



**BRIEFING PAPER TO THE EUROPEAN COMMISSION**

**AGAINST THE SPANISH DRAFT ROYAL DECREE ON  
COMMERCIAL COMMUNICATIONS FOR GAMBLING  
ACTIVITIES**

**TRIS PROCEDURE  
2020/443/E**

Submitted by Asociación Española de Juego Digital (“Jdigital”)

20<sup>th</sup> July 2020

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## 1. INTRODUCTION

1. On February 24<sup>th</sup> 2020, the Spanish government issued a draft Royal Decree on commercial communications for gambling activities and opened it for public consultation.
2. The draft contained extremely restrictive advertising restrictions on online gambling (not applicable to public operators), such as :
  - A restriction on advertising in audiovisual communications except from 1am to 5 am
  - A restriction on advertising during live events except 8 pm to 5 am
  - The prohibition of sponsorship and use of public and famous figures in commercial communications
  - The prohibition on welcome promotions and bonuses limitation to 100 euros.
3. It was notified to the European Commission on 2nd March 2020, under the normal procedure, and registered under notification number 2020/102/E.
4. The end of the standstill period expired on June 3<sup>rd</sup> 2020.
5. Some further elements of context are brought to the attention of the Commission.
6. On March 15th, as Covid crisis spread all around the world, a state of emergency in Spain was declared. On April 1st, the Spanish government passed Royal Decree 11/2020 that put a ban on commercial communications, with the only exception of the 1AM-5AM slot. The ground for this decision was the alleged impact this kind of advertising could have on people locked down at home.
7. The state of emergency was lifted in Spain June 21<sup>st</sup>, and 11 days before the end of it Royal Decree 21/2020 was passed (June 10th). This emergency bill cancelled in a final disposition the prohibition of advertising approved by Royal Decree 11/2020.
8. Literally, it was lifted "*for consistency with the greater flexibility in terms of gambling established during phases II and III of the Plan for the Transition towards a new normality*".
9. On 9th July 2020, the Spanish government notified under the TRIS procedure a new version of the Royal Decree on commercial communications for gambling activities (hereafter the "Draft Decree"), invoking the emergency procedure under Directive 2015/1535, so as not observe the standstill period which is required before adopting technical rules that may impact the Internal market of information society services.
10. According to the Spanish government, the reasons for the urgency are the existence of serious and unforeseeable circumstances relating to the protection of public health and, secondly, on the public order aspect, the protection of minors.
11. This draft Royal Decree - issued without any prior public consultation - whilst carrying over most of the critical restrictions already contained in the version notified in March - is even stricter than the previous draft by further restricting commercial communications for live sports events from 1 am to 5 am (contrary to the previous 8PM to 5 AM restriction) as well as further restraining sponsorship on jerseys.

12. Jdigital submits that this draft decree contains serious breaches of EU law both in terms of procedure and substance.
13. First, the draft Decree is in breach of the TRIS procedure under Directive 2015/1535, since the emergency procedure under which it has been notified has been wrongly invoked, Spain having built a fake link between the sanitary crisis and advertising for online gambling.
14. Secondly, the advertising restrictions contained in the Draft Decree - are some of the most stringent advertising restrictions in Europe, Spain boasting itself for it - and violate EU law fundamental freedoms, which should prompt the European Commission as well as other Member States to issue a detailed opinion, to request Spain to render its law compliant with EU law.

## **2. INFORMATION ON JDIGITAL**

15. Jdigital is the Spanish association for online gambling.
16. It provides the Spanish online gambling industry with a single voice on all issues of importance to regulators, legislators, and key decision-makers, in order to achieve a regulatory framework which is positive for competition and allows the development of an open and safe market.
17. In this capacity, it monitors closely, on behalf of its members, any new legislative developments in EU Member States and in particular Spain, which are able to affect online gambling, to ensure that these are compliant with the EU legal framework.

