

Magdalena Frańczuk

Department of Public Law
Cracow University of Economics

Iwona Knurowska

The Law Office of Dr. Iwona Knurowska

The Admissibility of Online Poker Games in the Polish Legal System versus Protective Legislation

Abstract

In the paper we analyse amendments to the Gambling Act of 19 November 2009 (OJ 2009, no. 201, item 1540, as amended) concerning the playing of online poker games in the context of laws and institutions protecting potential players. We argue that the absence of such regulation was replaced by a blanket ban on online gambling, which the legislature perceives as a preventive measure. The paper focuses on an analysis of the gap that came to light during a review of the amended provisions of the Gambling Act. The gap consists in a lack of either regulation or indeed institutions protecting potential gamers-consumers, especially minors but also those that have an impaired perception of the actions they take, against the consequences of gambling. The legislature's rationale in enforcing a prohibition is of particular interest. The paper also looks at sample protective institutions in selected European countries.

Keywords: gambling act, poker online, protective legislation, lawmaker.

1. Introduction

On 26 May 2011 an Act was passed amending the Gambling Act and certain other laws. Under the new legislation arranging gaming via the Internet is prohib-

ited, as is participating in such games, except for mutual betting, the arranging of which over the Internet is permitted subject to separate authorisation. In this paper, we analyse this amendment to the Gambling Act of 19 November 2009 (OJ 2009, no. 201, item 1540, as amended) concerning the playing of online poker games in the context of laws and institutions protecting potential players. It can be concluded that the absence of such regulation was replaced by a blanket ban on online gambling, which lawmakers perceive as a preventive measure. The paper analyses the gap in the amended provisions of the Gambling Act. This gap consists in a lack of either regulation or indeed institutions protecting potential gamers-consumers, especially minors, though also those that have an impaired perception of the actions they take, against the consequences of gambling. The legislature's rationale in pushing the prohibition of gambling is of particular significance.

According to T. Stawecki and P. Winczorek (2003), a well-designed legal regime should be complete and have no gaps. In addition to regulated matters, there may also be other socially relevant issues which, for one reason or another, are not regulated by the law even though they should be. Legislators choose to leave them beyond the scope of a given regulation, though they should not (Stawecki & Winczorek 2003, p. 128). It is assumed that a gap in the law is constituted merely of such lack of regulation which can be reasonably argued not to have been intended by the legislature. In other words, if it had acted rationally, it would have regulated this state of affairs (Stawecki & Winczorek 2003, p. 128). In this case, reference must be made not to a gap in the law in the strict sense of the word but rather to the concept of axiological gaps. An axiological gap is one in which the lawmaker should regulate the state of affairs, either generally or in a particular way, if doing so follows certain commonly accepted values, known as axiological assumptions.

In the case of the Gambling Act, the legislature did not propose any rules or institutions designed to protect potential gamers-consumers, but instead used the simplest, and not infrequently also the least effective method – a prohibition. Therefore, the gap in this area could rightly be called an axiological one.

2. Rationale for the Amendment to the Gambling Act versus a Gap in Protective Legislation

This section looks at the legislature's broad rationale for banning online gambling. As is widely known, developing a draft of the so-called Gambling Act, in compliance with "Principles of Legislative Drafting" contained in the Annex to the Regulation of the Prime Minister dated 20 June 2002 titled "Rules of Legis-

lative Technique” (OJ of 2002, no. 100, item 908), lawmakers had to justify the changes they proposed to make to the existing regulations.

In support of the parliamentary bill amending the Act on Games and Mutual Bets (Sejm register no. 2482) it is stated that “in the assessment of the proposers it is expected to reduce the negative social effects associated with the increase in access to gambling that has taken place in recent years, in particular, young people’s access, who are also the most vulnerable, and to curb a practice consisting, in numerous cases, in minors’ involvement in this form of gambling”¹. Even this short excerpt from the justification reveals the lawmaker’s main objective – to protect young people against Internet gambling.

