciones (Spain), available at http://www.loteriasypuestas.es/uploads/documentos/documentos_RESPUESTA_DE_LAE_A_LA_CONVOCATORIA_DE_CIERRE_PATRONAL_ca9812d4.pdf. A new shutdown was organized for some hours on June 29, 2010 and the government reacted by establishing procedures to take disciplinary measures. As a result, the unions abandoned their belligerent position. *Sancciones por cierre el 29 de junio de 2010*, ANAPAL, (Spain), Apr. 13, 2011, <http://www.anapal.org/ANAPAL/Articulos/Noticia.aspx?p1=MjI2>.

⁷⁸ *Informe sobre el anteproyecto de Ley de regulación del juego*, LA MONCLOA.COM, <http://www.lamoncloa.gob.es/ConsejodeMinistros/Enlaces/170910-enlacejuego>.

suspicion seems to have been valid because the public entity that operates the monopoly was later privatized by Royal Decree-Law 13/2010.⁷⁹ The decree contained different actions to promote investment and employment.⁸⁰ In theory, loosening the State's monopoly on the lottery and regulating online gaming are two different things. However, the preamble of the *Gambling Act* expressly states that turning to private law was necessary to deal with the upsurge of online activity in the gambling sector:

The impact produced by the emergence of online gambling has forced many European countries to amend their legislation in this area to discipline this new phenomenon, fulfilling also the European Union principles. . . . Gambling in Spain needs to be adapted to the new European legal framework and urgent measures have to be taken regarding the action and management of State Lotteries. The gaming operator has to modernize its organizational structure, adopting private legal forms suitable to compete adequately in the gaming market.⁸¹

On the other hand, powerful online gaming enterprises also reacted against the government plan because the current legal system was much more favorable for them than the proposed plan.⁸² Particularly, they argued against the new taxing system, which taxed the total volume of operations rather than earnings.⁸³

The Draft Bill was later formally used to consult the public, but official Public Hearings did not start until December 31, 2010.⁸⁴ The Hearings were hasty and lasted only six working days, in the midst of Christmas time – not the best way to take the pulse of public opinion.⁸⁵ Furthermore, the actual Draft

⁷⁹ Real Decreto-Ley de actuaciones en el ámbito fiscal, laboral y liberalizadoras para fomentar la inversión y la creación de empleo [Royal Decree-Law establishing several measures to promote investment and create employment], (B.O.E. 2010, 18651) (Spain), *available at* <http://www.boe.es/buscar/doc.php?id=BOE-A-2010-18651>.

⁸⁰ *See id.* at art. 14 (undertaking a reorganization and partial privatization of the national system of lotteries and betting, creating a National Lottery, and creating a betting corporation to replace the state-owned company who had till then managed the fiscal monopoly on public gambling). Investors may participate in the newly created corporation, by acquiring an interest of up to 49% of its equity. *Id.* at § 6. The overall aim seems to be earning revenue to contribute to the public deficit.

⁸¹ D. Rafael Andrés Alvez, *La venta anticipada de LAE, necesidad sin virtud* 812 ACTUALIDAD JURÍDICA ARANZADI, Jan. 11, 2011, at 5.

⁸² *Alegalidad de juego online genera millones*, GAMBLING HISPANO (Spain), Sept. 27, 2010, <http://www.gamblinghispano.com/2010/09/alegalidad-juego-online-genera-millones/>.

⁸³ UNA APROXIMACIÓN A LA PERCEPCIÓN SOBRE EL COMPORTAMIENTO Y LAS ACTITUDES SOCIALES RESPECTO AL JUEGO Y AL JUEGO *on line* en España 74 (2010). Another tax implication that troubled the gaming operators is that the gaming operator must absorb the effects when the total volume of gambling operations is considered taxable. In contrast, when earnings are taxable, the tax almost becomes an indirect value-add tax. *See* Juan Zornoza Pérez, *La tributación de los juegos de azar: una perspectiva comparada*, in JUEGOS DE AZAR 173–74 (Cecilia Mora-Donatto Coordinator, 2010).

⁸⁴ The call for comment was only announced through the website of the public entity in charge of the National Lottery. Due to technological updates it is no longer available. A screenshot of that website is offered at: Laura Guillot, *Se inicia el trámite de Audiencia Pública del Anteproyecto de la Ley del Juego: 11 días para hacer alegaciones*, EL BLOG DE LAURA GUILLLOT, Dec. 31, 2010, <http://lauraguillot.blogspot.com.es/2010/12/se-inicia-el-tramite-de-audiencia.html>.

⁸⁵ The whole preparation of the Draft Bill was obscured – it was not an example of transparency and it did not encourage public participation. Thus, no official record about the

Bill text in December was slightly different from the text previously leaked in September.⁸⁶ One particularly noteworthy change was a provision in the preamble that the National Lottery could be privately operated, which seemed to bear out the misgivings voiced by the traditional National Lottery outlet operators. Additionally, issues of how to manage games responsibly and respect players' rights had also been considerably developed.⁸⁷

The text of the Draft Bill contained 49 articles divided in 7 titles: Object and Application Field; General Provisions; Authorizations; Systems of Control; The National Gambling Commission; Sanctions; and Taxation. The text also contained several miscellaneous provisions, including: six additional provisions, seven transitional provisions, one repealing disposition, and six final provisions.⁸⁸

The Draft Bill was released as a minimal skeleton statute, which explains why essential provisions were ignored, such as limiting the number of available

number of participants at the Public Hearings or the quality of the hearings has been made public. In Spain, there is no provision to clearly discipline a closed procedure because the relevant article (article 22 of Government Act) is written ambiguously where it refers to "the convenient queries to require." Additionally, the final perception is that it remains a real "government's initiative" on its own. See generally, Karl-Peter Sommermann, *la Exigencia de una administración transparente en la perspectiva de los principios de democracia y del estado de derecho*, in *DERECHO ADMINISTRATIVO DE LA INFORMACIÓN TRANSPARENTE* 11–17 (Ricardo García Macho ed., 2010) (discussing the need to improve transparency and public participation).

⁸⁶ The original text leaked to the public in September 2010 was published only through the website of the National Lottery operator and is no longer available. Other versions of the text can be found at: *Anteproyecto de ley de Regulación del Juego*, available at http://www.elpais.com/elpaismedia/ultimahora/media/201101/26/economia/20110126elpepueco_1_Pes_PDF.pdf (including the preliminary version of Draft Bill dated in Sept. 14, 2010); *Anteproyecto de ley de Regulación del Juego*, available at http://lainformacion.com/static/pdf/ley_del_juego.pdf (containing a draft text dated Nov. 17, 2010); *Anteproyecto de ley de Regulación del Juego*, <http://www.iusport.es/images/stories/documentos/Anteproyecto-Ley-Regulacion-Juego-2011> (containing file as it was held to Public Hearings); *Anteproyecto de ley de Regulación del Juego*, *Diario del Derecho* http://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1046890&titulo=&texto=proyecto+de+ley+de+regulaci%F3n+del+juego (containing file as it was held to Public Hearings).

⁸⁷ Considering the flaws already mentioned (*e.g.*, the haste of the Public Hearings, lack of a proper announcement of the Draft Bill, and several different versions circulating unofficially) it is not surprising that most changes in the final Draft Bill responded to informal negotiations held after the Public Hearings. See 754 IX Legislatura (Daily record of the Chamber of Deputies of April 12, 2011), available at http://www.congreso.es/public_oficiales/L9/CONG/DS/CO/CO_754.PDF#page=2 (admitting to the flaws in the procedural handling of the Draft Bill and discussing how delicate the matter was).