## **3. THE MEASURES OF THE NOTIFIED DRAFT ROYAL DECREE BREACH EU LAW**

### **3.1 The procedure of adoption of the Draft Royal Decree breaches Directive 2015/1535 in that the emergency procedure has been wrongly invoked to adopt the draft without a standstill period and even without public consultation**

18. The Spanish authorities have invoked the emergency procedure for this decree arguing that as a consequence of COVID-19 and potential new regional lockdowns, it is necessary in order to protect people's health and minors against the increased economic vulnerability of the society, increased risks of gambling to solve economic problems, and risks of increased gambling related issues as a consequence of people staying more at home.
19. It is obvious that the Spanish authorities are making an improper use of the emergency procedure, and that the Spanish Draft Royal Decree is not eligible to such emergency procedure.
20. We trust that the Commission services have seen this just by reading the justification provided by Spain, but we would like to emphasize the legal argument showing that this is in breach of the Directive 2015/1535 :
21. Pursuant to Article 6(7)(a) of the TRIS Directive, the standstill period may be shortened *"in cases where [...] for urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules on services, also for public policy, in particular the protection of minors, a Member State is obliged to prepare technical regulations in a very short space of time in*

*order to enact and introduce them immediately without any consultations being possible"* (emphasis added).

22. The TRIS Directive further clarifies that "*the Member State shall give reasons for the urgency of the measures taken. The Commission shall give its views on the communication as soon as possible. It shall take appropriate action in cases where improper use is made of this procedure.*" (emphasis added).
23. It is submitted that the Spanish Draft Royal Decree is not eligible to the emergency procedure.
24. **First** of all, it is submitted that Spain cannot argue that the measures contained in the notified Draft Royal Decree (advertising restrictions on gaming) are directly linked to the COVID-19 pandemic. Indeed they do not address serious risks for the public health related to COVID-19 nor the protection of the population from the effect of this disease; the only cases of new drafts notified by Member States that warranted the use of emergency procedure during the pandemic were technical regulations concerning tests, medicinal products and devices, masks etc.
25. **Second**, in any case the criteria to establish urgency (to avoid the application of a standstill period) are not met.
26. Indeed, the Spanish authorities did not prepare such technical regulations "*in a very short space of time*" and/or due to the COVID state of emergency. The backbone of these measures were already prepared in February 2020 and notified to the Commission following the normal TRIS procedure<sup>1</sup> and adopted as Royal Decree 11/2020 on 31<sup>st</sup> March 2020, at a time when arguably the COVID-19 situation was even more serious and more unforeseeable than at the present stage. The notified measures are just adjusting (by providing more restrictions to the internal market) those already notified under the normal procedure at the heart of the crisis : how could they now qualify for an emergency that did not exist and was not invoked at that time ?
27. In the meantime, the COVID-19 most emergency measures in Spain have been lifted, including some of the restrictions to advertising established by the Royal Decree 11/2020 which have been lifted by Royal Decree 21/2020 published on 10 June 2020.
28. Furthermore the formal State of Alert in the country ended on 21<sup>st</sup> June making clear (and legal) that the sanitary risk is now lower than in March, when the earlier version was notified under the usual procedure (with a 3 months standstill period).
29. In any case, even if we follow the fake link built by Spain between the sanitary crisis and advertising for online gambling (*quod non*), contrary to what is argued by Spain, fewer people are now likely to stay home. As recognised by the Decree 21/2020 lifting some of the restrictions, most of the country is back to normal life and looks to enjoy it.
30. As ancillary argument it is recalled that this Draft Royal Decree has also been notified two times long before the COVID-19 situation, in 2015 and 2017, which shows that the topic of gambling advertising is not a topic related to COVID-19 and thus does not qualify as being

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<sup>1</sup> TRIS notification number 2020/102/E

occasioned "by serious and unforeseeable circumstances relating to the protection of public health".

