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Subject: SA.34469 (2014/NN ex 2012/CP) – Spain
Differential tax rates for online and land-based gambling in Spain

Sir,

1. PROCEDURE

- (1) On 9 March 2012 the Commission services received a complaint from an association that represents the interests of the stakeholders active in companies of the gaming machine sector, and a listed public company active mostly in the field of land-based gambling. The complaint challenged the taxation system laid down in the Spanish Gaming Act 13/2011¹ (hereinafter "the Gaming Act"). According to the complainants, the taxation system contained in this Act results into a favourable tax treatment granted to online gambling operators vis-à-vis land-based ones.
- (2) The Commission services sent a request for information to the Spanish authorities by letters of 25 May 2012 and 18 September 2012. The Spanish authorities submitted their reply by letter of 29 October 2012.
- (3) In view of the information submitted by the Spanish authorities and the complainants, the Commission services preliminarily concluded in a letter addressed to the complainants on 9 August 2013 that the challenged measure did not constitute *a priori* State aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU").

¹ Ley 13/2011, de 27 de mayo, de regulación del juego. Spanish Official Journal of 28 May 2011, n. 127, Section I, p. 52976.

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- (4) The complainants contested the preliminary views adopted by the Commission services by letter dated 9 September 2013 and submitted further comments with regard to the measure. The complainants insisted that the Commission adopt a position on the matter.
- (5) The complainant's submission and the preliminary assessment letter of the Commission services were sent to the Spanish authorities by letter of 15 November 2013. The Spanish authorities submitted their comments by letter of 21 January 2014.

2. DESCRIPTION OF THE MEASURE

2.1. The legal framework: Distribution of competences in taxation of gambling activities and Spanish Gaming Act 13/2011 of 28 May 2011

2.1.1. *The Spanish Gaming Act 13/2011*

- (6) The Gaming Act sets out the legal framework for gambling activities that take place at a national level. According to Article 1 of the Gaming Act, the primary objective is the protection of minors, consumers and the public order, as well as the prevention of gambling addiction and fraud. The legal framework laid down in the Gaming Act is without prejudice to the legal framework laid down in the Statutes of the Autonomous Communities with regard to the provision of gambling activities². In particular and for the first time, the Gaming Act also provides for a regulatory framework for gambling provided through online, electronic and interactive means³.
- (7) Article 2 of the Gaming Act defines the gambling activities that fall within its material scope: Lotteries, betting products, raffles, occasional games (of sporadic nature) and cross-border gambling activities, as long as they are provided at national level. .
- (8) Articles 48 and 49 of the Gaming Act provide for the taxation system applicable to gambling activities that take place at a national level and that fall within the scope of the Law. According to Article 48(2) of the Gaming Act, gambling activities –with the exception of lotteries- provided at a national level are subject to the gaming tax. The applicable tax rates are laid down in Article 48 (7), first indent, numbers 1^o to 12^o and range from 10% to 25% depending on the gambling activity in question:
 - 1) Pool sports betting: 22% of the total amount of stakes.
 - 2) Fixed-odds sports betting: 25% of the total amount of stakes minus winnings.

² This means in practice that certain gambling activities, such as land-based casino or land-based gaming machines would fall under the legal framework provided in the Statutes of Autonomy.

³ Prior to the adoption of the Gaming Act, online gambling activity was not regulated in Spain. The emergence of online gambling required a legislative response to this new phenomenon. In that vein, Law 56/2007 of 28 of December on Measures for Promoting the Information Society established a future mandate to regulate gaming and betting made through online and remote means.