⁸⁸ This structure was preserved in every known version of the Draft Bill. See *e.g.*, *Anteproyecto de ley de Regulación del Juego*, EL PAÍS, http://www.elpais.com/elpaismedia/ultimahora/media/201101/26/economia/20110126elpepueco_1_Pes_PDF.pdf. For the preliminary version of Draft Bill dated September 14, 2010, see *Anteproyecto de Ley de Regulación del Juego*, EL PAÍS, http://lainformacion.com/static/pdf/ley_del_juego.pdf (containing a draft text dated Nov. 17, 2010); *Anteproyecto de Ley de Regulación del Juego*, EL PAÍS, <http://www.iusport.es/images/stories/documentos/Anteproyecto-Ley-Regulacion-Juego-2011.pdf>; *Anteproyecto de ley de Regulación del Juego*, *Diario del Derecho*, EL PAÍS, http://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1046890&titulo=&texto=proyecto+de+ley+de+regulaci%F3n+del+juego. The latter report was used at the Public Hearings.

licenses and specifying the licensing requirements.⁸⁹ The text also failed to live up to sports operators' expectations, as it did not envision any return on income from sports and horse racing betting.⁹⁰

The Bill (the first official version of the Draft Bill) was finally referred to the Parliament in February 2011, where it followed a fast-track procedure to be approved.⁹¹ The Bill included some changes from the text offered at the Public Hearing.⁹² For instance, the role of the Treasury Department, almost absent in the preliminary papers, was detailed in articles 5 and 19 of the Bill discussed in Parliament.⁹³ In addition, there were three other particularly outstanding changes. First, lottery activity provisions were much more developed than in the Draft Bill.⁹⁴ Second, the taxable income for bets and online poker had been changed from gross earnings to net income, a change that greatly pleased gambling companies.⁹⁵ Finally, the Bill contemplated that sporting bets might be partially returned to sports operators to reinvest in sports competitions.⁹⁶

V. THE SPANISH GAMBLING ACT: A CRITICAL REVIEW

As finally passed, the Act is organized in a way that, for the most part, retains the structure of the different known versions of the Draft Bill and of the

⁸⁹ The text of the Draft Bill only included some general and quite obvious requirements. *See generally*, D. Rafael Andrés Alvez, *La nueva Regulación del juego y la Regulación del Juego en línea: el anteproyecto de Ley de Regulación del Juego*, ACTUALIDAD JURÍDICA ARANZADI, Oct. 21, 2010, at 14.

⁹⁰ Gaming operators take advantage of a parallel industry, sports and sporting events, which requires a large investment of time, effort, knowledge, and resources – both human and technological. Apart from some exemption on Football State Lotteries (Royal Decree 419/1991, 27th March), organizers of sports competitions in Spain do not reap any benefits from sports wagering. This situation leads to a professional sport deeply in debt and slows down amateur sport development. *See LAS APESTAS DEPORTIVAS* (Alberto Palomar Olmeda ed., 2010).

⁹¹ Resolución por la que se ordena la publicación en el Boletín Oficial del Estado del nuevo Reglamento del Congreso de los Diputados [Resolution ordering the publication of *Boletín Oficial* about Chamber of Deputies' Activities], (B.O.E. 1982, 55) (Spain), available at <http://www.boe.es/boe/dias/1982/03/05/pdfs/A05765-05779.pdf>.

⁹² Due to the obscurantism that surrounded the hearing and enactment procedure, the lobbies' and stakeholders' arguments were not made officially public. They are partially obtainable through some press releases issued privately by several associations and federations such as those operating, for instance, in Spanish football or basketball leagues. Yet, their aspirations were only minimally considered when the Draft Bill was transferred to its final form.

⁹³ Proyecto de Ley de regulación del juego [Daily record of the Chamber of Deputies], Boletín Oficial de Las Cortes Generales, 109-1 IX Legislatura (Feb. 11, 2011), available at http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_109-01.PDF#page=1.

⁹⁴ Lottery was considered specifically in three different provisions of the final Bill, while every preliminary version referred to lottery in only general terms.

⁹⁵ *El Proyecto de Ley de Regulación del Juego Illego al Congreso*, Confederacion Espanola de Empresarios del Juego, April 14, 2011, http://www.cofar.net/sites/default/files/boletines-pdf/cofarinforma_marzo_2011.pdf.

⁹⁶ This provision was initially too general. This provision will be settled by regulations under the newly added sixth additional provision, which will be commented later on.

Bill discussed in Parliament,⁹⁷ even though more than 370 proposals for amendments were presented during the parliamentary debates.⁹⁸

The first noticeable issue with the new statute is that, both in theory and according to the *Society of Information Act*, the aim of the new Act was supposed to be to regulate online gaming. However, few specific provisions in the final Act deal specifically with online gaming. The new legislation is instead general and ambitious. It appears to be an attempt to regulate all aspects of gaming through skeleton rules applicable throughout the “Spanish national sphere.”⁹⁹ Now, even if the Act refers specifically to “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, it also focuses on the provision of games by the monopoly lottery operators, regardless of the channel through which those games are provided.¹⁰⁰

The text of the Act contains three different groups of rules: general provisions on gaming structures; provisions on publicly operated gaming; and provisions on the taxing system.¹⁰¹ These three groups of rules are discussed below.

A. *Gaming Structures: Actors and Rules*

The Act identifies three groups of actors within the gambling world: operators, participants, and Public Administration.¹⁰²

Operators must be from the European Economic Area and must have at least one permanent agent living in Spain.¹⁰³ If the operator is a corporation, its only corporate purpose must be related to gaming management and marketing. Furthermore, foreign participants that share capital are limited.¹⁰⁴

Players’ rights and obligations are described in Article 15. The Act usually refers to players as ‘participants,’¹⁰⁵ but sometimes refers to them as ‘consum-

⁹⁷ See Ley de regulación del juego [Spanish Gambling Act] (B.O.E. May 28, 2011, 127) (Spain), available at <http://www.boe.es/boe/dias/2011/05/28/pdfs/BOE-A-2011-9280.pdf>. As published in the Official Gazette in May 2011, it comprises 49 articles, distributed in 7 titles: Object and Application Field; General Provisions; Authorizations; Systems of control; Gambling Authorities; and Sanctions and Taxation. Six additional provisions, nine transitional provisions, one repealing disposition, and eleven final provisions complete the text. *Id.*

⁹⁸ See generally Congreso de los diputados Hearing on 121/000109 Proyecto de Ley de Regulación del Juego, BOLETIN OFICIAL DE LAS CORTES GENERALES (May 29, 2011), available at http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_109-08.PDF#page=1; see generally Senado Hearing on 621/000096 Proyecto de Ley de Regulación del Juego, Boletín Oficial De Las Cortes Generales (April 27, 2011), available at http://www.congreso.es/public_oficiales/L9/SEN/BOCG/2011/BOCG_D_09_54_349.PDF.

⁹⁹ Spanish Gambling Act, *supra* note 97 at art. 2(1)(d). The new regulation applies to cross-border gambling activities offered from abroad to Spanish residents. *Id.* at art. 2.2b. However, it has no effect when the game takes place within a single Autonomous Region. *Id.*

¹⁰⁰ *Id.* at art. 3b.

¹⁰¹ See generally *id.* at tits. I–VI.

¹⁰² *Id.* at tits. IV, V.

¹⁰³ *Id.* at art. 13.