31. **Third** and to make it worse, the notified measures mostly aim at making the Decree as notified in March 2020 more restrictive and discriminatory, as further elaborated on in the sections on the breach of internal market freedoms below.
32. Thus, the only "urgent" motivation for Spain is to favour public lotteries against any other gaming and gambling activities. As the Commission knows, economic motivation cannot be considered as an acceptable justification for imposing restrictions to internal market freedoms, even less in emergency procedures<sup>2</sup>.
33. Thus, there has never been - and there are less than ever any - justification for Spain to invoke the emergency procedure for the Draft Royal decree on commercial communications for gambling activities.
34. All of the reasons put forward by Spain are fallacious, and must be construed as a misuse of the exception to the normal procedure provided by the TRIS Directive.
35. As set out by the Court of Justice<sup>3</sup>, exceptions are to be interpreted strictly so that general EU rules are not negated. Thereby, exceptions to the standard notification procedure are to be interpreted strictly, so that the objectives of the TRIS procedure are not negated. Indeed, allowing wide use of the emergency runs against the protection of the EU internal market area.
36. **Finally**, it should be noted that there is no date of end of validity indicated in the Draft Royal Decree, while the situation of the COVID-19 and its consequences will be temporary. Thus, the Decree will still be applicable and in force until it is declared void or overruled, even when the situation of the COVID-19 has actually passed.
37. On the background of all of the above, Jdigital would like to submit that the request for application of the emergency procedure by Spain does not comply with the TRIS Directive nor the case law providing for a strict interpretation of the exceptions, and thus the Commission must refuse it.
38. As a matter of fact, according to Article 6, last indent, of the TRIS Directive, the Commission must take appropriate action in cases where improper use is made of this procedure.
39. Thus the Commission is called upon to oppose Spain's request for adoption of the Draft Royal Decree without due regard to the TRIS standstill period. It is not only justified so as to allow Member States and interested parties to express their concerns against the notified Draft within the TRIS procedure, but also necessary to avoid a very bad precedent that would weaken the procedure as established by the TRIS Directive.

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<sup>2</sup> Judgment of 13 January 2000, Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH, C-254/98 ECR 2000 I-151 paragraph 33, Judgment of 5 June 1997, Syndesmos tot en lladi Touristikon v. Ypourgos, C-398/95, ECR 1997-I-03091

<sup>3</sup> See, for example, Judgment of the Court of 26 February 2015 in Case C-6/14, *Wucher Helicopter and Euro-Aviation Versicherung*, ECLI identifier: ECLI:EU:C:2015:122, paragraph 24, Judgment of the Court of 22 April 2010 in case C-346/08, *Commission v United Kingdom*, ECLI identifier: ECLI:EU:C:2010:213, paragraph 39, and Judgment of the Court of 29 April 2004 in Case C-476/01, *Kapper*, ECLI identifier: ECLI:EU:C:2004:261, paragraph 72

40. In case Spain would adopt the notified text without any standstill or before the end of the standstill period, since the emergency procedure has been wrongly invoked, and thus Spain has violated the obligations under the TRIS Directive, the Royal Decree should be considered inapplicable to third parties. This is notably stated in the case, *CIA Security International SA v Signalson SA and Securitel SPRL*<sup>4</sup>, paragraph 54, which reads as follows:

*"In view of the foregoing considerations, it must be concluded that Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals." (emphasis added)*

### **3.2 The Draft Royal decree introduces restrictions which breach the freedom to provide services and freedom of establishment**

#### **3.2.1 Preliminary remarks on article 56 TFEU in general and its application to online gambling**

41. The freedom to provide services is one of the fundamental freedoms of the European internal market set out in Article 56 TFEU. It gives the right to perform activities in another Member State subject to compliance with certain rules.
42. The freedom to provide services offers wide scope for businesses that wish to develop their activities and provide their services throughout the EU and it has thus contributed significantly to job creation, to the integration of a single market, to growth and to the provision of a greater choice to consumers.
43. Article 57 TFEU further defines the services, which are subject to article 56, as "*activities normally provided for remuneration*". The case law has found that the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character: the activity must not be provided for nothing, but there is no need for the provider to be seeking to make a profit.<sup>5</sup>
44. Online gambling activities have been defined as "*any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient of services.*"<sup>6</sup>
45. Gambling activities and, in particular online gambling have been consistently considered by the case-law of the Court of Justice as an "economic activity" subject to the fundamental freedoms of the Treaty : be it the freedom to provide services (article 56 TFEU) or the freedom of establishment (article 49 TFEU).<sup>7</sup>
46. Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services - even if those restrictions apply without distinction to national providers and to those of other Member States - if they are liable to ***prohibit, impede or render less attractive the activities***

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<sup>4</sup> Judgment of the Court of 30 April 1996 in Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL*, ECLI identifier: ECLI:EU:C:1996:172

<sup>5</sup> Judgment of the Court (Third Chamber) of 18 December 2007 in Case C-281/06 *Jundt* §32-33.

<sup>6</sup> *Green paper on online gambling in the Internal Market* published on 21<sup>st</sup> October 2011, COM/2011/0128 final.