- 3) Cross sports betting: 25% of the total amount of stakes minus winnings
 - 4) Pool horserace betting: 15% of the total amount of stakes
 - 5) Fixed-odds horserace betting: 25% of the total amount of stakes minus winnings.
 - 6) Other pool betting products: 15% of the total amount of stakes.
 - 7) Other fixed-odds betting products: 25% of the total amount of stakes minus winnings
 - 8) Other cross betting products: 25% of the total amount of stakes minus winnings.
 - 9) Raffles : 20% of the total amount of stakes.
 - 10) Contests: 20% of the total amount of stakes.
 - 11) Random combinations with advertising or sponsoring purpose: 10% of the total amount of stakes.
 - 12) Other games: 25% of the total amount of stakes minus winnings.
- (9) Article 48 (7) of the Gaming Act establishes that the Autonomous Communities may increase the tax rate already provided in the Gaming Act up to a maximum of 20% as long as the two following conditions are met:
- I. The gambling activity has to be provided by an operator with fiscal residence in that particular Autonomous Community.
 - II. That increase of 20% will be applied exclusively to the share of the tax base corresponding to the revenues obtained from gamblers with fiscal residence in that particular Autonomous Community.
- (10) In addition, Article 48 (9) of the Gaming Act establishes that the State Tax Administration is in charge of the management of the tax. This is without prejudice to the legal framework laid down in the Statutes of Autonomy of the Autonomous Communities and the Laws regulating the transfer of taxes between the State and the Autonomous Communities. In any case, the collected tax amount of online gambling activities will be allocated to the Autonomous Communities proportionally, according to the amount of stakes placed by gamblers with residence in each Autonomous Community.

2.1.2. Distribution of competences between the State and the Autonomous Communities in the field of taxation of gambling activities

- (11) The Spanish Constitution lays down a system of allocation of competences between the State and the Autonomous Communities.⁴ Although the Spanish Constitution does not refer explicitly to the regulation of gambling activities, it is the Spanish Constitutional Court who has defined and ring-fenced the scope of the State and regional competencies regarding the regulation of gambling activities.⁵

⁴ Articles 149 and 150 of the 1978 Spanish Constitution.

⁵ See Judgement of the Spanish Constitutional Court ("TC") of 26 May, STC 163/1994, and TC Judgment of 15 March, STC 35/2012.

- (12) According to the Spanish authorities the powers that are assigned to the Autonomous Communities are those expressly contained in their respective Statute of Autonomy. The majority of the Statutes of Autonomy, with the exception of Melilla and Ceuta, have assumed competences on gambling taxation with regard to those games that take place within their territory. The State has assigned to the Autonomous Communities legislative powers to regulate gambling activities as well as the competence to determine the tax system of gambling duties with regard to gambling activities that take place within their territory.
- (13) Articles 25 and 45 of Law 22/2009 of 18 December 2009 on the Financing System of Autonomous Communities of Common Regime and Cities with Statute of Autonomy consider gambling duties as taxes transferred from the State to the Autonomous Communities. According to Article 50 of Law 22/2009, the Autonomous Communities might assume legislative powers on the following taxation aspects: exemptions, taxable base, tax rates, fixed quotas, bonuses as well as other aspects relating to the implementation of the tax.
- (14) Prior to adoption of the Gaming Act, the taxation of gambling activities at national level was contained in two sets of State-wide regulations: Royal Decree-Law 16/1977, of 25th February on the Criminal, Administrative and Taxation Aspects of the Gaming Activity, as amended by Royal Decree 2221/1984; and Decree 3059/1966, of 1 December, on specific duties, levies and taxes. The former Royal Decree-Law laid down the taxation of games of chance and the latter Decree the taxation of raffles, tombola and betting combinations on a supplementary basis. That is, if an Autonomous Community would choose not to lay down the taxation system applicable to gambling activities that take place within their territory, the taxation system of gambling activities contained in the two State-wide regulations would apply.
- (15) After the adoption of the Gaming Act, Article 3(1) of the Royal Decree-Law 16/1977 and Article 36 of Decree 3059/1966 were amended in order to exclude from their scope of application those taxes that were already regulated in the Gaming Act.⁶
- (16) Therefore, the Autonomous Communities are competent for those gambling activities that take place within their territory and the regulation of gambling activities contained in the Statute of Autonomy prevails over the State one. The Gaming Act, in conjunction with Decree Law-16/1977 and Decree 3059/1966, provides for a subsidiary regulatory framework (including taxation) for gambling activities that would apply in those Autonomous Communities that had not legislated in that area.
- (17) Furthermore, there are certain gambling activities that cannot be provided at regional level and that are of national scope only. For these activities, the applicable legal framework is that of the Gaming Act only. This is the case

⁶ See Disposición Final Quinta of the Gaming Act .

e.g. of the national lottery, non-profit sports pool betting or online gambling activities that have a supranational scope.