On the other hand, the justification of the government’s bill on gambling (Sejm register no. 2481) indicates that “the gambling bill was developed because of the necessity of a comprehensive change in the regulations governing the area of gaming and mutual bets. The need for change arises from the rapidly changing and growing market for gaming and mutual bets, new technologies employed in this sector of the national economy and irregularities occurring in this market”.

The legitimate interest of the state in monitoring and regulating the gambling market also stems from the threat of addiction to gambling. Gambling can take many forms, the outcomes of which depend purely upon chance. It is also associated with an activity whose outcome depends purely on chance. Those who engage in gambling, despite a lack of control over the course of events, entrust the outcome to fate with the hope of winning. Expenditures on gambling are rising in Poland. The loss of self-control in gambling is characterised by an absence of noticeable (somatic) symptoms, which could help in diagnosing that loss of control. Pathological gambling has been qualified as a mental disorder, one “consisting in frequent, repeated gambling that prevails in human life to the detriment of social, occupational, material and family values and obligations” (Sejm register no. 2481). The problem of gambling addiction affects adults as much as teenagers. “According to experts on gambling, virtually unlimited access to various forms of gambling has resulted in a disturbing increase in the number of addicts in Poland. In particular, internet gambling, which is much more widely available than traditional games and slot machines, carries a higher risk of addiction and poses a greater threat to minors. The ease with which a person can become addicted is especially apparent in minors, who, being less emotionally mature than adults, are more susceptible to temptation, which in their case means that it more quickly evolves to become an addiction. Personal problems resulting from gambling include depression, the social alienation of addicts, codependence of relatives and financial costs (debt, bankruptcy, loss of income). The social and economic

¹ Item 1 of the justification.

costs of this addiction afflict not only gamblers' families and their employers, but society as a whole. The state therefore cannot remain indifferent to the risks arising from the availability of gambling and the risk of citizens becoming addicted. This threat is so high that it is indeed necessary to take radical steps and enforce restrictions on the industry”.

In the light of such a broad range of arguments surrounding the ban and lawmaker's focus mainly on the possible negative outcomes of certain online games, especially online poker, it is interesting that there is a lack of regulatory protection, a lack of specific institutions equipped to combat gambling addiction, and a lack of other initiatives on the part of lawmakers to provide for the establishment of and funding by the state authorities of measures to protect potential gamers, especially minors, from the harmful effects of gambling. Moreover, since the legislature indicates in its justification that Pole's spending on gambling is rising and that gambling is becoming a social problem, then it would be more just to go beyond a mere ban and introduce protective regulations, and in particular to launch a broad educational campaign aimed especially at young, inexperienced people potentially exposed to gambling (including online gambling). Such a campaign would, in the long run, probably have a more desirable outcome than the lawmaker's ban, which is likely to stimulate the shadow economy.

It should be noted here that the Polish law generally prohibits the advertising and promotion of gambling². The prohibition of advertising and promotion applies, among other things, to online poker games. Violation of this prohibition may result in criminal liability for a tax offense or liability for a tax misdemeanour. However, serious doubts are raised by the normative location of these prohibited acts in the Polish law, where prohibited advertising and promotion of gambling are established as tax offences, regulated under Section 9 of the Fiscal Penal Code, and not as ordinary offences³. This location may lead to the conclusion that, for the Polish legislature, state budget receipts becoming part of the generic object of protection under the provisions contained in Section 9 of the Fiscal Penal Code are more important than the mental health of citizens, reducing the risk of addiction to gambling and reducing costs associated with treating such addictions, which should be part of the object of protection in the gambling regulations, including regulations governing playing poker online⁴.

² As per the amendment to the Gambling Act (OJ 2011, no. 134, item 779), the Polish lawmaker allowed the advertising and promotion of betting, in particular on a website used for the organisation of such betting. That is a consequence of allowing the taking of bets over the Internet.

³ Cf. art. 110a § 1 of the Penal Fiscal Code.

⁴ For more on the subject cf. Błaszczuk (2013, p. 575–583). For objections regarding the axiological approach in the application of the law in the judicial decisions of administrative courts in gambling cases cf. remarks by Drożdż (2014, p. 124 *et seq.*).

It is particularly noteworthy that the European Commission has decided to consult with Member States on the regulation of the gambling sector. In its Communication (2012), adopted on 23 October 2012, the Commission proposed a series of measures which seek to respond to the regulatory, societal and technical challenges of online gambling (p. 7). In the Communication, the Commission notes that “National regulatory authorities need to have adequate competences and know-how in order to deal with regulatory challenges in a rapidly growing and technology-based market” (p. 10). “The Commission sees significant benefits in the development of a range of authorised gambling opportunities in order to effectively dissuade consumers from using other gambling offers” (p. 10). The Commission believes that it is important for authorised operators to be able to offer sufficiently attractive products, because in the absence of credible and sustainable offers consumers will continue to turn to unregulated gambling websites, and potentially suffer from the attendant harmful effects (p. 10).

In addition, in July 2014 the European Commission adopted the Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, Text with EEA relevance (2014/478/EU OJ L 214, 19.7.2014) (2014, p. 38–46), whereby it is recommended that Member States achieve a high level of protection for consumers, players and minors through the adoption of rules for online gambling services and for responsible commercial communications of those services, in order to safeguard health and to also minimise the eventual economic harm that may result from compulsive or excessive gambling (cf. Commission Recommendations... 2014, art. I clause 1).

In its recommendations, the European Commission pays special attention to, *inter alia*, the need to meet information requirements, ensuring easy identification of entities offering gambling games on behalf of which sales information is prepared, ensuring the transparency of sponsoring by service providers offering online gambling games, regular education and raising public awareness among consumers and minors in the area of online gambling games, as well as effective supervision (cf. Commission Recommendations... 2014, art. III–XII). The Commission believes that effective supervision is necessary for the appropriate protection of public interest objectives. Member States should designate competent authorities, lay down clear guidance for operators and provide easily accessible information for consumers, players and vulnerable groups including minors. It is also necessary to create awareness about the inherent risks of prevailing gambling websites, such as fraud, that are beyond any form of control at the level of the Union (cf. clauses 26 and 27 of Preamble to Commission Recommendations... 2014).

3. Examples of Protective Institutions in Selected European Countries

According to Caillois (2001, p. 6), there is no doubt that play must be defined as a free and voluntary activity, a source of joy and amusement. A game one were forced to play would at once cease to be played. It would become constrained drudgery from which one would strive to be freed. Meyer, Hayer and Griffiths (2009) note that as a leisure activity, gambling dates back to ancient times. More recently, the surge in avenues for gambling – casinos, sports betting, lotteries, and remote media (e.g. the Internet, mobile phones, interactive television) among them – finds a growing numbers of people losing control over their gambling behaviour, usually at great personal and financial expense.

In many European countries the regulation of online gambling games has been liberalised. However, these changes have always been associated with the introduction of regulations and institutions aiming to protect gamers-consumers and persons who should not be gamers, specifically minors who are unaware of the consequences of their actions.

One such country is Italy. The liberal change in Italian gambling regulations was accompanied by changes in the structure of the *Amministrazione Autonoma dei Monopoli di Stato* (AAMS) – *Agenzia Giochi*, an organisation whose main function is to enforce the law and compliance with new regulations. The agency was set up to be a guarantor of the arrangement of and compliance with gambling games in a manner provided for by the law. The agency's objective is to protect clear rules, the clarity of legal regulations and gamers-consumers' safety. Its motto is "Safe, legal and responsible gaming".

In the United Kingdom, gambling is regulated by the provisions of the *Gambling Act* of 2005⁵, enforced by the Gambling Commission acting on behalf of the Department for Culture Media and Sport (DCMS). Arranging online poker games is, however, only permitted if operators have a special charter and further regulations provide for a number of safeguards targeting people who, due to age (children) or condition (adults requiring care), need to be protected from behaviours which are by nature detrimental to them.

The vast majority of European countries are moving towards transparent regulation of online gambling. In most countries these regulations are much more liberal than the amended Polish law. Countries such as Denmark, Estonia, France, Spain, Great Britain, and Italy are not drastically restricting access to online poker games but rather have introduced clear rules to be followed by Internet game providers. In addition to the need to obtain a state license (in parallel with

⁵ www.legislation.gov.uk/ukpga/2005/19/contents (date of access: 15.02.2014).

provisions conditioning the availability of online gambling), they have introduced protective measures. These are regulations which protect minors against the harmful consequences of gambling and other gamers-consumers against dishonesty on the part of providers of illegal games, i.e. providers of online games offering online games without securing the permission of competent state bodies. This liberalisation of the rules is closely interconnected with the introduction of protection for potential players against unfair practices by online game providers and activities originating in the shadow economy.

Particularly noteworthy is the fact that in the European Union there are tools widely available to member states, mainly organisational and legal ones, aimed at preventing and excluding internet gambling pathology. Examples are listed below:

1. The European Gaming and Betting Association (EGBA) – plays an important role in protecting the online gambling market. Members are licensed operators in the European Union, and must comply with the organisation's standards⁶, which follow these standards:

- a) promotion of responsible gambling,
- b) prevention of minors from participating in online gambling and compliance with the principle of the transparency of customers,
- c) zero tolerance for behaviour bearing the hallmarks of crime or criminogenic activities,
- d) confidentiality of customer data,
- e) fast and accurate payment,
- f) on-going supervision of compliance with binding regulations,
- g) ethical and responsible marketing,
- h) support for customers in resolving disputes with operators,
- i) compliance with responsible market practices.

Additionally, EGBA members are bound by the Third Directive on the prohibition of money laundering 2006/70/EC⁷.

2. Research into criminogenic properties of online gambling in the field of money laundering. Studies on the use of online gambling to launder money have shown that transactions can be transparent, and possibly tracked on the Internet, and moreover that they are carried out via the intermediation of authorised entities such as banks and entities supporting credit card payments. In a free society it is impossible to completely avoid the risk of money laundering, but the risk can be minimised. One way of doing so comes from the control of e-gaming operations.

⁶ http://www.egba.eu/pdf/EGBA_Standards_March_2009_EN.pdf (date of access: 16.02.2014).

⁷ http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_214/l_21420060804en00290034.pdf (date of access: 20.02.2014); cf. Barker (2013).

Research conducted at the University of Cardiff corroborates the efficacy of this approach (*Money...* 2014).

In addition, a document titled *Online Gambling, Focusing on Integrity and a Code of Conduct for Gambling*⁸ was commissioned by the European Parliament. The document defines the meaning of a reliable, transparent market. If the research had clearly shown that online gambling is invariably closely associated with a high risk of money laundering, then clearly no EU country would have permitted in its legal system the operation of provisions admitting the existence of websites offering such games. In addition, sites should follow the “Know your customer” principle. Identifying customers is not as easy with online gambling as it is at traditional casinos, but nonetheless there are technical measures that enable such control (the client can be first identified by the provider of payment services who checks the bank account the money originating from; control can be exercised by external auditors and the website itself, while internally it can be done by verifying the documents required of the gamer).

In the United Kingdom the Gambling Commission maintains a programme that checks the compliance of activities offered by providers of online gambling games with the binding legal regulations, including specifically safeguards that prevent minors from gaining access to gambling websites. As a result of this programme it has been found that in fact there is very little possibility that minors are involved in playing the games offered by services designed for adult gamers.

3. Research into addiction to online gambling. Studies have been conducted by many leading universities and organisations in the EU and beyond. The results show no overwhelming correlation between Internet use and addiction to gambling. The number of people addicted to gambling is, as a rule, constant and independent of the presence in a country’s market of sites offering online gambling. In our field there is a great deal of literature dedicated to the topic (e.g. studies published by the Harvard Medical School, published research conducted by the Addiction Service of the Cambridge Health Alliance, etc.).

Similarly, probing problems associated with gambling, the British commission conducted research which led it to the conclusion that the UK ratios of addiction to online gambling during the period under research were lower than in the case of certain types of games offered through traditional non-online distribution channels. Addiction was not associated with the availability of the game but more its novelty. New types of games were seen as more attractive, regardless of whether they were offered online or off (*Past Addiction...* 2007).