¹⁰⁴ Real Decreto 664/1999, de 23 de abril, sobre inversiones exteriores. [Legislation on Foreign Investment in Spain (B.O.E. 1999, 16273) (Spain), available at <http://www.boe.es/boe/dias/1999/05/04/pdfs/A16273-16279.pdf>.

¹⁰⁵ *Id.* at art. 8.

ers,' particularly in Article 8, which calls for a responsible gaming policy. This choice of words could be coincidental, were it not for the fact that the new Consumer Rights Directive openly excludes gaming from its scope of application.¹⁰⁶ This leads to many questions about how to determine whether standard consumer rights (such as information availability, remedies against abuses of dominant position or unfair contracts, and collective redress) apply to gamblers, because the use of the word 'consumer' does not appear to be accidental.¹⁰⁷

The Act also describes the Public Gambling Administration, starting with the Treasury Department,¹⁰⁸ which has major powers in gaming matters according to Article 19. However, the leading role goes to the National Gambling Commission, a new public Agency with regulatory, inspection, and arbitration powers.¹⁰⁹ Finally, the Act also establishes the Gambling Policy Council, an office to oversee collaboration between the State and Autonomous Regions and to provide a forum to coordinate gaming policies.¹¹⁰

The most prominent new public entity is the National Gambling Commission. The Commission was designed, like other Spanish government bodies, along the lines of a typical North American regulatory agency – a model eagerly embraced by Europeans in the last couple decades.¹¹¹ Even the description of the Commission in Article 20.2 hints at this source of inspiration, as does its treatment as a regulatory board under the Sustainable Economy Act.¹¹²

The most striking feature of the Commission is that it combines rule-making duties and powers¹¹³ with supervisory and administrative ones.¹¹⁴ In doing so, the Gambling Commission seems to depart somewhat from the "pure" model of an independent regulatory agency because it is directly entrusted with few rule-making powers, and some of those powers are limited to its own internal workings.¹¹⁵ In many cases it only enjoys rule-making authority insofar as government or ministerial regulations call for further development.¹¹⁶ However, in other cases, the Commission received authority to enact guidelines of a quasi-regulatory nature.¹¹⁷ Overall, gaming rule-making appears to have been left mainly to ministerial authorities, rather than entrusted to the Gambling Commission.¹¹⁸

¹⁰⁶ Council Directive 2011/83/EU, art. 3.3c O.J. (EC).

¹⁰⁷ Regarding the issue of internet gamblers' position as consumers it is vital to check the research carried out at Leuven University by professors A Verbeke, B Tilleman and N Hoekx.

¹⁰⁸ See *id.* at ch. 1.

¹⁰⁹ See *id.* at ch. 2.

¹¹⁰ See *id.* at ch. 3.

¹¹¹ See Christopher Pollitt, Karen Bathgate, Janice Caulfield, Amanda Smullen & Colin Talbot, *Agency Fever? Analysis of an International Policy Fashion*, 3 J. COMP.POL'Y ANALYSIS RES. & PRAC. 271, 286 (2001) (discussing how agencies essentially have become an administrative fashion accessory).

¹¹² See Spanish Gambling Act, *supra* note 97, at art. 8, 20.

¹¹³ *Id.* art. 5, 6.3, 7.2, 19, 20.2, 21.1, 21.4, 21.5, 23.1, 26.9.

¹¹⁴ *Id.* art. 7.4, 10.5, 21.6, 21.7, 21.9, 21.12, 21.13, 22, 24

¹¹⁵ *Id.* art. 26.9.

¹¹⁶ *Id.* art. 5, 7.2, 19, 21.1, 21.5, 23.1.

¹¹⁷ *Id.* art. 6.3, 21.4, 21.5.

¹¹⁸ *Id.* tit. V.

The Gambling Commission has adjudicative powers in matters of licensing,¹¹⁹ dispute resolution,¹²⁰ and penalties.¹²¹ This combination of powers suggests that the Commission is expected to play a major role in pursuing the public policy objectives of the new Act. The extent of that role, however, will depend very much on the Commission's relationship with its parent Ministry.

Coordinating these three public agencies will likely be quite difficult in practice because of the general and imprecise wording of several parts of the Act. For instance, the rules defining each gambling method describe the powers of these three agencies only vaguely.¹²² As a result, the final structure will end up being very complex, created from successive layers of rules developed by the Ministry, the National Gambling Commission, the operators themselves, and the Gambling Policy Council, not to mention Autonomous Regions. Coordinating responsibilities and preventing rule conflicts could be difficult with this type of structure.

The main principle of the new legal framework for gaming is that freedom of establishment and freedom to provide gaming services are restricted so that only authorized activities are considered lawful.¹²³ This is important because, although the State Act includes poker and roulette games, activities such as live, in-play betting and bingo games are not expressly mentioned.¹²⁴ However, some regional statutes allow these activities within those regions.¹²⁵

¹¹⁹ For licensing powers, see *id.* art. 9.1, 10.1, 10.6, 11, 12. For revocation powers, see *id.* art. 9.5. For suspension powers, see *id.* at art. 42.2, 46.

¹²⁰ *Id.* art. 21.11, 21.15, 25.

¹²¹ *Id.* art. 42.1, 42.2.

¹²² See *id.* art. 19.1, 21.1 and 35 a. While one might expect that the three agencies would be involved in the preparation of regulations to be formally adopted by the Minister or the Council of Ministers, (indeed, this appears to be contemplated by the Act, such in art. 5, 19 and 20.2) organizing that process is not easy in advance. *Id.* art. 5, 19, 20.2.

¹²³ *Id.* art. 9.2.

¹²⁴ *Id.* art. 3.

¹²⁵ See the Act passed by the Regional Parliament of Madrid, Ley de Espectáculos Públicos y Actividades Recreativas [Public Entertainment and Leisure Activities Act], (B.O.E. 1997, 17) (Madrid, Spain), available at <http://www.boe.es/boe/dias/1998/04/24/pdfs/A13723-13735.pdf>. For Decrees regarding live bingo gaming, see Decreto por el que se aprueba el reglamento de los juegos colectivos de dinero y azar en la comunidad de Madrid [Decree approving the Rules of the Money Collecting Games and Gambling in Madrid], (B.O.C.M. 2004, 105) (Madrid, Spain), available at <http://gestiona.madrid.org/wleg/servlet/Servidor?opcion=VerHtml&idnorma=3083&word=S&wordperfect=N&pdf=S>; see also Decreto por el que se aprueba el reglamento de apuestas en la comunidad de Madrid [Decree approving the Betting Rules of Madrid], (B.O.C.M. 2006, 106) (Madrid, Spain), available at <http://gestiona.madrid.org/wleg/servlet/Servidor?opcion=VerHtml&nmnorma=4210&cdestado=P>; see also Decreto por el que se aprueba el reglamento de casinos de juego en la comunidad de Madrid [Decree the Regulation of Casino-Gaming in Madrid], (B.O.C.M. 2006, 58) (Madrid, Spain), available at <http://gestiona.madrid.org/wleg/servlet/Servidor?opcion=VerHtml&idnorma=4886&word=S&wordperfect=N&pdf=S>; see also Decreto del Consejo de Gobierno, por el que se modifican el Reglamento de los Juegos Colectivos de Dinero y Azar y otras normas en materia de juego de la Comunidad de Madrid y se regula el juego del bingo electrónico. [Decree Approving the Regulation of Bingo Gaming in Castilla-La Mancha] (B.O.C.M. 2011, 22) (Castilla-La Mancha, Spain), available at http://www.bocm.es/bocm/Satellite?blobcol=URLordenpdf&blobheader=application%2Fpdf&blobkey=id&blobtable=CM_Orden_BOCCM&blobwhere=1142643937404&ssbinary=true.