2.2. Arguments invoked by the complainants

- (18) The complainants are a listed public company active in the field of gambling; and an association that represents the interests of the stakeholders active in companies of the gaming machine sector.
- (19) According to the complainants, the taxation system laid down in the Gaming Act constitutes unlawful State Aid pursuant to Article 107(1) TFEU. The provision of gambling services is subject to different taxation depending on the distribution channel (online or land based), resulting into online gaming operators having to pay lower taxes than land-based operators when carrying out equivalent gambling activities.
- (20) The complainants argue that the taxation system established in the Gaming Law grants a selective advantage to online gambling operators consisting of a reduction of their tax burden vis-à-vis the tax burden borne by land-based operators. In the present case the system of reference would be the taxation system for gambling activities. Online and land-based gambling operators are in a comparable legal and factual situation, given that they provide the same gambling activity but through different channels. Therefore, the common or normal tax regime applicable in Spain to gambling activities is the tax regime applicable to all gaming activities, irrespective of whether it is adopted by the central or the regional authorities. The provision of the Gaming Act derogates from the common regime (irrespective of the allocation of competences) inasmuch as it differentiates between economic operators who are in a comparable factual and legal situation.
- (21) The complainants take the view that the Azores jurisprudence on regional selectivity is not applicable to the present case. The measure at stake relates to an advantage conferred on online gaming operators both at national and regional level. Moreover, the determination of the reference framework should not be dependent upon the allocation of tax competences to the regional authorities pursuant to the relevant constitutional framework that provides for the distribution of tax powers between the State and the regions.
- (22) The complainants allege that the differential tax treatment between online and land-based gambling cannot be justified by the internal logic of the tax system. The establishment of lower tax rate for online gambling products does not help to achieve the goals of consumer protection, minor protection, prevention of fraud, money laundering and other illegal activities.
- (23) The measure also has the effect to distort competition and affect intra-EU trade since the differential tax treatment would strengthen the position of online operators in comparison with land-based operators which compete in intra-EU trade.

- (24) The complainants claim that the measure cannot be declared compatible with the Internal Market pursuant to Articles 107 (2) and 107 (3) of the TFEU since the challenged measure is not the appropriate instrument to serve the objective of common interest addressed by Law 13/2011 which is *"to ensure a higher efficiency in the achievement of the overriding goals of guardianship and social protection of minors and of participants in the games, as well as other relevant aims such as the prevention of illegal activities, fraud and money laundering [...]"*.
- (25) The complainants question the relationship between the establishment of lower taxes for online gambling activities and the achievement of goals such as the protection of minors and other vulnerable people, the prevention of illegal activities, fraud and money laundering. The complainants consider that the achievement of these goals is rather obtained through the disciplinary provisions contained in the Gaming Act. According to the complainants, when striking the balance between the achievement of an objective of common interest and the potential negative effects of the measure, the measure is not well designed nor does it serve the objective of common interest.

2.3. Arguments of the Spanish authorities

- (26) According to the Spanish authorities, gambling has witnessed a profound and rapid transformation due to technological developments that triggered the emergence of remote gambling through the internet and other electronic means. Prior to the adoption of the Gaming Act, the regulatory framework for gambling activities had been in place since 1977 and was not able to provide satisfactory answers to the new phenomenon of online gambling. For that reason, it was necessary to establish new regulatory mechanisms that would offer legal certainty to the operators and players, taking into account the protection of minors and other vulnerable people, as well the protection of public order and the prevention of fraud, money laundering and the financing of criminal activities.
- (27) The Spanish authorities have indicated that given the supranational character of online gambling, it was deemed necessary to adopt a Law whose scope would encompass the whole national territory. Therefore, it was not possible to ring-fence the competences on taxation of online gambling activities to the territorial scope of the Autonomous Communities.
- (28) The Spanish authorities stated that the main objective of the Gaming Act is to create an adequate regulatory framework for gambling activities with a national scope that would offer legal certainty to both operators and players while ensuring the protection of the general interest, the protection of minors and other vulnerable people and the prevention of money laundering and the financing of criminal activities.
- (29) This new regulatory framework for gambling activities had to be laid down respecting the competences that the Autonomous Communities had recognized in their respective Statutes of Autonomy. It was therefore necessary to design new procedures and coordination mechanisms between the State and the

Autonomous Communities. According to the Spanish authorities, the Gaming Act is the first intervention from the State on the gaming sector since the exclusive assignment of the competences in the gambling area to the Autonomous Communities, with the exception of those gambling activities which are of the exclusive competence of the State, i.e. national lottery and non-profit sports pool betting.

