

Brussels, 29 November 2016

DG Internal Market, Industry,  
Entrepreneurship and SMEs  
DG GROW/B/2  
N105 4/66  
B-1049 Brussels

Att: Mr. Giuseppe Cassela  
Mr. Martin Eifel

Subject: Comments on planned amendment of Gambling Activities Act in Poland.

Dear Sirs,

I am writing to you on behalf of the **European Organization for Gaming Law (EOGL)** in regard to the proposed amendments in the gaming law by the Polish government.

The European Organization for Gaming Law is a nonprofit organization based in Brussels and represents European gaming and betting operators, licensed and regulated under the EU law. Further information about EOGL can be found at [www.eogl.eu](http://www.eogl.eu).

As active members of the European gaming/gambling industry for a long time, we want to give constructive comments in connection with the amendments on Gambling Activities Act, submitted recently by the Polish government. To this direction, please find hereunder a list of arguments that EOGL fully supports.

## **1. Gambling game and an on-line gambling game definition**

The planned amendment introduces a legal definition of a gambling game specifying that gambling games are games of chance, betting, card games and games on gaming machines. The Act further defines the individual types of gambling games.

The planned amendment includes specific reference to gambling games organized in the Internet. Namely, it provides that the Act applies to the organization of gambling games in the Internet, including organizing games whose rules correspond to the rules of games of chance and games on gaming machines. **A literal interpretation of this provision should lead to the conclusion that once the Act is amended, it will not apply to organizing games in the Internet, where the rules of such games correspond to the rules of betting or card games.** If such exemption from the catalogue of online gambling games was not the legislator's deliberate intention, the planned amendments of Article 1 clause 2 of the Act should be clarified.

## 2. Gambling, games of chance and skill games

The traditional understanding of the word “gambling” involves games and bets with a certain stake where a player can win something. The majority of gambling games are games where a player needs to pay a stake in order to participate, and he can win money or a prize.

- a. There is a change in the modified definition of an audiotext lottery which the Act classifies as a game of chance (and therefore, a gambling game). In its present form, an audiotext lottery is defined as a lottery, in which users can participate through a paid phone call or by sending a text message, regardless of whether the entity organizing it offers cash wins or material wins. The amendment removes the requirement of offering a win from the definition of an audiotext lottery, while retaining this requirement for all other types of games of chance. If such amendment was not the legislator’s intention, Article 2 clause 1 point 11) of the Act should be rectified accordingly.
- b. As far as concerns the games on gaming machines, the Act provides that games on gaming machines are games on mechanical, electromechanical or electronic devices, including computer devices, for a cash win or a material win, in which the game contains an element of randomness. **Even the smallest one, will be sufficient and definition does not account for the fact that many of these computer games or smart phone games require that a player develop or use their skills.** Moreover, the Act provides that a material win includes the possibility of continuing the game without the need to place a bet for participating in the game, or starting a new game by using the material win obtained in the previous game. If a game has a random character and is organized “for commercial purposes”, the Act considers it a game on a gaming machine, even when a player does not have a chance to obtain a cash win or a material win. **The definition of a game on a gaming machine is definitely too broad, because in practice it classifies every form of entertainment on mechanical, electromechanical or electronic devices, including computers devices and mobile phones, as a gambling game, if only any element of randomness is perceivable in it, and if a player can win something. To the extent that the result of the game depends on the player’s skills, such game should not automatically be classified as a gambling game.** That is why the definition of games on gaming machines in Article 2 clauses 3-5 should be limited solely to paid games on mechanical, electromechanical or electronic devices, including computer devices, for a cash win or a material win, in which the game has random character. Where a player does not risk the stake he paid, there is no cash win or material win, and skills prevail over the random element in the game itself, such game should not be considered a gambling game.

## 3. Card games

**The proposed change of the definition of card games is a positive one.** Namely, gambling games will include only those, black jack, poker and baccarat games that

are played for cash prizes or material prizes. To ensure consistency of terminology, draft Article 2 clause 5a, however, should refer to cash wins or material wins, and not to prizes.

#### **4. Gaming machines and gaming devices definition**

The Act and its amended version prohibit organizing games on gaming machines by entities that do not hold an appropriate license. After the amendment, mere possession of gaming machines will be prohibited. However, the amended Act suggests defining gaming devices as any device used to hold a gambling game, and any device whose operation affects the operation of games.

**Linguistically, this definition is extremely broad and can create a lot of confusion.**

**Instead, we suggest defining gaming machines as those that unlicensed entities are prohibited to possess and that require registration. This can be achieved, for example, by replacing draft Article 4 clause 1 point 3 with the definition of a gaming machine as a mechanical, electromechanical or eclectic device, including a computer device, on which games on gaming machines are organized.**

#### **5. The scope of the state monopoly on gambling**

The draft amendment of the Act significantly broadens the scope of the State Treasury monopoly on gambling. In addition to numbers games, cash lotteries and telebingo games, traditionally subject to the monopoly, the amendment strives to monopolize organizing games on gaming machines outside casinos and the entire online gambling sector, except for betting and promotional lotteries.