4. Institutions combating addiction to gambling and promoting responsible gaming. In every country that allows online gambling there exist many public and

⁸ <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=23191> (date of access: 20.02.2014).

private institutions whose aim is to combat addiction to gambling and to promote responsible gaming. Examples of such institutions are many and varied:

a) Adictel, Addiction Prevention – an organisation that helps people addicted to gambling (its Internet website is available, e.g., in English, French, German, Spanish, Italian, Danish and others),

b) SOS Jouers – is an organisation operating in France that seeks to protect individuals addicted to online gambling,

c) The GREaT Foundation – is the UK's largest foundation and its responsibilities involve combating online gambling addiction, financing research and education in this area and treating gambling addicts,

d) The Responsible Gambling Fund – the fund supports activities that reduce the impact of problem gambling,

e) Gamcare – offers support to people addicted to gambling and their families,

f) Gamblers Anonymous UK – is a fellowship of men and women who share their experience with each other in order to help fight their problem with gambling.

Unfortunately, with little visibility or popularity, such organisations in Poland are not widespread.

5) Ban on minors' access to online gambling. Checking customers. Minors' access to gambling is forbidden in all EU countries by way of acts or is terminated in systems relying on authorisation / licences. Websites verify the age and data of the people who want to participate in online gambling. A gamer's age can be verified through a variety of tools, usually initially through payment systems.

In addition, providers of Internet gambling (if they are members of EGBA, on the basis of the abovementioned regulations) are required to target game ads only to adults; provide links to systems capable of filtering content on the Web and thus blocking minors' access to online gambling sites; and embed in the websites clear signs prohibiting access to minors. In EU countries, research is carried out on an on-going basis to monitor whether minors are able to gain access to online gambling. In Belgium, for example, in 2009 the consumer organisation CRIOC developed a study of compliance with laws concerning minors' access to online gambling⁹.

The above measures were found by the states permitting online gambling games to be played within their territory to be effective and necessary elements of protection:

- of minors against addiction to gambling,
- against the risk of money laundering,
- against the development of the shadow economy.

⁹ <http://www.oivo-crioc.org/files/fr/4435fr.pdf> (date of access: 15.02.2014).

So far no country has managed to completely eliminate any possibility for minors to engage in e-gambling, regardless of whether there exist bans or not. A total ban on online gambling will not prevent minors and adults from seeking access to illegal sites offering gambling on the Internet. Prohibition is therefore not justified, and indeed facilitates excessive activity in the shadow economy. Safeguards are a reasonable alternative to a complete ban on online gambling. The Polish legislature has moved in a direction that has been criticised by the ECJ, and one that has not been followed in most European countries.

As Collins (2003, p. 53) pointed out, in recent history, governments have usually confronted the problem of gambling in the context of legalising a previously illegal industry rather than of trying to rein in one that has hitherto operated as an ordinary part of the leisure business in a free market. But, either way the question governments are faced with is: What are the principal features of a well-regulated gambling industry? It is reasonable to say that banning online gambling will not be effective and lawmakers will not attain the objective of their regulation – to protect players and their families. Gearing regulations towards the development of awareness of potential gamers and the promotion of “healthy” gaming seem to be more appropriate measures. A more liberal regulation, in combination with safeguards, would not only effectively alleviate the problems addressed in this paper but also bring tangible benefits in the form of state budget revenues from the taxation of legal online gambling.

4. Conclusions

In conclusion, the provisions of the amendment to the Gambling Act in respect of certain types of games, such as online poker, may stoke the shadow economy and thus reduce tax revenue to the state budget from the taxation of Internet gambling. Secondly, regulations introduced by means of the amendment violate not only EU rules, but also provisions of the current Polish Constitution, in particular principles which a state guided by the rule of law should follow.

In the case of a unilaterally restrictive policy of a Member State regulating online gambling in a manner that results in an excessive focus on the negative effects of gambling, one can talk about the violation of fundamental freedoms guaranteed by EU law. The freedom granted to Member States in formulating their internal gambling regulations is not a blanket one. Gambling (including Internet gambling) is a type of cross-border economic activity and thus its regulation in the Member States must be consistent, first of all, with art. 49 and art. 56 of the EU Treaty.