There are three different types of authorizations, all personal and non-transferable.¹²⁶ First, general licenses authorize operators to offer bets, raffles, contests, poker, or roulette games as defined in Article 3.¹²⁷ These types of licenses are valid for 10 years, extendable for another 10 years, and are drawn by the National Gambling Commission after a public and competitive procedure.¹²⁸ But general licenses are not enough to enable an operator to offer a game: the Ministry must have previously exercised its Article 5 regulation-making authority. Then, under Article 11, the specific modality or game must be licensed as well.¹²⁹ This second kind of license lasts between one and five years and its regulation is to be detailed in a future text.¹³⁰ Finally, occasional gaming activities require a third type of authorization, also delivered by the National Gambling Commission.¹³¹ In addition to this, software, technical equipment, terminals, and systems supporting gaming activities must also be standardized and authorized.¹³²

B. Publicly-Managed Gaming

Issues related to publicly operated gaming are dealt with in several different parts of the Act.¹³³ These provisions address gaming that is managed directly or through an external network, carried out in person or online, and organized by the central State itself, or its agencies and collaborators, which collect public revenue (similar to a voluntary tax).¹³⁴ The most significant provision establishes a monopoly on lotteries in favor of SELAE (*Sociedad Estatal Loterías y Apuestas del Estado*) and ONCE (*Organización Nacional de Ciegos de España*). SELAE is the half-private corporation that, by virtue of the Royal Decree-Law 13/2010, has taken over the ancient public entity in charge of National Lotteries. ONCE is a non-profit organization focused on improving the quality of life of persons with severe visual impairments.¹³⁵ According to the preamble, this monopoly is considered appropriate to provide a higher level of control against fraud, money laundering, and addiction.¹³⁶ Also, this monopoly is tax-exempt.¹³⁷

Overall, the new Law divides the gaming market into two separate segments,¹³⁸ a “reserved market” with non-occasional, state-wide lottery and lotto games and a “non-reserved market” that is open to competition, though it requires an administrative license.

¹²⁶ See Spanish Gambling Act, *supra* note 97, at art. 9.3.

¹²⁷ *Id.* art. 10.

¹²⁸ *Id.*

¹²⁹ *Id.* at art. 11.1.

¹³⁰ *Id.* at art. 11.4.

¹³¹ *Id.* at art. 12.

¹³² *Id.* at arts. 16–18.

¹³³ *Id.* at art. 4, disposición adicionales 1–3, disposición transitoria 2, 4, disposición final 3.

¹³⁴ *Id.* at disposición adicional 1, para. 4.

¹³⁵ *Id.* at pmbl. § III (introducing both of these organizations).

¹³⁶ *Id.*

¹³⁷ *Id.* at art. 48.2.

¹³⁸ See Pablo González-Espejo & David López Velázquez, *La Nueva ley del juego*, in *ACTUALIDAD JURÍDICA URÍA MENÉNDEZ* 30, 39 (2011).

Thus, the Act dramatically disturbs gaming competition, especially if we consider the position of private investors on SELAE against other gaming businesspeople operating out of the lotteries sector. Some justification for this may exist, but it is not mentioned anywhere in the Act. In fact, the three reasons evoked in the preamble as advantages of the lottery monopoly are not very solid. First, the Act proclaims the objective is to combat fraud, not only for lotteries, but also for casino games, sports betting, and horseracing, for which there is no provision of monopoly. Second, in regard to money laundering, while lottery notes are not the only type of bearer bonds available in the gaming market, they are the only type protected under the monopoly regime. Finally, because lotteries are also operated online, the well-known risk factors for problems associated with gambling, including easy access and fewer social constraints, will always be present.

C. Tax System

The new Act taxes gambling and prize draws that are conducted for promotional or advertising purposes. These taxes are to be paid by lawful operators and by owners of media used to offer illegal gambling services.¹³⁹ The Spanish Tax Administration Agency (AEAT) will collect taxes.

Tax rates and taxable income depend on the kind of game, the kind of event upon which the bet is made, and how the sums at stake are organized and distributed.¹⁴⁰ Most forms of online gaming are taxed on gross profit.¹⁴¹ The tax rates vary from 10% to 25%.¹⁴² Fixed odds horserace betting is taxed at 25% of gross profit, as are other fixed odds games and exchange betting.¹⁴³ Sports pool betting (22%), horseracing, pool, and pari-mutuel bets (15%) continue to be taxed at the turnover rate.¹⁴⁴

In addition, Autonomous Regions are free to raise the rates within their borders up to a certain limit.¹⁴⁵ In any case, profits from sports and horse race betting are always considered State revenue, while profits from other online gambling activities are shared among Autonomous Regions' governments in proportion to the amount of money gambled by their populations.¹⁴⁶

The regulatory activities of the National Gambling Commission will be financed by a one percent administrative fee collected from each operator's turnover.¹⁴⁷ This fee is to be paid annually,¹⁴⁸ along with a list of additional

¹³⁹ Spanish Gambling Act, *supra* note 97 at arts. 48.4, 48.5.

¹⁴⁰ *Id.* at arts. 48.6, 48.7.

¹⁴¹ *Id.* at art. 48.7.

¹⁴² *Id.* at art. 48.7(1)–(12).

¹⁴³ *Id.* at art. 48.7(2), (3), (5), (7), (8).

¹⁴⁴ *Id.* at art. 48.7(1), (4).

¹⁴⁵ One should keep in mind that gaming taxes have been a source of major revenue for the Autonomous Regions since 1980. See GERMÁN ORÓN MORATAL, RÉGIMEN FISCAL DEL JUEGO EN ESPAÑA (1990); Rosa Galapero Flores, *La tributación del juego desde la Ley Orgánica de financiación de las Comunidades Autónomas hasta el modelo de financiación de las Comunidades Autónomas 2002–2007*, in ANUARIO DE LA FACULTAD DE DERECHO 22, 29 (2004).

¹⁴⁶ Spanish Gambling Act, *supra* note 97 art. 48.11.

¹⁴⁷ *Id.* at art. 49.

¹⁴⁸ *Id.*

fees. For example, each time a license is demanded or an inspection is carried out, the operator must to pay a fee.¹⁴⁹

Another striking feature of the Act is that it forces online gaming companies to pay taxes retroactively for the period of time during which they operated without a clear legal framework.¹⁵⁰

D. Miscellaneous

Finally, the Act includes a few other important provisions. The law covers advertising, promotion, and sponsorship of gaming activities.¹⁵¹ In particular, advertising, sponsorship, or any form of endorsement of gaming activities is forbidden.¹⁵² Also prohibited is the advertising or promotion of unlicensed gaming operators.¹⁵³ The Act states that advertising, sponsorship, and promotion activities carried out by media operators regarding gaming or gaming operators will need additional licensing, which will be specified in forthcoming implementing regulations.¹⁵⁴ The Act also establishes a transition period for sport sponsorship, advertising, and promotion deals signed before 2011,¹⁵⁵ so it recognizes a kind of “status quo on advertising,” which will affect, for instance, banners on online sports news websites and advertising on sports venues.

Online gaming operators must use a Spanish domain ending in “.es” to allow the government to have more control, to prevent tax evasion, and to deter money laundering and terrorist financing.¹⁵⁶

Underage and vulnerable players’ protection is also mentioned in the preamble and text of the Act.¹⁵⁷ Nevertheless, it has never appeared to be a major concern, especially considering the terms and subjects of the parliamentary discussions, which instead focused on the economic interests of stakeholders, sports operators, and internet operators involved in gaming.