<sup>7</sup> Judgment of the Court of 24 March 1994 in case C-275/92 *Schindler* paragraph 19, Judgment of the Court of 21<sup>st</sup> October 1999 in case C-67/98 *Zenatti* and Judgment of the Court of 6<sup>th</sup> November 2003 in case C-243/01 *Gambelli & Others*.

**of a service provider established in another Member State** in which it lawfully provides similar services.<sup>8</sup>

47. Thus, article 56 TFEU requires the Commission to assess whether the different gambling regulations or national practices of Member States contain any such restrictions and if so raise the incompatibility of such regulations or practices with EU law.
48. Furthermore, previous case-law has ruled that legislation which limits online gambling operators from other Member States from promoting their products constitutes a restriction on the freedom to provide services, even if applied indistinctly.<sup>9</sup>
49. It is settled case-law that restrictions of the type mentioned-above are prohibited by article 56 TFEU, unless they fulfill the following four cumulative conditions<sup>10</sup>:
- they are applied in a non-discriminatory manner;
  - they are justified by imperative requirements in the general interest;
  - they are suitable for securing the attainment of the objective which they pursue;
  - they do not go beyond what is necessary in order to attain it.
50. As will be demonstrated below, there are numerous restrictions set out in the Draft Royal Decree and these do not fulfill the conditions of Article 56 TFEU.

### **3.2.2 The main measures introduced by the Draft Royal Decree and qualifying as restrictions to Article 56 TFEU**

51. JDigital provides the Commission here below with the main measures introduced by the Royal Decree, pointing to the ones being aggravated by the Draft version notified on July 9<sup>th</sup>.
52. It is submitted that all of these measures constitute restrictions to the freedom to provide services and the freedom of expression of operators wishing to offer gambling services and make themselves known to Spanish customers.<sup>11</sup>
53. These restrictions are more of an obstacle to operators established outside Spain, since as recognized by the jurisprudence advertising is a particularly effective and necessary way to make themselves known to the public in this country, as established and incumbent Spanish operators already benefit for a customer base.

#### **i Ban of promotions (section 13)**

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<sup>8</sup> Judgment of 16<sup>th</sup> February 2012 in cases C-72/10 & C-77/10, *Costa and Cifone*, par 69, Judgment of 8<sup>th</sup> September 2009 in case C-42/07, *Liga Portuguesa de Futebol Profissional & Bwin International (Santa Casa)*, par 51. and the case-law cited therein.

<sup>9</sup> Judgment in case C-275/92, §44

<sup>10</sup> Judgment of the Court of November 30<sup>th</sup> 1995 in case C-55/94, *Reinhard Gebhard c. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, §39.

<sup>11</sup> Case C-212/05, Hartmann, paragraph 30.

54. According to Section 13(1.) of the Draft Decree "*Promotions to attract customers, regardless of their conditions of promotion, are prohibited.*"
55. This constitutes without any doubt a restriction of the freedom to provide services, and the freedom of expression of operators wishing to offer gambling services and make themselves known to new customers.<sup>12</sup>
56. Such restriction is more of an obstacle to operators established outside the Member State, which are denied a means of marketing that is particularly effective and necessary for making these games known to the public, by incentivising customers to open an account with them.
57. The prohibition to offer promotions to new clients also presupposes a completely unequal restriction in relation to already registered clients.

**ii Prohibition of the appearance of persons of public relevance or public attention on gambling communications (section 15)**

58. According to Section 15, the appearance in commercial communications of famous people or public figures, whether real or fictitious is prohibited.
59. The scope of the prohibition, which has no exception other than for very specific and residual events, and the vagueness that characterises the concept of "persons of public relevance or public attention" is a particularly disproportionate regulatory approach.
60. The regulatory approach taken in a former draft decree which was to use the participation of celebrities for the benefit of the promotion of responsible gambling policies, unless they were particularly attractive to, specifically or mainly, the under-age public, provided that they carry out, with their voice and, where appropriate, image, the message "Gamble responsibly" in commercial communication itself was a much more effective and proportionate way of legislating and more coherent with the objective of the Spanish Government.

**iii Prohibition on sponsorships (section 12)**

61. According to Section 12, sponsorship activities including on T-shirts or sports equipment will not be allowed.
62. This is a further restriction to the previous Draft Royal Decree, which had exempted sports sponsorship on T-shirts or sports equipment, from the full ban of commercial sponsorship.