- (30) The Spanish authorities argue that the differential tax treatment does not amount to State aid pursuant to Article 107(1) TFEU due to the following reasons:
- (31) First, according to the Spanish authorities, online and land-based gambling operators are not in a comparable legal and factual situation. The undertakings of the online and land-based gambling sectors operate in different markets and do not compete with each other. Moreover, the characteristics of the demand differ for online and land-based gambling, being able both sectors to attract different types of players. Factually, the characteristics of the average player are different for the online gambling sector and the land-based gambling sector.
- (32) Second, the differential tax treatment between online and land-based gambling activities does not constitute a selective advantage granted to land-based gambling operators. It is not possible to determine the reference framework for all gambling activities –online and land-based- because the distribution of powers between the State and the Autonomous Communities is structured on a geographical basis. That is, if the gambling activity takes place within the territorial scope of an Autonomous Community, it will fall under the regulatory framework of that specific Autonomous Community. Conversely, if the gambling activity takes place at a national level, it will be subject to the national regulatory framework. Thus, depending on the geographical scope of the gambling activity, the applicable regulatory framework would be that of either the State or the Autonomous Community.
- (33) Third, it follows from the intrinsic nature of the gambling activity that whereas online gambling would likely take place at a national level, gambling regulated at an infra-state level would rather have a land-based character. However, this does not exclude that online gambling activities might be subject to the regulatory framework of the Autonomous Community when the online gambling is provided within the geographical scope of that Autonomous Community. Nonetheless, the economic reality shows that, factually, this is less likely to be the case for online gambling activities. In order for a gambling operator to be subject to the infra-state regulatory framework of the Autonomous Community, the online gambling has to be limited to the geographical scope of that Autonomous Community. Indeed, Article 48(7) of the Gaming Act allows Autonomous Communities to increase up to 20% the tax rate already established for online gambling provided at a national level, provided that (1) the operator is a fiscal resident of the Autonomous Community and; (2) the 20% is applied with regard to amounts played by the residents of that specific Autonomous Community.

- (34) Finally, the Spanish authorities sustain that when laying down the taxation system established in the Gaming Act, the aim of the legislator was to achieve the most equitable treatment possible between online and land-based gambling.

3. ASSESSMENT OF THE MEASURE

3.1. Presence of State Aid within the Meaning of Article 107(1) TFEU

- (35) Pursuant to Article 107(1) TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”.
- (36) A measure is qualified as State aid if the following cumulative conditions are met: (i) the measure has to be granted by Member States through State resources, (ii) it has to confer a selective economic advantage to certain undertakings or the production of certain goods, (iii) the advantage has to distort or threaten to distort competition, and (iv) the measure has to affect intra-EU trade.

3.1.1. State resources

- (37) Pursuant to Article 107(1) TFEU, the measure should be granted by a Member State or through State resources in any form whatsoever. According to settled case-law⁷, the concept of aid is more general than that of a subsidy. It encompasses not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure⁸.
- (38) In the case at stake, the presence of the criterion of involving State aid resources has been contested neither by the complainants, nor by the Spanish authorities.
- (39) By establishing different tax rates to similar gambling activities provided through different channels (land-based or online), the State is foregoing revenues that would otherwise revert to the State's Budget. The Commission holds the view that the measure at stake involves a loss of State resources and therefore it is granted through State resources.

⁷ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365 para 38.

⁸ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10/12/1998, p. 0003 – 0009.

3.1.2. Undertakings

- (40) According to settled case-law⁹, “*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.*”
- (41) Neither the complainants nor the Spanish authorities have contested the undertaking character of online and land-based gambling operators.
- (42) In the present case, the operators of online and land-based gambling are engaged in an economic activity that consists of the provision of online and land-based gambling services in a market. Hence, land-based and online gambling operators are to be considered undertakings within the meaning of Article 107(1) TFEU.