As the Draft Bill was being debated, National Lottery vendors’ associations pointed out the issue of responsible gaming management. They highlighted the importance of a careful and responsible gaming framework, especially regarding vulnerable groups, in accordance with the principles defined by the World Lottery Association (WLA) and the European State Lotteries and Toto Association (AELTE).¹⁵⁸ In their view, only publicly managed games can channel the natural gambling instinct of the population and address

¹⁴⁹ *Id.* at art. 49.2.

¹⁵⁰ *Id.* at art. 48.3.

¹⁵¹ *Id.* at art. 2.1.

¹⁵² *Id.* at art. 40(d).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at art. 7.

¹⁵⁵ *Id.* at transitional provision 9.

¹⁵⁶ *Id.* at art. 10.4(d).

¹⁵⁷ *Id.* at art. 1; art. 4.2(e); art. 11.4; art. 20.1, art. 35(f).

¹⁵⁸ See European Responsible Gaming Standards, THE EUROPEAN LOTTERIES, May, 2012, available at https://www.european-lotteries.org/search/apachesolr_search?filters=tid%3A18%20tds_cck_field_date%3A%5B2012-01-01T00%3A00%3A00Z%20TO%202013-01-01T00%3A00%3A00Z%5D

the needs of both society and participants.¹⁵⁹ This claim was justified on the following three grounds. For participants, public gaming offers reliable and secure games that cater to participants' gambling instincts while avoiding unrealistic expectations by ensuring that participants are always informed about the characteristics and new developments of each game.¹⁶⁰ For society, the focus changes from mere products to more fundamental concerns such as social needs on education, culture, employment and sport, because revenues are allocated to the Treasury.¹⁶¹ Finally, publicly managed games promote responsibility, transparency, integrity, security, and rigor in order to maintain and enhance society's trust in such state-owned games.¹⁶²

Unfortunately, given the well-documented health hazards associated with gambling, the new legislation gives scant attention to that issue beyond a brief general reference, and appears to completely omit it from the public interest concerns underlying the statute.¹⁶³ For instance, the Act does not impose on operators any specific duty or spell out any penalty regarding age or identity verification.¹⁶⁴ Instead, it relies on notions such as "responsible gaming," which follows the trend on light touch regulation that has commonly spread abroad, but has not yet proved to be fully suitable to dangerous consumptions like gambling.¹⁶⁵

The legal nature and effects of undertakings, co-regulation agreements, and self-regulation of advertising are matters of speculation.¹⁶⁶ The attempt to define the concept of "social responsibility of business," as it applies to gaming operators, is particularly significant.¹⁶⁷ In the end, only practice will show if

¹⁵⁹ See generally *Preguntas al President del Gobierno*, SALVEMOS EL JUEGO PUBLICO, (Dec. 1, 2009), http://www.salvemoseljugopublico.com/SalvarJP/Web/salvar_juego_publico.aspx.

¹⁶⁰ *Anteproyecto de Ley de Regulacion del Juego*, ANAPAL, (Jan. 11, 2011), <http://www.anapal.org/ANAPAL/Articulos/Noticia.aspx?p1=MTk0>.

¹⁶¹ See generally *Agrupación Nacional de Asociaciones Provinciales de Administradores de Lotería*, <http://www.anapal.org/ANAPAL/Articulos/Noticia.aspx?p1=MJk5> (last visited Nov. 4 2012).

¹⁶² Such statements are common for the supporters of State-owned gaming in the European Union, who consider the National Lottery, for instance, as "a tasteful and acceptable way to win money," "run in a fair and trustworthy manner that is beyond reproach." David Miers, *Regulation and the Public Interest: Commercial Gambling and the National Lottery*, 59 MOD. L. REV. 489 (1996) (discussing the situation in the United Kingdom in the 1990s, when state-sponsored gambling was being re-introduced as a revenue raising device).

¹⁶³ Gambling addiction is only mentioned in general terms in the Preamble of the Act, when justifying the need to restrict gaming. Spanish Gambling Act, *supra* note 97, at preamble sec. V.

¹⁶⁴ There are several references to this issue throughout the text of the Act, but the terms are vague and too general. The impact of the new gaming law on consumer privacy protection is outlined, for instance, in J Sempere Samaniego, *Comentarios al proyecto de Ley de Regulación del Juego*, DATOS PERSONALES.ORG, Feb.11, 2011, http://www.madrid.org/cs/Satellite?c=CM_Revista_FP&cid=1142639887220&esArticulo=true&idRevistaElegida=1142629583982&language=es&pag=2&pagename=RevistaDatosPersonales%2FPage%2Fhome_RDP&siteName=RevistaDatosPersonales.

¹⁶⁵ See LOUISE GUYON, ET AL., *TABAC, ALCOOL, DROGUES, JEUX DE HASARD ET D'ARGENT: À L'HEURE DE L'INTÉGRATION DES PRATIQUES* 178-82 (Québec, Presses de l'Université Laval, 2009).

¹⁶⁶ See Spanish Gambling Act, *supra* note 97, art. 10.5, 24.5, art. 7.4.

¹⁶⁷ *Id.* at art. 8, 10.2, 10.5.

any of the semi-voluntary arrangements can substitute for command-and-control type regulations.

VI. FURTHER STEPS AND CURRENT SITUATION

While the Spanish text was under parliamentary discussion, the European Internal Market and Services Commission launched an extensive investigation into the public policy challenges and possible single market issues resulting from the rapid development of licit and unauthorized online gambling offers directed at EU citizens.¹⁶⁸ The Commission's communication 'Green Paper On Online Gambling in the Internet Market'¹⁶⁹ in March 2011 led ultimately to a European Parliament resolution in November 2011 addressing online gambling in the Internal Market.¹⁷⁰ That resolution emphasizes the subsidiary principle¹⁷¹ and rejects any European legislative act uniformly regulating the entire gaming sector. Nonetheless, the resolution recognizes that in some areas a coordinated European approach would have value, given the cross-border nature of online gaming.¹⁷² According to the European Commission, the political process initiated by this Green Paper is in no way aimed at deregulating or liberalizing online gaming, but the industry is still guessing whether the Green Paper will remain soft law indefinitely or eventually become a real directive.¹⁷³

In Spain, the first decrees in furtherance of the Gambling Act were made public by the end of 2011.¹⁷⁴ Rules for specific games such as poker, roulette, and blackjack were established by Orders of Treasury Department and published during the same month as the main directives to allow gaming licenses.¹⁷⁵ The process had started, but still had obstacles left to face.

¹⁶⁸ See *On-line Gambling in Europe: Let's Discuss*, EUROPA, (Mar. 24, 2011), http://europa.eu/rapid/press-release_IP-11-358_en.htm?locale=en.

¹⁶⁹ *Green Paper: On On-Line Gambling in the Internet Market*, EUROPEAN COMMISSION, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0128:FIN:EN:PDF>.

¹⁷⁰ Resolution on Online Gambling in the Internal Market, Eur. Parl. Doc. INI 2084 (2011), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=/EP//TEXT+TA+P7-TA-2011-0492+0+DOC+XML+V0//EN>.

¹⁷¹ The subsidiary principle is one of European Law's key notions. It implies that policymaking decisions should be made at the most decentralized level. According to the principle, a centralized governing body would not take action unless it is more effective than action taken at a lower government level. Again, the Resolution cited in the text uses the expression literally.

¹⁷² Resolution on Online Gambling in the Internal Market, *supra* note 170, at 9.

