

Draft bill of gaming and privatisation of State Lotteries

On 3 December 2010, the Spanish Council of Ministers announced "*the transformation of the public corporate entity Loterías y Apuestas del Estado (State Lotteries and Bets) in order to create an independent regulator which will be assigned to the Ministry of Economy and Finance until the future National Gaming Commission is incorporated*". It announced the creation of a company which will remain public given that, in the words of the Second Vice-President, only 30% will be privatised.

This initiative is framed in the Government's decision to undertake new regulation in the gaming sector in light of the impact that technological advances have had on this sector of the economy.

Thus, in compliance with the provisions of the twentieth additional provision of Law 56/2007, of 28 December on Measures to Promote the Information Society (*Medidas de Impulso de la sociedad de la Información*), the Spanish Government has initiated the works meant to approve the Draft bill to regulate gaming and betting activities, in particular those carried out through interactive electronic communication systems.

The purpose of this memorandum is to provide information on the main points of the draft bill to regulate gaming and betting activities which the Government is preparing, in accordance with the draft that was circulated; to provide data on the creation by the General State Budgets Law for 2011 (*Ley de Presupuestos Generales del Estado*) of the State-owned Company *Loterías y Apuestas del Estado*; and succinctly outline the different milestones of its future privatisation process from a legal-procedural perspective.

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The draft bill to regulate gaming and betting activities

Since its decriminalisation by means of Royal Decree Law 16/1977, of 25 February, which regulates the Criminal, Administrative and Tax Aspects of Games of Chance, the legal regime of gaming had undergone few changes and it had been maintained as a highly traditional concept. The competent authorities for its regulation were the Autonomous Communities by virtue of the exclusive jurisdiction they assumed in their respective Statutes of Autonomy (*Estatutos de Autonomía*), provided that such activities were carried out in their respective territories.

With the Internet growing as a medium through which games and bets can be played or carried out, the gaming sector has experienced a significant change in its conception which requires, as indicated by the European Court of Justice, a new regulation that is in accordance with its new dimensions.

According to the Stated Purpose of the draft bill to regulate gaming and betting activities ("**Draft Bill**"), the lack of appropriate regulatory instruments to provide a response to the questions generated in light of the new market situation has created in the sector the need to establish new regulatory mechanisms which offer legal security to operators and participants in the different games. The Draft Bill was prepared in response to this objective.

The main new changes deriving from the Draft Bill are as follows:

- It regulates gaming activity in its different categories when it is carried out through electronic, computerised and interactive channels in which the face-to-face media must have a secondary nature, except for those games conducted by entities designated by the law to carry out activities subject to reservation. In other words, the Law regulates private online gaming activities that are currently and allegedly carried out in Spain.
- It includes in its scope of application cross-border gaming activities, i.e., those carried out by individuals or legal entities located outside of Spain which organise or offer gaming activities to Spanish residents. It thereby invokes the European Court of Justice's case law on this matter.
- Gaming activities carried out through electronic, computerised or interactive media, the scope of which does not exceed that of an Autonomous Community, are excluded.
- The state lotteries or those which are beyond the scope of any Autonomous Community in all their categories are reserved for operators appointed by law. The state monopoly on lotteries is therefore maintained. Specifically, government-owned corporation *Loterías y Apuestas del Estado* and the Spanish National Organisation of the Blind (*Organización Nacional de Ciegos Españoles*) will be the designated operators to market the lottery games regulated by the law.
- Any gaming category subject to the scope of the Draft Bill that is not regulated by Spain's future National Gaming Commission is considered prohibited. Once regulated, in order to be effectively exercised, the corresponding authorisation must first be obtained and it must be recorded in the General Registry of Gaming Licences and Authorisations.
- The individuals or legal entities, public or private companies of Spanish nationality or of a country within the European Economic Area and which have at least one permanent representative in Spain, expressly authorised and previously recorded at the General Registry of Gaming Licences and Authorisations, will be considered operators.

- The National Gaming Commission is created as a functionally independent body of the Spanish General Administration, although it is associated with the Ministry of Economy and Finance. It will carry out the following functions, among others:
 - Approve the regulations and bases of the different games according to law or at the request of the interested operator.
 - Propose the base specifications for calls for bids provided by the Draft Bill, as well as grant the authorisations necessary to carry out the activities regulated by the same.
 - Establish the maximum and minimum rates allocated for reimbursement as prizes for each gaming category.
 - Define and establish the technical and functional requirements needed for the games that are carried out remotely or interactively, the standards for technological transactions and quality certificates for processes, procedures, disaster recovery plans, business continuity as well as information security plans.
 - Supervise, control, inspect and, if applicable, sanction gaming-related activities.
 - Pursue unauthorised gaming, whether it is carried out from within Spain or abroad and it is aimed at the Spanish territory.
 - Create and maintain the General Registry of Gaming Licences and Authorisations, the General Registry of Prohibitions for Gaming Access and the Registry of Entities Associated with Gaming Operators.
- A sanctioning regime is established in which infringements classified as very serious will be fined between 1,000,000€ to 50,000,000€, along with the possibility of losing their gaming authorisation, preventing them from carrying out activities subject to the law for a maximum term of four years or closing the media through which they provide information society services that support gaming activities.
- The Draft Bill includes the tax regime on gaming activities, the scope of which exceeds the territory of an Autonomous Community.