**iv Restrictions on commercial communications in audiovisual communication services except 1am - 5 am (section 18)**

63. Section 18 provides that commercial communications by gaming operators may only be broadcast between 1 am and 5 am.
64. The limitation of the time slots where commercial communications may be disseminated in audiovisual channels is, without a doubt, the one of the most serious and preoccupying restrictions introduced in the Draft Royal Decree.

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<sup>12</sup> Case C-212/05, Hartmann, paragraph 30.



65. Such restriction must be assimilated to a "ban" on advertising activity altogether, as it practically reduces any impact of advertising for commercial operators.
66. Indeed it relegates advertising to a night time in which its essential objective (the promotion of the consumption of the advertisers' goods or services) has no meaning at all.
67. Of course, such ban affects more operators from other Member States for whom advertising is key to penetrate the local Spanish market.
68. Such ban is both discriminatory and disproportionate.

**v Restrictions on commercial communications during live events in audiovisual communication services except 1 am - 5 am (section 19)**

69. According to section 19, commercial communications by gaming operators via audiovisual communication services during live broadcasts of sporting, equestrian or other events of a competitive nature, may only be broadcasted from 1 am to 5 am.
70. The alignment of time restraints for commercial communications during live events has been one of the measures being rendered stricter by this new version of the Royal Decree.
71. Indeed, under the former Draft Decree notified under TRIS in March and registered under number 2020/102/E, advertising during live events was permitted from 8 p.m. to 5 a.m. keeping at least part of "normality" accessible to these programs.

**3.2.3 Such restrictions are gravely discriminatory**

72. Public gambling operators such as State-run SELAE and ONCE, are exempt from all the above mentioned advertising restrictions no matter the game they offer and the potential of addiction of the said game.
73. This confirms that the Royal Decree is an ad hoc discriminatory regulation taken specifically to affect only part of the industry, the online gambling, the only one affected by the measures adopted in the Draft Royal Decree and favour public lotteries against any other gaming and gambling activities, by exempting the latter from its scope.
74. Such way of regulating defies all principles of good regulation and equal treatment.
75. The state run operators being local operators, the discrimination can be in fact assimilated to a discrimination on the basis of nationality.
76. It is also a violation of the general principle of equal treatment.
77. According to settled case-law of the EU Court of Justice, the general principle of equal treatment and non-discrimination prohibits to treat differently comparable situations unless differentiation is objectively justified.<sup>13</sup>

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<sup>13</sup> Judgement of 19 October 1977 in joined Cases 117/76 and 16/77, Ruckdeschel v Hauptzollamt Hamburg-St. Annen, ECLI:EU:C:1977:160, para. 7.

78. This difference of treatment has no justification in this instance since the games offered are comparable and they pose the same hazards.
79. ONCE for example commercialises products such as scratchcards with nationwide distribution across gas stations, convenience stores, supermarkets, 24 hour shops, online, and through street vendors.
80. This kind of product is exempt of any identity and age control that yet apply to private operators. These are instant reward games, with a 24 hour availability, that generated over 300M € in net revenues last year.
81. The differentiation made between public and private gambling operators is not justified since the justification of preventing incitement being the same, pursuing the watershed ban only for one type of games and not the others breaches the "principle of consistency" and runs contrary to all the CJEU case-law which requires for justifications to be admissible that the policy pursued by the national gambling policy actually genuinely reflects a concern to attain the objective of general interest in a consistent and systematic manner.
82. If the measure is needed, it should apply across the board, not only to private operators.

**3.2.4 Absence of legitimate overriding reasons of public interest justifying the above-mentioned restrictions and lack of necessity and adequacy of such restrictions**

83. It is submitted that not only do the above-mentioned restrictions breach article 56 TFEU due to the fact they are *de jure* and *de facto* discriminatory, but they also lack admissible/suitable justifications by the Member State under EU law.
84. It is recalled that the restrictions to the freedom to provide services may only be justified by Member States according to one of the reasons listed in article 52 TFEU - public policy, public security or public health - or an overriding reason in the public interest, in so far as the restrictive measure is non-discriminatory, necessary and proportionate to the intended objective.<sup>14</sup> The Court of Justice strictly interprets any derogation to the freedom of economic operators to provide services.<sup>15</sup>
85. As the measures mentioned above are clearly discriminatory, public policy, public security or public health should be the only acceptable justifications.
86. However, this is not the case and, anyhow, there is a lack of justification by the Spanish State of the restrictions contained in the Draft Royal Proposal with regards to several respects developed below.
- a) There is no public health problem related to gambling in Spain
87. The proposed prohibition and its regulation by urgency, like the one that supposedly motivated the approval of Royal Decree 11/2020 due to the state of emergency, backs the adoption of the measures for a public health purpose.