¹⁷³ See Brochure for the 6th Annual Legal Gaming in Europe Conference (London, Jan. 23-24, 2012), available at http://www.bulletbusiness.com/gambling-conference/documents/LegalGamingEU6_Viz.pdf

¹⁷⁴ See Real Decreto por el que se desarrolla la Ley de regulación del juego, en lo relativo a los requisitos técnicos de las actividades de juego [Royal Decree developing the Gambling Act] (B.O.E. 2011, 1613) (Spain), available at <http://www.boe.es/boe/dias/2011/11/15/pdfs/BOE-A-2011-17835.pdf>; see Real Decreto por el que se desarrolla la Ley 13/2011, de 27 de mayo, de regulación del juego, en lo relativo a licencias, autorizaciones y registros del juego [Royal Decree developing the Gambling Act with regard to licenses, approvals, and registrations of gaming] (B.O.E. 2011, 1614) (Spain), available at <http://www.boe.es/boe/dias/2011/11/15/pdfs/BOE-A-2011-17836.pdf>.

¹⁷⁵ See Orden por la que se aprueba el pliego de bases de la convocatoria de licencias generales para el desarrollo y explotación de actividades de juego de la Ley 13/2011,

Several gaming companies felt the procedure to obtain a license was too strict and challenged different aspects of the decrees in Court.¹⁷⁶ Those lawsuits are still pending, and the change of government after the General Election of November 2011 has slowed the process.¹⁷⁷ In fact, a special executive order on December 30, 2011 extended the end of the so-called “transition period” from January 1, 2012 to June 30, 2012.¹⁷⁸ The first licenses were finally issued on June 1, 2012 and enabled more than 50 online operators to legally offer gaming starting on June 5, 2012.¹⁷⁹

However, the country has suffered a severe financial crisis and, in the current market conditions, the search for private partners for SELAE does not look promising.¹⁸⁰ Moreover, given current conditions, setting up a new administrative body is not considered suitable anymore, thus the yet-to-be-born Gambling Commission may never see daylight. Recent government releases have said the functions of the Gambling Commission could be transferred to a general National Commission of Markets and Competition. This Commission would be created by merging several sectorial regulatory bodies and would reduce the number of Spanish public agencies.¹⁸¹

de 27 de mayo, de regulaci3n del juego [Order approving the bases to regulate the licensing of gaming operators] (B.O.E. 2011, 3124) (Spain), available at <http://www.boe.es/boe/dias/2011/11/18/pdfs/BOE-A-2011-18053.pdf>.

¹⁷⁶ See Laura Guillot, *La audiencia nacional desestima la peticion de codere de suspender el procedimiento de concesion de licencias, ahora se apunta la OID denunciando ante la fiscalia anticorupcion*, EL BLOG DE LAURA GUILLOT, (June 8, 2012), <http://lauraguillot.blogspot.com.es/2012/06/la-audiencia-nacional-desestima-la.html>.

¹⁷⁷ See Laura Guillot, *Incomprensiblemente el gobierno quiere dejar zanjada la Regulacion del Juego online antes de las elecciones del 20N*, EL BLOG DE LAURA GUILLOT, (Oct. 26, 2012), <http://lauraguillot.blogspot.com.es/2011/10/incomprensiblemente-el-gobierno-quiere.html>; see Laura Guillot, *Prorroga del periodo transitorio todo el pastel para los 2 grandes: las primeras licencias “florecean” en primavera de 2012*, EL BLOG DE LAURA GUILLOT, (Dec. 15, 2011), <http://lauraguillot.blogspot.com.es/2011/12/prorroga-del-periodo-transitorio-o-todo.html>.

¹⁷⁸ See Real Decreto-ley 20/2011, de 30 de diciembre, de medidas urgentes en material presupuestaria, tributaria, y financier para la correcci3n del deficit publico [Provision regulating urgent measures to mend public deficit, which affects to Temporary Provisions 8 and 9 on Law 13/2011] (B.O.E. Dec. 31, 2011, 20638) (Spain), available at <http://www.boe.es/boe/dias/2011/12/31/pdfs/BOE-A-2011-20638.pdf>.

¹⁷⁹ The complete list of authorized operators can be found through the Treasury Department website (Gambling Regulation Office), available at <http://www.ordenacionjuego.es/es/operadores/buscar>.

¹⁸⁰ This situation has lessened disputes between State and traditional Lottery vendors, who have also obtained some judicial orders to protect the administrative nature of their bonds with the gaming administration and to ensure their acquired rights.

¹⁸¹ The first government releases were unofficial and gave rise to different critiques and speculations. See Tomas de la Quadra-Salcedo, *A la confusion por la fusion: la perdida de independencia de los organismos regulatrios no augura nada bueno*, EL PAIS ECONOMIA, Apr. 22, 2012, http://economia.elpais.com/economia/2012/04/19/actualidad/1334860051_273410.html. The project of merging several sectorial regulatory bodies has already been already launched, and a Bill has been referred by the Government to the Parliament. See *referencia del consejo de ministros*, LA MONCLOA, Sept. 27, 2012, http://www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2012/refc20120927.htm#ComisionNacional. Surprisingly, the inclusion of the Gambling Commission in the future Agency is not clear in the text of the Bill, it still has to be discussed in Parliament.

As things stand in early 2013, some key aspects of gaming regulation appear likely to change. Indeed, the Budget Bill for 2012¹⁸² carries several amendments to Act 12/2011 that specifically address the Gambling Commission and clarify the returns from sporting bets to sports operators.¹⁸³ In addition, by Royal Decree-Law 21/2012, 13th July, SELAE is to support a new joint fund to avoid Autonomous Regions cash-flow problems. According to government plans, SELAE will lend € 6.000 million to this fund, which will be charged to future income. Unfortunately, this risks jeopardizing SELAE's financial reputation and could make it impossible to profitably privatize it.¹⁸⁴

VII. FRENCH GAMBLING REGULATION ACT: COMPARATIVE LAW CONSIDERATIONS

France also recently passed new gaming legislation in May 2010. While Spain was debating the Draft Bill, the French government adopted a new law, which only referred to "online gambling and gaming" in its title. However, the law actually contained a regulatory framework for the whole gaming sector, stressing the extraordinary nature of gaming among commercial activities.¹⁸⁵

A. *Scope and origins of French Act*

By means of Law 2010-476 of May 12, 2010 Providing for Free Competition and Regulation in the Online Gambling Sector ("French Online Gambling and Gaming Act"),¹⁸⁶ France responded to a European Commission (Commission) formal request.¹⁸⁷

¹⁸² Ley 2/2012, de 29 de junio, de Presupuestos Generales del Estado para el año 2012 [State Budget for 2012] (B.O.E. 2012, 160) (Spain), available at <http://www.boe.es/boe/dias/2012/06/30/pdfs/BOE-A-2012-8745.pdf>.

¹⁸³ *Id.* at Disposición final 6. This law gives traditional vendors the chance to opt for a private contract instead of their administrative link to public Gaming Administration in the Seventy-seventh Additional Provision. *See id.*

¹⁸⁴ *El Gobierno autoriza el endeudamiento de Loterías y Apuestas del Estado*, MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, Aug. 31, 2012, available at <http://www.minhap.gob.es/Documentacion/Publico/GabineteMinistro/Notas%20Prensa/2012/CONSEJO%20DE%20MINISTROS/31-08-12%20Endeudamiento%20SELAE.pdf>.