3.1.3. Distortion of competition and effect on trade

- (43) According to Article 107(1) TFEU, a measure qualifies as aid if it affects intra-EU trade and distorts, or threatens to distort competition. In this regard, the Court of Justice has consistently held that the fact that a measure strengthens the position of undertakings in comparison to others is sufficient to establish this criterion.¹⁰
- (44) In the case at stake, both land-based and online gambling providers are exposed to competition and intra-EU trade. Consequently, a favourable tax treatment of online gambling operators vis-à-vis land-based gambling operators necessarily affects intra-EU trade and distorts or threatens to distort competition.

3.1.4. Advantage

- (45) Furthermore, the measure must confer a financial advantage to the recipients to constitute State aid. An advantage is conferred to an undertaking if it receives an economic benefit that would not have been obtained under normal market conditions.¹¹ According to settled case-law¹², the notion of aid encompasses not only positive benefits, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking.
- (46) According to the complainants, the challenged measure grants an advantage to online gaming operators through state resources consisting of a reduction of their tax burden vis-à-vis the tax burden borne by land-based operators. From its standpoint, the differentiation in treatment is clearer with respect to the

⁹ Joined cases C-180/98 to C-184/98 *Pavlov and others* [2000] ECR I-6451, para 74.

¹⁰ Case T-288/07, *Friuli Venezia Giulia*, [2001] ECR II-1619.

¹¹ Case 173/73, *Italy v Commission* [1974] ECR 709; Case C-342/96 *Spain v. Commission* [1999] ECR I-2459, paras 46 *et seq*; Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para 60; Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 78.

¹² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECR 3, p. 19.

Autonomous Communities which have established their own taxable amount and tax rates in their respective Statutes of Autonomy.

- (47) The Spanish authorities argue that the measure was adopted in order to achieve the most equitable treatment possible between online and land-based gambling. The tax system for gambling, as laid down in the Gaming Act, accordingly takes into account the nature and specific characteristics of each gambling sector.
- (48) The Commission finds that for gambling activities of national scope and hence subject only to the Gaming Act, the existence of an advantage granted to online operators as opposed to the land-based operators of the same gambling service resulting from the provisions of the Gaming Act cannot be established since both operators are subject to the same tax rates. The tax rates laid down in the Gaming Act cannot therefore be said to confer an advantage on online providers of gambling activities as compared to land-based providers that provide gambling services at national level.
- (49) However, for those gambling activities that are subject to laws of the Autonomous Communities, the interaction between the regional laws and the Gaming Act may lead to different taxation of the same gambling activity, depending on the applicable legislation. For example, in the case of taxation of casinos, which are typically regulated by the respective Statutes of Autonomy, a land-based casino will be subject to the (more or less advantageous) rates established by the regional law of the Autonomous Community concerned, whereas an online provider of casino services will be subject to the rates of the Gaming Act. Moreover, by providing the authorities of the Autonomous Communities with the power to increase the tax rate by 20% under certain conditions, the Gaming Act opens the possibility of further conferring an economic advantage in the form of reduced taxation to certain providers of gambling services at national level as compared to those established at the level of the Autonomous Communities. It is therefore necessary to examine whether that potential advantage arising from the Gaming Act is selective in nature.

3.1.5. *Selective advantage of the measure*

- (50) A measure should be found selective inasmuch as it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU.
- (51) Differential taxation in gambling has to be examined in light of the case-law on the notion selectivity¹³. Differential taxation would be *prima facie* selective if it constitutes a departure from the general (or "reference") tax framework. In this regard, it is necessary to assess whether the measure favours certain undertakings in comparison with other undertakings, which are in a comparable legal and factual situation in light of the objective pursued by the reference tax system. According to the Court's case-law, a *prima facie* selective measure can be justified by the logic of the tax system. However, in

¹³ Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paras 49 *et seq.*

this regard, only intrinsic reasons inherent to the tax system and no external policy reasons can be taken into account. If the *prima facie* selective measure cannot be justified by the logic of the tax system, it would amount to a selective advantage and, if all other conditions are fulfilled, it would be State aid within the meaning of Article 107(1) TFEU¹⁴.