**It is difficult to agree with the assertion that only an entity controlled by the State Treasury and operating in accordance with the Act and on the basis of the approved gaming regulations is able to provide the appropriate level of protection for players. The justification of the draft amendment does not duly explain why private operators acting in accordance with the Act and on the basis of similar regulations approved by the minister responsible for public finance regulations, are not able to ensure the same level of protection.**

One of the objectives of the amendment is to redirect players currently using offers of unlicensed operators to the websites of Polish operators. Therefore, the list of gambling games available in Poland is to be extended, and at the same time almost the entire range of these games on the Internet, except for betting and promotional lotteries, is to be restricted for the state monopoly.

This means that if Polish residences do not wish to use the services of the monopoly, then they should be protected against the effects of gambling by generally prohibiting (except for online betting or promotional lotteries) or criminalizing participation in online gambling games. Such a planned approach to the monopoly, that, after all, is expected to protect players, may raise justified doubts in terms of its compatibility with constitutional law and the EU law.

Therefore, we propose that the relevant provisions of draft Article 5 should, rather, be as follows: 1) no amendment of current clause 1 of Article 5 of the Act indicating the scope of the State Treasury monopoly; 2) adopting the planned provision of clause 1a on multi-jurisdiction games as drafted; 3) limiting the scope of the proposed

monopoly of the State Treasury in clause 1b exclusively to gambling games in the Internet with the rules corresponding to the rules of the games of chance; 4) an explicit exemption in draft clause 1c from the monopoly of the State Treasury of the following online gambling games: betting, card games, games on gaming machines and promotional lotteries; 5) providing in clause 1d that the activity in the field of games on gaming machines outside a casino can be performed in licensed gaming machine venues, and introducing provisions permitting private operators to re-obtain licenses or permits to organize games on gaming machines.

## **6. Game of Poker**

**With regards to poker, it is positive that draft Article 2 clause 5a of the Act recognizes poker (and other card games listed therein) as a gambling game solely when such a game is played for cash or material prizes.** This means that if a game of poker is not played for a cash prize or a material prize, then poker is not a gambling game, and thus, is not subject to the regulations of the Gambling Games Act.

**Another positive change is restoring the possibility of organizing poker games outside casinos by entities holding a relevant license, both in the form of a game played by a player against the operator, and in the form of a tournament between players.** Moreover, it will be possible to organize tournaments outside casinos, without a proper license, on condition that the regulations have been approved, the tournament is held in a separate place, and the event has been notified to the relevant Customs and Excise department, and under the additional condition that the prize has the form of material gains with a value not exceeding 50% of the base amount, which currently amounts to PLN 4,063.75 (approx. EUR 1,000).

The planned amendment does not contain a provision that would allow Polish players to participate in international poker tournaments played online, where the world's best players compete and where Polish players are often successful. Unfortunately, the planned amendment reserves the entire sector of online gambling games, except for betting and promotional lotteries, for the monopoly of the State Treasury, while prohibiting persons in the territory of Poland from participating in any games organized by an operator not being the State Treasury monopolist or by an operator not holding the required permit.

Therefore, as already described above, it would be recommendable to exclude online poker from the scope of the monopoly of the State Treasury, to allow private operators to obtain a license for online poker, and to allow Polish players to participate in international poker tournaments played online.

## **7. Fees for the use of sport results, an indirect taxation**

As soon as any contest between people or animals finishes, the results are made public. Such results can be found in news services, and they are not a secret. Hence, it is a little surprising that the Act continues to include Article 31 clause 2, setting forth the condition that an operator of betting on the results of sports contests between people or animals is required to obtain the consent of national organizers of such competitions for the use of their results.

Such organizations often require a charge in the form of a specified fraction of a percent of revenues generated by the operator in the previous year. Thus, such a

system is another “private” tax imposed on the turnover of operators holding national licenses, which further reduces their income, compared to that of operators outside Poland, who are not required to pay such charges to Polish organizers of sports competitions between people or animals.

As mentioned above, once sports contests between people or animals are over, their results become publicly available information, and that is why such a charge “taxing” the revenue of licensed betting operators should be abandoned.

## **8. The gaming tax base**

The current gaming tax collection system provides for various rates and tax bases for each type of gambling game. Tax rates range from 2.5% (betting on sporting competitions involving animals), through 12% (fixed-odds betting) to 50% (games on gaming machines, roulette games, dice games, card games, excluding poker played in the form of a tournament). The most common tax base is not the operator’s income (Gross Gaming Revenue), but the operator’s revenue from a given game. Gross gaming revenue (GGR) applies only to audiotext lotteries, roulette games, dice games and card games (but with the exception of poker played in the form of a tournament), and to games on gaming machines. To make it even more complicated, in a poker game organized in the form of a poker tournament, the taxation base is the amount of the win, less the amount of the fee for taking part in the tournament.

Regardless of the tax already collected, where a player’s win is more than PLN 2,280 (approx. EUR 500), a player will still have to pay the prize tax of 10%].

In addition, tax bases for different types of games must not be aggregated. This means that if an operator suffers a loss in any gambling game, such loss cannot be “settled” against the profit on another gambling game.

**Therefore we propose that the existing various tax bases set forth in Article 73 of the Act should be replaced with one universal base in the form of gross gaming revenue (GGR).** It should be also considered whether or not the various tax rates in Article 74 of the Act should be uniform and replaced with a single rate. Then, it would be possible to aggregate taxation bases. **This could significantly simplify the current gaming tax system, and a moderate rate of such tax could further encourage foreign operators to enter the Polish market (as is the case in other European countries).**

If you have any questions or believe that the arguments we have presented here need further explanation, please let us know.

Yours sincerely,



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President

European Organization for Gaming Law