¹⁸⁵ Loi 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (1) [Law 2010-476 of May 12, 2010 Providing for Free Competition and Regulation in the Online Gambling and Gaming Sector] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], May 13, 2010 p. 8881 (art. 1) [hereinafter French Online Gambling and Gaming Act], available at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20100513&numTexte=1&pageDebut=08881&pageFin=08897.

¹⁸⁶ *Id.*

¹⁸⁷ While EU law permits Member States to restrict the offering of gambling services due to the public interest, (for example, to prevent gambling addiction or organized crime), such restrictions must align with the Member State's own restrictive behavior toward services and operators. Furthermore, any measures taken by Member States to restrict the market must be necessary, proportionate, and non-discriminatory. Acting upon complaints, the Commission had taken the view that France's restrictions on foreign service providers were disproportionate. As a result, the Commission started infringement proceedings against France in 2006. Press Release, Free Movement of Services: Commission Inquires into Restrictions on the Provision of Certain Gambling Services in Austria, France and Italy (Oct. 12, 2006), *availa-*

Before France changed its law, French residents who wished to legally gamble online could only choose between two operators that offered a limited selection of services: Pari Mutuel Urbain (PMU) for horse racing, and La Française des Jeux for other forms of sports betting.¹⁸⁸ Both enjoyed exclusive rights to organize certain forms of sports betting online and in shops.¹⁸⁹ As a result, no other European gaming operator could legally offer its online services in France.¹⁹⁰ The Commission found that France's restrictions on online gaming affected foreign operators. It also found that the restrictions were disproportionate to, and inconsistent with, the objective sought, thereby breaching EU rules on the freedom to provide services.¹⁹¹ Thus, the Commission requested that France amend its law.¹⁹²

The Commission has since decided to withhold any further action because the new French Law now allows for the cross-border provision of services and includes clear licensing rules for domestic and European operators.¹⁹³

ble at http://europa.eu/rapid/press-release_IP-06-1362_en.htm?locale=en; Press Release, Free Movement of Services: Commission Acts to Remove Obstacles to the Provision of Sports Betting Services in France, Greece and Sweden (June 27, 2007) (issuing a reasoned opinion), *available at* http://europa.eu/rapid/press-release_IP-07-909_en.htm?locale=en.

¹⁸⁸ The traditional legal framework of gambling in France was perfectly reported by Senator F Trucy during parliamentary discussions about the Bill. SÉNAT RAPPORT No. 209, p. 12 (2010) *available at* <http://www.senat.fr/rap/109-209-1/109-209-11.pdf>.

¹⁸⁹ *See id.*

¹⁹⁰ The situation has been studied by Deputy JF Lamour and can be consulted in his report. ASSEMBLÉE NATIONALE RAPPORT No. 1860, p. 42-43 (2009), *available at* <http://www.assemblee-nationale.fr/13/pdf/rapports/r1860.pdf>.

¹⁹¹ The Commission had concerns about the proportionality of cases in which operators licensed and regulated in other Member States were denied access to the French sport and horse race betting market for reasons such as the protection of consumers from gambling addiction; yet, it seemed that the French sport betting market continued to expand and offer more choice and opportunity for consumers to bet. Free Movement of Services: Commission Inquires into Restrictions on the Provision of Certain Gambling Services in Austria, France and Italy, *supra* note 187.

¹⁹² The Commission formally requested France to amend its laws following consideration of its reply to the letter of formal notice sent in 2006. Free Movement of Services: Commission Acts to Remove Obstacles to the Provision of Sports Betting Services in France, Greece and Sweden, *supra* note 187. This formal request took the form of "reasoned opinion." The second stage of the infringement procedure laid down in Article 226 of the EC Treaty.

¹⁹³ The Commission welcomed France's decision to open its gambling market by closing the infringement procedure in November 2010, after it was assured that French citizens would have access to a wider choice of duly authorized online gambling services as a result of the changes made to France's laws about online gambling. The Commission believes that France's new online gambling law has introduced a national licensing system permitting cross-border sports betting on a non-discriminatory basis, while providing strict controls on gaming. This has allowed a broader choice of online gambling services for sports betting. The new law has also legalized online poker in France. These services are authorized and supervised by a new specific online gambling regulator (ARJEL). European gambling operators now have the possibility to apply for French licenses and offer their services in France. Nevertheless, gambling continues to be regulated to protect vulnerable consumers, to minimize gambling addiction, and to prevent criminal activities. Press Release, On-line Gambling: Commission Welcomes France's Decision to Open its Gambling Market and Closes Infringement Procedure (Nov. 24, 2010), *available at* http://europa.eu/rapid/press-release_IP-10-1597_en.htm?locale=en.

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B. *Provisions of new French Law from a comparative point of view*

French Act 2010-476 only deals with the online provision of sports betting services, including horse racing and club games such as poker. A new independent agency, l'ARJEL, is in charge of regulating and supervising online gaming¹⁹⁴ and has a wide range of responsibilities, including issuing, suspending, and revoking licenses for online companies.¹⁹⁵ Also, another committee called the Advisory Committee on Gambling¹⁹⁶ is in charge of responsible gaming.¹⁹⁷ Similar to the laws in Spain, the French Act pays special attention to online commercial communications and sales promotions so as to protect consumers and combat gambling addiction.¹⁹⁸

French taxes on online gaming are designed to finance charitable and public interest activities as well as events on which online sports betting relies.¹⁹⁹ The taxes are charged over total volume of betting rather than over net earnings.²⁰⁰ Finally, the new Law allows longstanding operators²⁰¹ to continue.²⁰²

The new French and Spanish laws both try to stop unauthorized cross-border offers of online gaming and to create more open markets. In the beginning, each country started with a different point of view about online gaming, but they both ended up addressing the issue using similar regulatory and technical means. This is not surprising, considering that both countries faced a previous situation where enforcement was ineffective and there was a *de facto* tolerance for banned or restricted gambling activities.

However, the Spanish and French schemes are very different when it comes to sanctions. Whereas Spanish legislators rely only on the long-established regime of administrative sanctions, now codified in Law 30/1992,²⁰³ their French counterparts not only apply a similar range of sanctions,²⁰⁴ but also devised an entirely new system that includes a specialized tribunal. This tribunal is formally embedded in the regulatory agency,²⁰⁵ but consists of magistrates drawn from the three top courts in the country.

The new French rules on gaming are also much narrower than the Spanish ones. For instance, the French rules only consider online services through the Internet. This means the French Law leaves aside important issues such as those regarding mobile applications. But even in this restricted field of opera-

¹⁹⁴ *Rôle et missions*, ARJEL - Autorité de Régulation des Jeux en Ligne - site officiel, <http://www.arjel.fr/-Role-et-missions-.html> (last visited Jan. 5, 2013).

¹⁹⁵ See French Online Gambling and Gaming Act, *supra* note 185, at art. 34, 43. Chapter 10 enumerates each of the responsibilities and requirements of the agency. *Id.* at art. 34–45.

¹⁹⁶ *Id.* at art. 3. The Committee is referred to as *Comité Consultatif des Jeux*. *Id.*

¹⁹⁷ *Id.* The body in charge of responsible gaming is called the *Observatoire des Jeux*. *Id.*

¹⁹⁸ See *id.* art. 5, 7, 8 and 9.

¹⁹⁹ *Id.* at art. 52.

²⁰⁰ *Id.* at art. 46–55.

²⁰¹ The longstanding operators are *La Française des Jeux* and *Pari Mutuel Urbain*. SÉNAT RAPPORT NO. 209, *supra* note 188, at p. 29.

²⁰² See French Online Gambling and Gaming Act, *supra* note 185, at art. 68.