Comparable legal and factual situation of online and land-based gambling

- (52) In order to determine whether the challenged measure is selective, it is necessary to examine whether the measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation, within the context of a particular legal regime¹⁵. Therefore, prior to the assessment of a differential tax treatment, it is necessary to examine if online gambling and land-based gambling are in a comparable legal and factual situation. If this is the case, it would need to be assessed subsequently whether the tax measure – in the present case a differential tax treatment for online and land-based gambling activities- constitutes a selective advantage for certain undertakings -online gambling providers- in comparison with others –land-based gambling providers- which are in a comparable legal and factual situation.
- (53) According to the complainants, online and land-based gambling operators are in a comparable factual and legal situation. In essence, it is the same gambling activity, although provided through different channels. Even though each channel might have its own intrinsic features, the existence of such special features does not lead to the existence of separate markets for online and land-based gambling activities. The complainants state that both groups of gambling operators usually offer the same type of games (bingo, casino games such as baccarat, blackjack or poker, slot machines etc.) to the same type of customers, using the same technology although with little variations. There is no evidence that shows that customers do not easily switch from one channel to another. Furthermore, land-based casinos also provide online games where players place stakes via monitors with similar software than those of the online gambling products.
- (54) The Spanish authorities contest the complainant's standpoint. As stated in recital (33), the Spanish authorities consider that online and land-based gambling operators are not in a comparable legal and factual situation. The undertakings of the online and land-based gambling sectors operate in different markets and do not compete with each other. Both the offer and the demand differ between online and land-based gambling, being able both sectors to attract different types of players. From the standpoint of the demand, the characteristics of the average player for the online gambling sector are different from those of the land-based gambling sector, being the offered gambling products consequently adapted to the needs of the consumer in question. An increase in price of online gambling products would not result in consumers moving from the online to the land-based gambling sector. From

¹⁴ See Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

¹⁵ Cases T-211/04 and T-215/04, *Gibraltar and United Kingdom v Commission*, [2008] ECR II-3745, para 80.

the standpoint of the offer, the cost structure deriving from carrying out an online gambling activity differs from the land-based one. In Spain, there are substantial regulatory barriers that would impede an automatic shift of an operator from one activity to another. Indeed, in order to have access to the online gambling market, it is necessary to obtain a licence granted by a public authority.

- (55) The Commission has already considered that the games offered by land-based and online gaming operators are equivalent and that they merely consist of two different distribution channels in relation to the Danish Gaming Act¹⁶. Indeed, the games offered by both online and land-based operators form part of the same activity of gambling, regardless of their online or land-based settings. The Commission therefore concluded that online and land-based casinos should be perceived as being legally and factually in a comparable situation. Furthermore, the Court held in *Zeturf* that the internet constitutes a channel through which games of chance can be offered¹⁷.
- (56) The Commission thus concludes that online and land-based gambling activities are in a comparable legal and factual situation. The arguments invoked by the Spanish authorities are not sufficient to evidence a substantial difference between the undertakings of both sectors. Indeed, the alleged differences in the socio-economic profile of the average consumer, the addiction risks, and the characteristics of the operators do not suffice to demonstrate that online and land-based are not legally or factually comparable. In essence, irrespective of the channel through which they are offered, both gambling activities refer to the same games (for instance, roulette, baccarat, punto banco, black jack, poker, gaming machines etc.), showing similar features that are inherent to the gambling activity. Moreover, the reality shows that, in many occasions, land-based operators also provide online products within their premises.
- (57) Since it has been concluded that land-based and online gambling are in a comparable legal and factual situation, it is necessary to assess the presence of selectivity by comparing the tax treatment of online gambling and land-based gambling activities.

Reference framework

- (58) The determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with the "normal taxation system". The normal tax rate is the rate in force in the geographic area constituting the reference framework.¹⁸
- (59) According to the complainants, the common or normal regime applicable for gambling taxation in Spain is the tax regime applicable to all gaming

¹⁶ Commission Decision C35/2010 (ex N 302/2010) of 20 September 2011.

¹⁷ Case C-212/08 *Zeturf Ltd v Premier minister* [2011] ECR I-5633, para 75..

¹⁸ Cases T-211/04 and T-215/04, *Commission and Spain v Government of Gibraltar and United Kingdom* [2008] ECR II-3745 para 80. See *supra* at footnote 18.

activities, irrespective of its adoption by the central or the regional authorities. The tax provisions of the Gaming Act derogate from that common regime, inasmuch as they differentiate between economic operators who are in a comparable legal and factual situation.