The underlying justification offered by the Polish legislature on the grounds of overriding public interest was not rationally corroborated by the official Justification for the Act on Games of Chance, nor in any other document constituting the basis for the amendment. Moreover, the proposer did not make use of nearly any of the critical comments submitted during the drafting of the bill by way of public consultation. Thus we can assume that the Polish state is prevented from reaping the benefits of healthily developing competition in online gambling or access to the highest standards of safety and quality of services offered and provided by foreign entities, condemning itself to a virtual monopoly of domestic companies, which, in the absence of competition, are not interested in ensuring that, apart from minimum statutory standards, further requirements for consumer protection against negative influences associated with gambling are met. Such action on the lawmaker's part will inevitably give rise to the shadow economy, while a lack of institutions similar to those established in other Member States to spread awareness of the dangers of gambling and of responsible gaming coupled with a lack of a broad information campaign targeting above all minors, flagrantly violate the requirement of "general public interest", which the proposer was to have been guided by in drafting the law under analysis.

Bibliography

- Barker A. (2013), *Online Gambling Faces Closer EU Scrutiny*, "Financial Times", February 3.
- Błaszczak M. (2013), *Zakazana reklama hazardu (art. 110a § 1 KKS)*, "Monitor Prawniczy", nr 11.
- Caillois R. (2001), *Man, Play and Games (Les jeux et les hommes)*, The Free Press of Glencoe, a division of Simon and Schuster.
- Collins P. (2003), *Gambling and the Public Interest*, Praeger, Westport, Connecticut London.
- Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, Text with EEA relevance (2014), 2014/478/EU OJ L 214, 19.7.2014.
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a comprehensive European framework for online gambling (2012), COM(2012) 596 final.
- Drożdż R. (2014), *Aksjologiczne stosowanie prawa w orzecznictwie sądów administracyjnych w sprawach hazardowych*, "Przegląd Sądowy", nr 10.
- Meyer G., Hayer T., Griffiths M. (2009), *Problem Gambling in Europe, Challenges, Prevention, and Interventions*, Springer, New York.
- Money Laundering Risks and e-gaming: A European Overview and Assessment, Final Report*, http://www.egba.eu/pdf/Levi_Final_Money_Laundering_Risks_egaming%20280909.pdf (date of access: 16.02.2014).

Past Addiction Rates of Gamers, British Gambling Prevalence Survey 2007 (2007), National Centre for Social Research, <http://www.gamblingcommission.gov.uk/PDF/British%20Gambling%20Prevalence%20Survey%202007%20-%20Sept%202007.pdf> (date of access: 20.02.2014).

Stawecki T., Winczorek P. (2003), *Wstęp do prawoznawstwa*, C.H. Beck, Warszawa.

Dopuszczalność gier w pokera *online* w polskim systemie prawa a regulacje ochronne

W opracowaniu przeprowadzono analizę zmian Ustawy z dnia 19 listopada 2009 r. o grach hazardowych (Dz.U. 2009, nr 201, poz. 1540 ze zm.) w zakresie prowadzenia gier w pokera *online* w kontekście przepisów i instytucji chroniących potencjalnych graczy. Przyjęto tezę, że brak takich regulacji zastąpił ogólny zakaz hazardu *online* uznany przez ustawodawcę za rodzaj prewencji. Opracowanie skupia się na analizie luki, jaką można zauważyć w zmienionych przepisach ustawy hazardowej. Luka ta zatem polega na braku regulacji oraz instytucji chroniących potencjalnych graczy-konsumentów, a zwłaszcza osoby nieletnie i nie w pełni świadomie podejmujące swoje czyny, przed skutkami hazardu. Szczególnie ciekawy staje się poruszony problem w konfrontacji z uzasadnieniem motywów, jakimi kierował się ustawodawca, wprowadzając wspomniane zakazy. W opracowaniu przywołano przykłady instytucji ochronnych w wybranych krajach europejskich.

Słowa kluczowe: ustawa hazardowa, poker online, przepisy ochronne, prawodawca.