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<sup>15</sup> Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, paragraph 45.

88. However, it is obvious that there is no public health problem concerning gambling in Spain. There is a huge discrepancy between the real dimension of pathological gambling, faithfully traced by the Administration in the repeated EDADES and ESTUDES reports, and the measures adopted in this regard.
89. The Minister of Consumer Affairs himself acknowledged that there is no public health problem, and the RD's explanatory memorandum for commercial communications justifies it mentioning social sensitivity on the issue together with public opinion.
90. According to the ESTUDES report,<sup>16</sup> gambling disorder accounts for only 0,5% (from mild to severe, there is no detail on the levels). This percentage was 0.3% and curiously was recently raised to 0.5% a few days ago.
91. On the other hand, addictions to tobacco or alcohol account for 34% and 5,1% respectively.
92. Furthermore, there is no evidence of a reduction of gambling problems due to commercial communications banning.
93. In 2019, a study by Alicante University<sup>17</sup> underlined that online operators exhaustively comply with consumer protection policies. In the research, most of the operators analyzed include basic information and awareness measures, warning about the inadmissibility of minors to online gambling halls. Most of them also enable self-assessment tests in relation to gambling behavior and offer specialized help through healthcare centers and groups.
- b) There is no correlation between the adoption of Covid-19 related national measures and decrease of gambling
94. The Draft Royal Decree puts a ban on commercial *communications*, with the only exception of the 1AM-5AM slot. The ground for this decision was the impact this kind of advertising could have on people locked down at home.
95. The only *tangible* consequence of this decision is that Spanish authorities closed 414 illegal online gambling websites between April and May, twice the number of illegal websites closed in 2019.
96. The state of emergency was lifted in Spain on the 21st of June, and 11 days before the end of it Royal Decree 21/2020 is passed (June 10th). This emergency bill cancels in a final disposition the prohibition of advertising approved by Royal Decree 11/2020 with the justification that Spain is back to "new normality".

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<sup>16</sup> EDADES 2017/2018, Delegación del Gobierno para el Plan Nacional sobre Drogas Observatorio Español de las Drogas y las Adicciones Secretaría de Estado de Servicios Sociales Ministerio de Sanidad, Consumo y Bienestar Social Madrid, 10 de diciembre de 2018 Encuesta sobre alcohol y drogas en España.

<sup>17</sup> "Consumer protection on online gambling websites hosted by licensed operators in Spain" (La protección al consumidor en las webs de juego online de los operadores con licencia en España), Alejandra Hernández-Ruiz in Adicciones vol. xx, no.x · 2019

97. According to the government, the reasons for the urgency are the existence of serious and unforeseeable circumstances relating to the protection of public health and, secondly, on the public order aspect, the protection of minors.
98. The pandemic caused by COVID-19 has affected the social conditions in which gambling are practiced in Spain. According to the Spanish government, the serious economic consequences resulting from the necessary measures adopted to contain the disease are causing:
- a. An increase in the economic vulnerability of society as a whole, as a result of the extraordinary rise in unemployment produced and, consequently, a higher probability of gambling behaviour in an attempt to resolve economic problems;
  - b. An increase in the risk of problematic or pathological gambling behaviour starting or worsening.
99. There are no factual data or evidence demonstrating this assumption. The Spanish government is merely supposing this could be the case without substantiating anyhow these statements. It is obvious that the health risks created by Covid-19 do not rely in the online gambling activities.
100. It is useful to take into consideration the Swedish case, through Copenhagen Economics study: *The degree of channelization on the Swedish online gambling market (27 April 2020)*. The results aimed to support our belief : that restrictions need to take in consideration how poorly assessed restrictions will be devastating to the channelization and drive players and operators out of the license system, which is very bad for problematic players specifically.
101. As long as the Government continues to take decisions without any proper analysis and research, it will be devastating effect on the license system and risk putting players in harm way when pushed towards non-licensed operators without the appropriate tools and processes in place to protect high risk player efficiently.
- c) The justifications put forward are in any case inadmissible since they are based on favoritism of economic interests and do not seek to genuinely pursue and attain an objective of general interest
102. As stated above, the restrictions introduced only apply to private gambling operators - public lotteries are exempt from such far reaching restrictions; on the basis of economic considerations.
103. It is settled case-law that economic considerations are improper to justify restrictions to the freedom to provide services.<sup>18</sup>
104. In addition, the Spanish policy in introducing such differential restrictions between private and public operators breaches the principle of "consistency".
105. Indeed, by prohibiting any kind of commercial communications of their games by private operators (it cannot be validly argued that a 1 to 5 am ban is anything but a total ban, since it

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<sup>18</sup> Judgment of 13 January 2000, Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH, C-254/98 ECR 2000 I-151 paragraph 33, Judgment of 5 June 1997, Syndesmos tot en Iladi Touristikon v. Ypourgos, C-398/95, ECR 1997-I-03091.

reduces to nil any kind of advertising effort), whilst allowing public operators like ONCE to commercialise and advertise without any control whatsoever (be it on the substance or the time restraints) products such as scratchcards, the Spanish legislation does not genuinely meet the concern to reduce opportunities for gambling and gaming, to limit activities in that area and to fight gaming and gambling-related crime in a consistent and systematic manner.<sup>19</sup>

### 3.2.5 The restrictions introduced are disproportionate

106. The restrictions introduced by the Draft Royal Decree can only be considered as **absolute and general**, since they do not provide for any mitigating factors or for any alternatives. Such a blanket provision does not result in a decrease of gambling activities thereby lacking any reasonable justification.
107. Pursuant to established CJEU case-law, a measure which consists in an absolute and general prohibition is unlikely to be necessary and justified.
108. It would also fail to meet the proportionality test where less restrictive measures could be proposed as an alternative to reach the same objective.
109. With the second lowest problem gambling prevalence in Europe at 0,3% (the lowest in the EU) as measured by the Health Ministry through the National Plan Against Drugs, an advertising ban is unjustified and disproportionate.
110. The restrictions on digital advertising are intended to impose conditions that practically make it impossible to execute. This leads to the absurdity of allowing an activity that, due to the conditions imposed on it, become totally impractical. .
111. Furthermore, the time slot chosen by Spain seems completely arbitrary. It must be emphasised that the Spanish authorities have at no times come with a rigorous impact assessment showing why the 1-5 am ban was chosen and needed and why other less restrictive time restraints would not achieve the same objective, considering i) kids are asleep from 8 pm anyway and ii) that in the first version of the Draft Royal Decree, for live events, advertising was allowed from 8 pm. No valid reason was given for this sudden aggravation in the restriction.
112. In addition, the omission of a transitional period that allows the implementation of the new requirements of the Royal Decree by the operators inevitably leads to a general initial failure to comply with the measures whose characteristics require internal development works, as well as the intervention of third parties.
113. It is here submitted that less restrictive means exists such as i) applying a less stringent time restraint if any and ii) applying it across the board of the private and public operators.
114. As long as the Spanish authorities will keep a 1 am - 5 am ban, applicable only to private gambling operators, the law is violating article 56 TFEU.

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<sup>19</sup> Judgment of the Court (Third Chamber), 30 April 2014, *Robert Pflieger and Others*

### 3.3 Breach of the freedom to receive services

115. As stated by settled case-law, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions.<sup>21</sup>
116. The advertising restrictions make it practically impossible for Spanish consumers to get offers from online gambling providers abroad, especially if they did not hear of them before the entry into force of these measures.

### 3.4 Breach of principles of legal certainty and legitimate expectations

117. The Royal Draft Decree is in breach of the principles of legal certainty and legitimate expectations.
118. Pursuant to established CJEU case-law, the general EU law principles of legal certainty<sup>20</sup> and legitimate expectations require legal norms to be clear and predictable.
119. They require that: (i) laws and decisions must be made public; (ii) laws and decisions must be definite and clear; (iii) decisions of courts must be binding; (iv) limitations on retroactivity of laws and decisions must be imposed and (v) legitimate expectations must be protected.
120. This is however not the case in hand as the procedure has been highly non transparent, and the measures have not been submitted for public consultation.