²⁰³ Administrative Common Procedures (B.O.E. 1992, 30), available at http://noticias.juridicas.com/base_datos/Admin/130-1992.t3.html#a30.

²⁰⁴ See French Online Gambling and Gaming Act, *supra* note 185, at art. 41.

²⁰⁵ AUTORITÉ DE RÉGULATION DES JEUX EN LIGNE, <http://www.arjel.fr/> (last visited Mar. 4, 2013).

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tion, the initial results of the law came short of expectations. Indeed, a recent assessment of the workings of the new law claims that illegal gambling is still offered online and suggests about twenty improvements to the current statute.²⁰⁶ As such, substantial changes to the Online Gambling and Gaming Act were expected, but delayed by the presidential and parliamentary elections in 2012. The Act has only been amended four times, including by two supplementary budget laws,²⁰⁷ the Act on sports ethics and sportspeople rights,²⁰⁸ and one decree.²⁰⁹ Recently, the idea of extending regulations into the online skill games industry²¹⁰ has also been addressed.²¹¹ On the other hand, the Spanish Law is certainly more complex. Only practice will show to what degree such an intricate structure will be able to fulfill market needs.²¹²

In sum, the similarities between the new online gambling legislation in France and Spain are useful to note. I do not believe it is coincidence that these regulatory frameworks for gaming display common features. Even if gaming was not regulated by sector-specific rules at the EU level,²¹³ these countries are

²⁰⁶ See generally, Rapport d'information sur la mise en application de la loi n° 2010-476 [Government report on the application of Law 2010-476] [p. 131–140], www.assemblee-nationale.fr/13/pdf/rap-info/i3463.pdf (last visited Jan. 5, 2013).

²⁰⁷ See Loi 2010-1658 du 29 décembre 2010 Budget: loi de finances rectificative [Law 2010-1658 of December 29, 2010 on the Budget: Amending Finance Act 2010 (4)], Journal Officiel du 23 février 2011 [Official Journal of February 23, 2010], available at http://www.assemblee-nationale.fr/13/dossiers/quatrieme_collectif_2010.asp; see also Loi 2012-354 du 14 mars Budget: loi de finances rectificative 2012 [Law 2012-354 of March 14, 2012 on the Budget: Amending Finance Act 2012], Journal Officiel du 15 mars 2012 [Official Journal of March 15, 2012], available at http://www.assemblee-nationale.fr/13/dossiers/quatrieme_collectif_2010.asp.

²⁰⁸ Loi 2012-158 du 1 février 2012 Sports: renforcer l'éthique et les droits des sportifs [Law 2012-158 of February 1, 2012 on Sports: strengthening the ethics and rights of athletes], Journal Officiel du février 2012 [Official Journal of February 2012], available at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20120202&numTexte=2&pageDebut=01906&pageFin=01910.

²⁰⁹ Décret 2011-169 du 10 février 2010 modifiant l'article 3 de la loi no 2010-476 du 12 mai 2010 [Decree 2011-169 of February 10, 2010 modifying Article 3 of Law 2010-476 of May 12, 2010], available at http://legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110212&numTexte=21&pageDebut=02746&pageFin=02746.

²¹⁰ Law 2010-476 shall not apply to skill games according to its article 2. Article 2 of the Act sets its scope as follows: "a game of chance is a game played for money in which chance predominates over skill and over combinations of intelligence to obtain winnings." Loi 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (1) [Law 2010-476 of May 12, 2010 Providing for Free Competition and Regulation in the Online Gambling and Gaming Sector], at art. 2, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], May 13, 2010 p. 8881, available at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20100513&numTexte=1&pageDebut=08881&pageFin=08897.

²¹¹ It is not always easy to establish whether skill games fall within the French prohibition against gambling and lotteries or whether they fall within a permissible category because of the thin border between online skill games and pure skill games (chess, checkers).

²¹² Such an aspect was foreseen, for instance, by M Lycka, *The New Spanish Online Gambling Law: The Devil Will Be in the Details of the Secondary Regulation*, 15 GAMING LAW REV. AND ECON. 705 (2011).

²¹³ Gambling services are explicitly excluded from the scope of EU law in the case of the E-Commerce Directive and of the Services Directive.

both subject to a number of other EU enactments.²¹⁴ In fact, the entire gaming industry will always be influenced by globalization, legal constraints, market liberalization, and technological innovation. All of this naturally makes for largely parallel, if not uniform, sets of national rules.²¹⁵ This is true not only for substantive gaming laws but also for the organization and management choices, as demonstrated by the common trends within the OCDE regarding Agencies, Independent Regulatory Boards, and public-private partnerships.²¹⁶

In the end, what singles out one particular national system from the others will likely be the extent and form of State involvement in the regulation of gaming, and the peculiar manner in which that State's regulation is integrated into national administrative law requirements and traditions.

The very different act-making procedures for the Spanish *Gambling Act* and the new French *Online Gambling and Gaming Act* clearly reflect the diverse commitments of the two governments to socio-political conciliation, public participation, and transparency. These two stories also suggest that legislative bodies may respond very differently to lobbying by conflicting interest groups, especially on a subject as sensitive as gaming.

In any scheme of regulation, public organizations and private operators must communicate and cooperate, even though they differ widely as to their positions and nature. Such communication and cooperation may prove difficult to achieve. In legal systems based on a sharp distinction between public law and private law, such as in Spain, the difficulty is compounded by establishing a zone of new actors that is neither clearly public nor clearly private. Yet, a well-documented trend in Spanish law has favored the appearance of such hybrid entities. This gives rise to serious legal and political problems. Important legal issues regarding such entities crucially depend on their characterization as public or private. Channels of political accountability are blurred or completely vanish.

Provisions regarding SELAE in the new Spanish *Gambling Act* illustrate other problems arising out of this trend away from the clear delineation between public law and private law regimes. Under the new law, some private investors have been granted a privileged position – while marginally exposed to a competitive market, they will operate under the umbrella of a public agency and enjoy a monopoly. Any further privatization of SELAE should be strongly disciplined to maintain the public interest in the monopoly.

The current economic crisis makes the long-term prospects uncertain for the Spanish Administration, especially because of its complex structure, with

²¹⁴ Such as: the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive, the Directive on privacy and electronic communication, and the Directive on the common system of value added tax. See Fabienne Péraldi Leneuf, *La Cour de Justice et la libéralisation des jeux en ligne: l'exigence de cohérence A propos de l'arrêt Santa Casa* 46 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 7–29 (2010).

²¹⁵ See generally SYTZE F. KINGMA & TATIANA VAN LIER, *THE LEEWAY OF LOTTERIES IN THE EUROPEAN UNION. A PILOTSTUDY ON THE LIBERALISATION OF GAMBLING MARKETS IN THE EU* (2006).

²¹⁶ VV.AA., *LES AUTRES VISAGES DE LA GOUVERNANCE PUBLIQUE. AGENCES, AUTORITÉS ADMINISTRATIVES ET ÉTABLISSEMENTS PUBLICS* 35–38 (2002), available at <http://claude.rochet.pagesperso-orange.fr/pdf/DPG—FRseule2.pdf>.

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one central State and 17 Autonomous Regions full of aspirations and owners of both legislative and executive powers. In such a situation, predicting how gaming legislation will evolve in Spain is challenging. As such, this article does not purport to foretell the path of gaming legislation; instead, this article simply aims to provide information about the past and present Spanish laws on gambling. While one may find some clues to the future in the fact that Spain and its northern neighbor have recently moved broadly in the same direction, fortune-telling about the law is a risky game.