Many of the provisions of the Draft Bill require the corresponding implementing regulations for their effective enactment. As a result, the Government must not delay their endorsement of the appropriate regulations once the law is approved.

Creation of the government-owned corporation, "Loterías y Apuestas del Estado"

The Fortieth Additional Provision of Law 39/2010, dated 22 December, on General State Budgets for 2011 (the "**2011 Budgets Law**") creates the government-owned corporation "*Loterías y Apuestas del Estado*" (State Lotteries and Bets), declaring the closure of the public corporate entity of the same name, as from the time the new state-owned corporation is recorded at the Mercantile Registry. The Council of Ministers will approve its corporate by-laws and appoint its management body prior to 31 March 2011.

Effective as from the date of closure of the public corporate entity *Loterías y Apuestas del Estado*, the branch of activity related to gaming, state-wide in scope, including all assets and liabilities, goods and

rights, as well as all operating permits it held to date, will be contributed as share capital to the *Loterías y Apuestas del Estado* state-owned corporation.

The provisions of Article 67 of the Restated Spanish Companies Act ("*Ley de Sociedades de Capital*") (the "**LSC**"), approved by Royal Legislative Decree 1/2010, dated 2 July, will not apply to this contribution in relation to the independent expert's report, but will instead be substituted by the expert valuation established in Article 114 of Law 33/2003, dated 3 November, on Public Administration Holdings (the "**Public Administration Holdings Law**").

The state-owned corporation *Loterías y Apuestas del Estado* will control the exercise of all faculties that were attributed to the public corporate entity *Loterías y Apuestas del Estado* for the exclusive management of state-owned games. All of its rights and obligations deriving from the contribution of said assets and liabilities, goods and rights, would likewise be subrogated as from the date the Public Administration Holdings Law enters into force.

Once the public corporate entity *Loterías y Apuestas del Estado* has been closed, the competencies related to exercising the regulatory duties of the gaming market at the state level will be attributed to the Ministry of the Economy and Finance until the National Gaming Commission is created.

The creation of the state-owned corporation *Loterías y Apuestas del Estado* by the 2011 Budgets Law is in response to the intention to reorganise the gaming sector, and is the first action implemented in this regard. The existence of this state-owned corporation was preconceived in the Draft Bill.

Privatisation of 30% of the "*Loterías y Apuestas del Estado*" state-owned corporation

On 3 December 2010, the Second Vice-President of the Spanish Government announced the privatisation of 30% of the future state-owned corporation *Loterías y Apuestas del Estado* created by the Twentieth Additional Provision of the 2011 Budgets Law.

Once constituted, this state-owned corporation will form part of the public sector of the state, and will be governed, as appropriate, by the provisions of the Public Administration Holdings Law and Spanish private law, except regarding those matters to which legislation on budgets, accounting, financial controls and contracting applies. The shares representing its share capital will form part of the corporate assets of the General State Administration.

The transfer of share certificates representing the share capital of the state-owned corporations is governed by the Public Administration Holdings Law. Thus, the privatisation of 30% of the future state-owned corporation *Loterías y Apuestas del Estado* must be carried out pursuant to the provisions of Title VII of the Public Administration Holdings Law.

To be concise, the transfer of 30% of the shares representing the share capital of the future state-owned corporation *Loterías y Apuestas del Estado* requires the approval of the Minister of the Economy and Finance, who will determine the transfer procedure. In some cases, the Public Administration Holdings Law requires prior authorisation from the Council of Ministers. We will have to wait and see if the transfer is subject to prior authorisation from the Council of Ministers or not, once the specific details of the transfer operation are known.

Since this involves a company which, we assume, will not be listed on organised secondary markets, the transfer procedure will normally entail a bid or auction. This notwithstanding, the shares will be directly awarded in the following cases:

- a) If the by-laws contain restrictions on the free transfer of the shares, or if pre-emption rights exist.
- b) If the acquirer is a public or private law legal entity belonging to the public sector.
- c) If an auction is declared void or is unsuccessful as a result of the breach by the successful bidder of its obligations. In this case, the direct transfer must occur within one year from the date the auction was held, and the conditions of the transfer must be the same as those announced for the auction or those in which the award took place.
- d) If the transfer is made to the company itself, in the cases and according to the conditions and requirements set forth in [Article 75 et seq](#) of Royal Legislative Decree 1564/1989, dated 22 December, which approved the Revised Text of the Spanish Public Limited Companies Act, or if the transfer is made in favour of one or more shareholders in the company. In the latter case, share certificates must be offered to the company, and the company must distribute them among those shareholders wishing to acquire them, in proportion to their respective stake held in the share capital.

The Minister of Economy and Finance will establish the transfer price, which cannot be less than the amount determined according to the valuation made by the Directorate General for State Assets or, in the case indicated in paragraph a), the amount determined using the process established in the company's by-laws for setting the value of the share certificates.

If the company decides to hold a bid or auction as the transfer procedure, the provisions of the Public Administration Holdings Law and those which implement or complement it will apply to the bidding process. In addition, the rules of administrative law will apply – including those on public sector contracting – to all matters regarding the competence to take the corresponding actions and the procedure to be followed for this purpose, and the rules of private law as they affect the rest of the aspects of the legal regime.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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