- (60) The Spanish authorities contest the aforementioned position: it is not possible to establish a reference tax system given that the distribution of competences with regard to gambling taxation is based on the geographical scope of the gambling activity in question. If the gambling activity takes place within the territory of an Autonomous Community, then the reference taxation framework would be the one of that Autonomous Community. Conversely, if the gambling activity takes place at national level, the reference framework would be the one of the State. The Spanish authorities state that it is mistaken to conclude that the Gaming Act would constitute an exception to the normal taxation regime applicable to gambling activities. On the contrary, the Gaming Act is the common regime for those gambling activities that take place at national level.
- (61) According to the Spanish authorities, the Spanish Constitution distributes the competences between the Autonomous Communities and the State. Although the Spanish Constitution does not explicitly refer to the regulation of gambling activities, the Constitutional Court case-law has defined the scope of the State and regional competencies regarding gambling activities. According to Article 149 (3) of the Spanish Constitution of 1978, the powers assigned to the Autonomous Communities are those expressly laid down in their Statute of Autonomy. In this regard, the Autonomous Communities have assumed in their Statutes of Autonomy competences on gambling taxation with regard to those games that take place within their territory, irrespective of their land-based or online character. According to the Spanish authorities, all Autonomous Communities, with the exception of Ceuta and Melilla, have adopted legislative powers to determine the tax rate and taxable base of gambling duties with regard to gambling activities that take place within their territory, namely games of chance, raffles, tombola, betting and random combinations.
- (62) According to settled case law¹⁹, the reference framework does not necessarily need to be defined within the limits of the Member State, so that a measure conferring an advantage in only one part of the territory is not automatically selective for the purposes of Article 107(1) TFEU. Thus, it is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measure it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment. Therefore, the legal framework appropriate to determine the selectivity of a tax measure may be limited to the geographical area concerned.

¹⁹ Case C-88/2003, *Portugal v Commission*, [2006] ECR I-7115, paras 57 and 58.

- (63) In the *Azores* judgement²⁰, the Court stated that in order to establish the selectivity of a measure adopted by an infra- State body vis-à-vis the measure established in the rest of that State, it is necessary to examine whether the measure was adopted by that body in the exercise of powers sufficiently autonomous vis-à-vis the central power and whether the measure applies consistently to all the undertakings established in the territory within the competence of that infra-State body. In that respect, the Court identified three scenarios:
- a) First, a situation where the central government unilaterally decides that the applicable national tax should be reduced within a defined geographic area.
 - b) Second, a situation that corresponds to a model of distribution of tax competences in which all regional authorities that are at the same level have the autonomous power to decide the tax rate applicable in the territory within their competence.
 - c) Third, a situation where the regional authority adopts, in the exercise of sufficiently autonomous power in relation to the central power, a tax rate lower than the national rate and which is applicable only to the undertakings active in the territory within its competence.
- (64) In the present case, it is necessary to identify the geographical reference framework in a scenario where undertakings that are in comparable situation may be subject to a different taxation as a result of the interaction of national law (the Gaming Act) and regional laws adopted within the exercises of autonomous regional competences. The tax rate of a gambling activity provided online nation-wide (or in several regions) and on land-based premises in a given Autonomous Community will depend on the following: the existence of the regional laws setting up a tax rate for that gambling activity, which would apply to the land-based service in that region, and the comparison of that tax rate with the one provided in the Gaming Act, applicable to the same gambling activity provided online. Moreover, Article 48(7) of the Gaming Act provides for the possibility for the Autonomous Community to increase, under certain conditions, the tax rate established in the Gaming Act by up to 20%. The appropriate reference framework in the present case is therefore the taxation of gambling activities in each Autonomous Community.
- (65) In the case at stake, the Commission considers that the model of distribution of tax competences corresponds to the second *Azores* scenario in the sense that all Autonomous Communities have the power to decide the tax rate applicable for gambling activities that take place within their territory (casinos, gaming machines, games of chance, raffles, tombola, betting and random combinations), by virtue of their respective Statutes. However, in a given region, gambling activities that are subject to tax rates determined at regional level can co—exist with the same activities that are subject to the Gaming Act, because they are provided at national level.

²⁰ Ibid, para 62.