### 3.5 Breach of the EU Charter of Fundamental Freedoms

121. The Draft Royal Decree is in breach of the EU Charter
122. Generally speaking, by prohibiting operators to perform both audio-visual/radio distribution activities and television/radio broadcasting services or media services, irrespective of de facto impact, Spanish law directly restricts the exercise of freedom to conduct business, without due justification or consideration of proportionate remedies - and is therefore **in breach of Article 16 of the EU Charter**.
123. Indeed, article 16 of the Charter of Fundamental Rights enshrines the principle of “freedom to conduct a business” in EU law.
124. According to this principle, all economic operators must be free to pursue an economic activity, and the exercise of such activity must not be subject to any unjustified and/or disproportionate hindrance.
125. As stated above, foreign based online gambling operators are subjected to unjustified and disproportionate hindrance of their freedom to provide services in Spain.

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<sup>20</sup> Judgement of the Court of 22 January 1997 in case T-115/94, *Open Austria v Council*, ECLI:EU:T:1997:3, para 124; Judgement of Court of 16 June 1993 in case C-325/91, *France c Commission*, ECLI:EU:C:1993:245, para. 24. See also Judgement of the Court of 22 January 1961 in joined cases 42 and 49/59, *S.N.U.P.A.T v High Authority*, ECLI:EU:C:1961:5.

126. It is further submitted that by reducing practically to "*peau de chagrin*" any possibility for gambling operators to provide information about their offer to customers resident in Spain, be it through advertising on media, sponsorship etc., the measures also infringe the operators' right to freedom of expression, enshrined in Article 11 of the Charter.

### **3.6 Breach of the principle of fair and undistorted competition**

127. The restrictions to the activity of gambling operators, contained in the draft Royal Decree, only apply to private operators, public companies such as SELAE and ONCE are exempt from the application of such restrictions.

128. This goes against the principle of fair and undistorted competition in the market since a public owned company (SELAE) and a public law corporation (ONCE) gain a better treatment compared to private operators, not affected by advertising restrictions.

129. They would therefore operate with a clear and unjustified advantage.

130. Similarly, restrictions on the advertising of gambling activities constitute an insurmountable barrier to enter the market that makes it completely impractical for new operators (not benefitting from the historical monopoly and customer base) to enter the market).

131. The most representative example is the prohibition of offering promotions to potential new customers.

132. Advertising of in person gambling activities is not subject to the same restrictions as online advertising. Thus, operators that offer products and services in person, exclusively or not, have a promotion channel (physical stores) are subject to fewer restrictions, leaving online operators at a clear disadvantage.

133. So there is a distortion of competition between public and private and online and offline channels. As a consequence, the way the measures are designed to target some operators, mostly based outside Spain and exempt or favor operators granted by the State with exclusive or special rights is also likely to qualify as in breach of article 106 TFUE, in relation to Articles 101/102 and 107/108 TFUE.

#### 4. CONCLUSION

134. As has been explained above, the notified Draft Royal Decree breaches a number of fundamental European Union law provisions and principles, namely:

- Directive 2015/1535 by the wrong invocation of the emergency procedure
- the freedom to provide services guaranteed by article 56 TFEU ;
- the freedom to receive services guaranteed by article 56 TFEU
- the freedom of establishment guaranteed by article 49 TFEU ;
- the principle of equal treatment ;
- Article 16 of the Charter of Fundamental Rights of the European Union ;
- Article 11 of the Charter of Fundamental Rights of the European Union ;
- the principle of fair and undistorted competition as well article 106 in relation to 101/102 and 107/108 TFUE.

135. Therefore, Jdigital calls on the Commission to

- Refuse the Spanish authorities request' to use the emergency procedure under Directive 2015/1535
- Issue a detailed opinion against the restrictions introduced in the Draft Decree.
- Should the text of the draft technical regulation under consideration be adopted without account being taken of the abovementioned objections, the Commission may be compelled to send a letter of formal notice pursuant to Article 258 of the Treaty on the Functioning of the European Union. It also reserves the right to send a letter of formal notice should it not have received the response from your government by the time of adoption of the draft technical regulation in question.

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