- (66) Moreover, for those activities covered by the Gaming Act, Article 48 (7) of that Act authorizes the Autonomous Communities to raise the applicable tax rate (up to 20% on top of the existing rates) for those games that take place within their territory. In this case, the Autonomous Communities have the power to legislate on the final taxation rate of gambling activities that take place within their territory.
- (67) As the Spanish authorities have indicated, it follows from the intrinsic nature of the gambling activity that whereas online gambling would likely take place at a national level, land-based gambling –which requires the existence of premises- is likely to fall within the regulations of the competent infra-state body, in this case, the Autonomous Communities.
- (68) On the basis of the foregoing, the taxation system for gambling activities, resulting from the interaction of the Gaming Act and regional laws, at the level of the Autonomous Communities in Spain introduces a differential tax treatment for operators of gambling activities provided at national level (online activities and other activities of national scope) and the operators of the same activities provided at regional level (typically land-based), which are legally and factually in a comparable situation. It follows of such an analysis that it cannot be excluded that the measures under review would be *prima facie* selective within the meaning of Article 107 TFEU.

Justification by the logic of the system

- (69) Furthermore, in line with the jurisprudence, one should assess whether a measure, which appears to be *prima facie* selective, can be justified by the nature and the intrinsic logic of the system. For this purpose, a Member State has to establish whether the measure under consideration derives from the basic or guiding principles or rationales of the tax system that would justify the selectivity of the measure.²¹
- (70) In the present case, the Spanish authorities have argued that, given the supranational character of online gambling, it was deemed necessary to adopt a Law whose scope would encompass the whole national territory. Moreover, the regulatory framework for gambling had to be done with full respect of the competences of the Autonomous Communities contained in the Statutes of Autonomy. In order to strike a balance between the need to respect the Autonomous Communities' competences and the acknowledgement of the supranational character of online gambling, it was deemed necessary to design new procedures and coordination mechanisms between the State and the Autonomous Communities.
- (71) It is undisputed that online gambling is of national and supranational character and that the provision of online gambling cannot be confined to a specific geographic area. It follows from the intrinsic nature of gambling activities that land-based gambling would be subject to the regulatory framework of the Autonomous Community where the gambling activity is organised; and

²¹ Case 173/73 *Italian Republic v. Commission of the European Communities* [1974] ECR 709, para 15.

conversely, online gambling, given its national and international character, would effectively be subject, in the absence of harmonisation, to the State's regulatory framework. Moreover, such a logic is further reinforced by the fact that the decision on the location of the fiscal seat of an online gambling company may be different from the place where the gambling services are effectively provided. Regional taxation of activities provided by online operators could therefore be a decisive element for the ultimate fiscal location of these companies. In light of this, it would be therefore contrary to the logic of the tax system to exclusively limit the competences on taxation of online gambling activities to the territorial scope of the Autonomous Communities.

- (72) Based on the foregoing the Commission concludes that the nation-wide tax rates for gambling activities of national scope are justified by the logic of the tax system of gambling activities.
- (73) This conclusion is without prejudice to the possibility of the Autonomous Communities to make use of Article 48(7) of the Gaming Act and increase the tax rates established in the Gaming Act by up to 20% for the fiscal residents in the Autonomous Community and with respect to the revenues obtained from gamblers with fiscal residence in that Community. However, the Spanish authorities confirmed that no Autonomous Community has applied Article 48(7) and it is therefore not possible to analyse the concrete implication of this Article in this decision. Should an Autonomous Community apply Article 48(7) of the Gaming Act and increase the tax rate in its territory, the existence of aid for that region would need to be evaluated for that region separately.

3.1.6. Conclusion

- (74) In the light of the foregoing, the Commission concludes that the selectivity requirement set out in Article 107(1) TFEU is not fulfilled and that the tax rates provided in Article 48, paragraph 7, first indent, 1° to 12°, of the Gaming Act does not constitute State aid granted to online gambling providers with respect to land-based gambling providers. This conclusion is without prejudice to the case-by-case analysis in case any Autonomous Community decides to increase tax rates established in the Gaming Act, as per Article 48(7) of the Gaming Act. The Spanish authorities confirmed that no Autonomous Community has made use of this provision yet.

4. CONCLUSION

The Commission has accordingly decided,

- that the tax rates established in the Gaming Act for certain gambling activities provided at national level (Article 48, paragraph 7, first indent, 1° to 12°) do not constitute aid.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of

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Your request should be sent by registered letter or fax to:

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State aid Registry
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Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission