82/6/A/2013

JUDGMENT

of 23 July 2013

Ref. No. P 4/11*

In the Name of the Republic of Poland

The Constitutional Tribunal composed of:

Zbigniew Cieślak – Presiding Judge
Stanisław Biernat
Mirosław Granat
Wojciech Hermeliński
Teresa Liszcz – Judge Rapporteur,

Grażyna Szałygo: Recording Clerk,

having considered, at the hearing on 23 July 2013, in the presence of the Sejm and the Public Prosecutor-General, a question of law referred by the Voivodeship Administrative Court in Poznań:
as to whether Article 135(2) of the Gambling Act of 19 November 2009 (Journal of Laws - Dz. U. No. 201, item 1540), which rules out – for persons that carry out economic activity which consists in making low-prize gaming machines available for use as regards business projects commenced before 1 January 2010 - a possibility of changing the siting of the said gaming machines which was indicated in a given permit (a possibility provided for previously) is consistent with the principle of protection of existing interests of persons carrying out economic activity, expressed in Article 2 of the Constitution of the Republic of Poland, where the said persons commenced the implementation of six-year business projects, relying on the previous provisions.

* The operative part of the judgment was published on 30 August 2013 in the Journal of Laws - Dz. U. item 1002.

adjudicates as follows:

Article 135(2) of the Gambling Act of 19 November 2009 (Journal of Laws - Dz. U. No. 201, item 1540, of 2010 No. 127, item 857 as well as of 2011 No. 106, item 622 and No. 134, item 779) **is consistent with Article 2 of the Constitution of the Republic of Poland.**

STATEMENT OF REASONS

[…]

III

The Constitutional Tribunal has considered as follows:

1. General remarks, the scope of the review, and the constitutional issue.

1.1. The Voivodeship Administrative Court in Poznań referred a question of law as to whether Article 135(2) of the Gambling Act of 19 November 2009 (Journal of Laws – Dz. U. No. 201, item 1540, as amended; hereinafter: the Gambling Act), which ruled out a possibility of changing the location of gaming machines (a possibility provided for previously), was consistent with the principle of protection of existing interests of entrepreneurs carrying out economic activity involving low-prize gaming machines (hereinafter: gambling activity; low-prize gaming machines), expressed in Article 2 of the Constitution, where the entrepreneurs commenced the implementation of six-year business projects before 1 January 2010, relying on the previous provisions.

Challenged Article 135(2) of the Gambling Act stipulates that: "The change of a given permit may not result in a change of the location where gaming machines are made available for use, with the exception of a situation where the number of locations with gaming machines has been reduced".

The Constitutional Tribunal deems that the question of law meets statutory requirements and may be the subject of the Tribunal's review. At the same time, it stresses that the scope of this case comprises neither gambling activity as such nor any motives –

whether substantive or political ones (indicated in the draft versions of the Act; the Sejm Papers No. 2481 and 2482/6th term of the Sejm) - for the enactment of the Gambling Act.

1.2. The Constitutional Tribunal points out that, in an appeal to the aforementioned administrative court, an entrepreneur alleged that the Gambling Act – which, in his opinion, comprised technical regulations (within the meaning of EU law), but which had not been notified to the European Commission in accordance with a proper procedure – was ineffective in the context of private parties. The said issue was the subject of a reference for a preliminary ruling made by the Voivodeship Administrative Court in Gdańsk (see its decision of 16 November 2010, ref. no. III SA/Gd 261/10) and was determined by the judgment of 19 July 2012 (ref. no. C-213/11) issued by the Court of Justice of the European Union (hereinafter: the CJEU), which held that the provisions of the Gambling Act - which could result in the limitation of (or even gradual elimination of) gaming machines made available for use outside casinos and game arcades - potentially constituted 'technical regulations' within the meaning of Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204 of 21 July 1998, p. 37 and OJ – the special Polish edition, chapter 13, vol. 20, p. 337, as amended). However, the draft of those regulations should have been referred to the European Commission only if it had been determined that the said regulations introduced conditions that could have a considerable impact on the properties or sales of products (i.e. low-prize gaming machines), and the obligation to determine that fact lay with a competent national court.

After the issuance of the above-mentioned judgment by the CJEU, Polish administrative courts issued several judgments on the change of permits for making low-prize gaming machines available for use, with regard to the location of the said machines; however, those rulings were divergent.

The court which made the said reference for a preliminary ruling issued a judgment on 19 November 2012 (ref. no. III SA/Gd 569/12), in which it revoked decisions that had been issued in administrative proceedings in the first and second instance, insofar as they had resulted in refusal to change permits for commencing and carrying out activity pertaining to low-prize gaming machines. The said court stated that the provisions of the Gambling Act – including Article 135(2) – had had a considerable impact on the properties

and sales of products i.e. the said gaming machines, which after the expiry of permits, could still be used, but only in casinos, and in small numbers (in Poland as a whole – 3640 low-prize gaming machines, i.e. 6.9% of the total number of the said machines actually in use at the end of 2009). The remaining gaming machines would have to be reprogrammed and changed into 'high-prize gaming machines' (i.e. ones without a set amount of the maximum prize) which were sited in casinos, or into skill with prizes machines (SWPs) situated in other establishments than casinos (those machines were not subject to the Gambling Act). Thus, in both cases, there would be a significant change in the properties of a given machine. In those circumstances, the court deemed that the Gambling Act comprised technical regulations, and thus it should have been notified to the European Commission. The said judgment was not legally effective; a cassation appeal was lodged with the Supreme Administrative Court in February 2013, and is being examined under the reference number II GSK 194/13.

The issue was resolved differently – although also in a way that was not yet legally effective – in a number of judgments issued by the Voivodeship Administrative Court in Wrocław; for instance, in a judgment of 31 May 2013 (ref. no. III SA/Wr 121/13), the court dismissed an appeal filed by a limited liability company against refusal to change a decision on the location of gaming machines. The said court in Wrocław stressed that gambling was not subject to harmonisation at the EU level, and thus it was EU Member States that were to independently establish a legal framework in that regard, although they might not infringe the four Treaty freedoms. However, they might impose certain restrictions on the freedoms, provided that such restrictions were indispensable for protecting values expressed in Article 36, Article 52, Article 62 and Article 65 of the Treaty on the Functioning of the European Union (OJ C 83 of 30 March 2010, p. 47) or were justified by superior requirements that were of significance for society as a whole and which were approved by the jurisprudence of the CJEU (such as e.g. public morality, public policy or public security; the protection of health and life of humans). The said court in Wrocław held that, in the light of EU law, barriers to trade might be allowed only where they were necessary and had an objective in the public interest of which they constituted the main guarantee. Even the mere statement that the provision had the character of a technical regulation did not deprive a given Member State of relying on the clause of public policy and public security, public health or public morality – as supreme values that were protected by the Member State, which had the right to safeguard consumers against

undesirable phenomena that could ruin social structures, such as gambling – "an addiction which led to a prodigal lifestyle, the deprivation of the family of its financial means, bankruptcy, suicide, the loss of mental health, and the breakdown of family, professional and social ties, as well as to criminal behaviour".

In the view of the said court in Wrocław, the gradual elimination of low-prize gaming machines in so many locations entailed moving away from an earlier exception to the rule that gaming machines should be placed only in casinos and game arcades. Different criteria should be applied to the realm of gambling than those applied to economic activity aimed at satisfying the standard needs of society (trade, the provision of services). Solutions adopted in the Gambling Act were not discriminatory in character, as they concerned – on the same terms and to the same extent – all subjects which had so far operated in the domestic market, were proportionate in that regard, and were justified by public interest. In those circumstances – in the opinion of the court – they could not constitute technical regulations, in particular that the previous gaming machines might be used legally in locations where they had been used so far until the time of the expiry of current permits and in the future they might be used in casinos, after a relevant permit would be granted, or they might be transformed into skill with prizes machines (SWPs) which were not subject to the Gambling Act. At the same time, the provisions of the Gambling Act did not have a "significant" impact on the properties of those products.

The Constitutional Tribunal states that the issue presented above does not constitute the subject of the question of law, and hence it does not fall within the scope of the Tribunal's analysis or adjudication. By contrast, it underlines that the possible non-conformity of the Gambling Act to EU law, especially non-conformity that arises from negligence within the scope of formal law on the part of certain Polish authorities, does not automatically affect the assessment of the constitutionality of the regulation challenged by the court referring the question.

1.3. The issue presented before the Constitutional Tribunal concerns an impact changes to the binding law have had on the legal situation of entrepreneurs that have been operating for some time under the former legal regulation as well as the new one. The essence of the case is the question whether conditions for carrying out economic activity may be made more specific by the legislator in a way that is less beneficial for entrepreneurs, or whether the constitutional principle of protection of citizens' trust in the

state and its laws as well as the principle of protection of existing interests, where the latter principle is a derivative of the former, guarantee that the legal situation of entrepreneurs will not aggravate.

2. Legal provisions concerning gambling activity and amendments thereto.

2.1. The Constitutional Tribunal states that – due to the specific character of the review commenced by the question of law referred to the Tribunal and the facts of the case underlying that question – only legal provisions that are relevant to the case are subject to analysis, starting with the moment when the entrepreneur was granted an administrative decision that allowed him/her to carry out a certain kind of gambling activity (October 2008), and ending with changes introduced at the beginning of 2010 by the challenged Act. The subject of the analysis comprises only the issue of making low-prize gaming machines available for use, and mainly in the context of determining the location of the machines as well as the change of that location.

2.2. In the case underlying the question of law, an administrative decision – i.e. a permit for carrying out gambling activity – was issued on the basis of the Gaming and Betting Act of 29 July 1992 (Journal of Laws - Dz. U. of 2004 No. 4, item 27, as amended; hereinafter: the previous Act). The category of games played on low-prize gaming machines was added in the said Act in mid-2003, by the Act of 10 April 2003 amending the Act on games of chance, betting activity and gaming machines as well as amending certain other acts (Journal of Laws - Dz. U. No. 84, item 774).

Pursuant to the previous Act, games on low-prize gaming machines were games on mechanical, electromechanical and electronic devices with cash and non-cash prizes where the value of one prize did not exceed EUR 15, and the stake for one game was not more than EUR 0.07 (an equivalent amount was determined on the basis of the exchange rate set by the National Bank of Poland on the last day of the previous calendar year; Article 2(2b) of the previous Act). The machines had to “be adjusted in such a way that the rights of players would be respected and the provisions of the Act would be implemented”, and could be made available for use – by entrepreneurs that had appropriate permits – only after the use thereof had been authorised by a competent minister for public finance (subsequently – after amendments adopted on 31 October 2009, by virtue of Article 197(4)

of the Act of 27 August 2009 on Customs Service, Journal of Laws - Dz. U. No. 168, item 1323, as amended; hereinafter: the Act on Customs Service – by the head of a given customs office; Article 15b(3) and (4) of the previous Act); also, they could not be owned by third parties (Article 28(2) of the previous Act). The terms of making low-prize gaming machines available for use were specified by the regulation of 3 June 2003 issued by the Minister of Finance with regard to the terms of making gaming machines available for use and taking bets (Journal of Laws - Dz. U. No. 102, item 946, as amended). That category of games was only permitted for persons over 18 (Article 17(1a) of the previous Act).

Activity which consists in making low-prize gaming machines available for use could only be carried out by a joint-stock company or limited liability company, which has its registered office in the Republic of Poland (Article 5(1) of the previous Act) and the capital of which could not be less than EUR 200 000 (Article 25(3) of the previous Act), and such games could only be made available in places where low-prize gaming machines were sited (in other words, such gaming machines could not be installed in "gaming centres" i.e. casinos, game arcades, arcades with cash bingo machines, or betting shops), i.e. places where games on such machines were provided on the basis of approved rules, and the number of such gaming machines did not exceed 3 machines (Article 7(1a) and Article 9(3) of the previous Act). Such gaming machines could be sited in eating places (e.g. bars, cafes), shops or service points (e.g. petrol stations) which were situated at least 100m from schools, educational institutions, care centres and centres of religious worship (Article 30 of the previous Act). Moreover, there was a prohibition against advertising such games, understood as encouraging to participate in such games, persuading about the benefits of the games, disseminating information about the location of the gaming machines and the possibilities of playing the games (Article 8(1) of the previous Act).

A company applying for a permit for a gaming machine or for activity involving low-prize gaming machines was to provide a local tax office (after the entry into force of Article 197(2) of the Act on Customs Service – the Director of the Main Customs Office in a given city) with the rules of such a game (as well as a draft of any change to the rules; Article 13(3a) of the previous Act), which specifies detailed terms and conditions of a game, the rights and obligations of players, the name of an entity that makes a relevant gaming machine available for use, rules for filing complaints and the amount of the capital allocated for the payment of prizes (Article 13(4) of the previous Act). Within the meaning of Article 24(1a) of the previous Act, permits for making low-prize gaming machines

available for use and for carrying out activity involving such machines are granted by a competent tax office (within the boundaries of its jurisdiction the said machines were to be made available for use; after the entry into force of Article 197(11)(b) of the Act on Customs Service, the director of the main tax office in a given city where gaming machines were made available became the competent authority in that respect – Article 24(1b) of the previous Act).

The permit mentioned, *inter alia*, the name of the company, the location of the games as well as the type and minimal as well as maximum number of games (Article 35(1) of the previous Act). What follows from the above is that the indication of the locations where low-prize gaming machines are sited (the location of a building or a business establishment) was a necessary element of a permit for carrying out such activity only in those indicated locations (a permit issued in the case underlying the question of law specifies the name, detailed addresses and persons who run the relevant shops, bars, cafes, establishments providing services and petrol stations).

The permit was issued for 6 years with the possibility of extending it by another 6 years (Article 36(1) and (3) of the previous Act) and it mentioned a certain number of locations where low-prize gaming machines were made available for use (Article 37 of the previous Act). Also, what was required was a financial security that would guarantee the protection of the financial interests of players and which would serve to satisfy any other possible claims, including tax liabilities (Article 38 of the previous Act).

Persons carrying out activity involving low-prize gaming machines were subject to a fixed-amount tax on games in the amount of EUR 180 a month for games provided on every gaming machine (Article 40 and Article 45a(1) of the previous Act; the amount in euros was determined on the basis of the purchase exchange rate announced by the National Bank of Poland on the last day of the month preceding the month when the payment of the tax was made – Article 45a(2) of the previous Act). The supervision and control within the scope of activity involving games on low-prize gaming machines, as regards the conformity of that activity to the statutory provisions, its adequacy to the issued permit as well as compliance with the rules of the games were the tasks of the main tax office in a given city that had granted the permit (Article 48a of the previous Act), and – as the second in line – the Customs Service (Article 48 of the previous Act as amended by Article 197(20) of the Act on Customs Service).

2.3. The Gambling Act – by overlooking transitional and adjusting provisions included in chapter 12 – does not mention the term ‘games on low-prize gaming machines’. It only refers to ‘games on gaming machines’ which constitutes games on mechanical, electromechanical and electronic devices, including computers for cash or non-cash prizes, where a given game involves an element of chance (a prize may be used to continue a given game without a necessity to pay for the game, or it is possible to begin a new game by using the prize won in the previous game; Article 2(3) and (4) of the Gambling Act). Gaming machines should be adjusted in such a way that the rights of players would be respected and the statutory provisions would be implemented, and they could not constitute the property of their parties, unless they are the subject of a leasing agreement (Article 23(1) and (2)). The terms of making gaming machines available for use are set out in the regulation of 9 March 2012 issued by the Minister of Finance with regard to the detailed terms of registering and using gaming machines and other gaming devices (Journal of Laws - Dz. U. item 312). Moreover, as of 14 July 2011 there has been a rule that the amount of prize money programmed on every gaming machine may not be lower than 75% of the amount of stakes that have been paid (Article 18(3) of the Gambling Act, added by Article 1(6) of the Act of 26 May 2011 amending the Gambling Act and certain other acts, Journal of Laws - Dz. U. No. 134, item 779).

The Gambling Act also eliminated the category of places where gaming machines were sited (only providing for the existence of casinos – separate places established for the purpose of gambling where, *inter alia*, gaming machines are made available for use in the number of 5 to 70 machines, arcades with cash bingo machines and betting shops; Article 4(1) of the Gambling Act). It clearly stipulates – unlike the previous Act – that gaming machines may only be made available for use in casinos (Article 14(1) of the Gambling Act), which the location of which may be determined depending on the number of residents in a given town or city (with the restriction that the total number of casinos should not exceed the ratio of one casino per 650 000 residents of a voivodeship) as well as passenger sea vessels and ferries flying the Polish flag (Article 15 of the Gambling Act). By contrast, making gaming machines available for use outside casinos is subject to a penalty of PLN 12 000, paid for a single gaming machine (Article 89 of the Gambling Act). Only persons over 18 may enter casinos; also, prohibitions comprise the following: advertising games on gaming machines (the public dissemination of trademarks or graphic symbols and other marking related thereto, as well as the names and graphic symbols of

entities that carry out activity within that scope as well as the dissemination of information about the location of gaming machines and the possibility of playing them) and the promotion thereof (*inter alia*: the public presentation of games on gaming machines, the giving away of gadgets, the handing out of tokens or any efforts to persuade about the benefits of playing the said games or to encourage others to visit casinos; Article 27(1) and Article 29(1), (6) and (7) of the Gambling Act).

Activity which consists in making low-prize gaming machines available for use could only been carried out in the form of a joint stock company or limited liability company, registered in the Republic of Poland (Article 6(4) of the Gambling Act) and its capital could not be less than PLN 4 million (Article 10(1)(1) of the said Act), on the basis of a permit for running a casino issued by a competent minister for public finance (Article 6(1) and Article 32(1) of the Gambling Act). The permit is assigned to one casino (Article 41(1) of the Gambling Act) and indicates, *inter alia*, the name of the company, the location where the machines are made available for use, as well as the type and minimal and maximum number of games (Article 42 of the Gambling Act). It is granted for 6 years (Article 49(1) of the Gambling Act), and the entity that has been granted the permit must submit a financial security in order to protect the financial interests of players as well as to secure liabilities arising from a tax on games (Article 63 of the Gambling Act). Pursuant to Article 8 of the Gambling Act, cases specified therein are governed respectively by: the provisions of the Act of 29 August 1997 – Tax Regulations (Journal of Laws - Dz. U. of 2012 item 749, as amended; hereinafter: the Tax Regulations) – unless the Act does not specify otherwise. Providing gambling opportunities is subject to a tax on games; the rate of the tax in the case of games on gaming machines amounts to 50% (Article 71(2) and Article 74(5) of the Gambling Act).

2.4. In the context of the question of law, special significance is assigned to the transitional provisions of the Gambling Act, which regulate its impact on relations that emerge under the rule of the previous Act, including Article 135(2).

First of all, the legislator modified the term ‘games on low-prize gaming machines’, stating that he construes it as “games on mechanical, electromechanical and electronic devices for cash and non-cash prizes, where the value of a given prize is not higher than PLN 60, and the maximum stake for playing one game may not be higher than PLN 0.5” (Article 129(3) of the Gambling Act). The legislator determined that permits

granted on the basis of the said Act remained valid until their expiry date (Article 117(1) of the Gambling Act); however, proceedings that had been instituted and were pending before the day of the entry into force of the Gambling Act were governed by the provisions of the Act, unless the Act provided otherwise (Article 118 of the Gambling Act). At the same time, taxpayers carrying out activity which involved low-prize gaming machines were required to pay the fixed amount of PLN 2000 a month as a tax on games provided on every gaming machine (Article 139(1) of the Gambling Act).

What is of special significance is Article 129(1) of the Gambling Act within the meaning of activity involving low-prize gaming machines which have been carried out, on the basis of permits granted under the rule of the previous Act, – until the expiry of permits – by entities to whom the permits were granted and in accordance with the previous provisions (again – "provided that the Act does not stipulate otherwise"). Also, the legislator deemed that proceedings that have been instituted and have not been completed in a case concerning the issuance of a permit for carrying out activity involving games on gaming machines (Article 129(2) of the Gambling Act).

In the transitional provisions, the legislator has determined the admissibility of changes in permits for games on gaming machines, granted on the basis of the previous Act, and stated that the said permits may be changed by competent directors of main customs offices, in accordance with rules set out for the change of permits in the Gambling Act (Article 135(1) of the Gambling Act in conjunction with Article 24(1b) of the previous Act). However, the legislator made a proviso in Article 135(2) that the change of a given permit may not result in the change of the location of gaming machines, with the exception of decreasing the number of the places with gaming machines (Article 138(1) of the Gambling Act). Also the permits may be withdrawn if it is deemed that a given gaming machine allows a player to win a prize in the amount that exceeds the one specified in the Act (Article 138(3) of the Gambling Act). Moreover, the legislator has decided that – with regard to low-prize gaming machines made available for use – on the basis of permits granted under the previous Act – there is no fine provided for making the machines available outside casinos (Article 141 of the Gambling Act). However, he indicated that – with the fine for fiscal irregularities – a person running an eating place, a shop or an establishment providing services, should be notified in writing to a competent head of a given customs office as regards the siting of a gaming machine in a given establishment, before the establishment has been opened to customers (Article 142 of the Gambling Act).

3. The analysis of allegations raised in the question of law.

3.1. According to the court referring the question, the entry into force of the Gambling Act resulted in the infringement of Article 2 of the Constitution – the principle of protection of existing interests, as it ruled out the change of the location where low-prize gaming machines were made available for use, which had been permitted earlier, for persons that, on the basis of the previous Act, had begun the implementation of 6-year business projects which consisted in making gaming machines available for use. To put it in simple terms, in the light of the previous Act - in the opinion of the court referring the question –it was possible to change the location of gaming machines i.e. in other words, move gaming machines from one establishment to another (e.g. in the event of shutting down an eating place where they had originally been situated), and such action was ruled out by the legislator by the challenged Article 135(2) of the Gambling Act. What requires an analysis is an issue whether – in the specific circumstances of a given case – the legislator's action infringed the principle of protection of existing interests.

3.2. The principle of protection of citizens' trust in the state and its laws, arising from Article 2 of the Constitution (also referred to as the principle of the state's loyalty towards its citizens), is addressed to state authorities and its content may be summed up as a prohibition that the law-maker should not set up "pitfalls" for citizens, make empty promises or as well as should not suddenly back out of promises that have already been made or rules that have been set. What is derived from that principle is the principle of protection of existing interests such interests are business and financial projects commenced in the context of provisions that were binding earlier, but which were not completed in a situation where those provisions had been amended (see: the judgment of 25 November 1997, ref. no. K 26/97, OTK ZU No. 5-6/1997, item 64). The point is that the legal situation of persons that are the addressees of that regulation is subject to transitional provisions that allow them to complete projects commenced in the light of the previous regulations with the justified conviction that regulations are and will be stable (see the judgment of 28 January 2003, ref. no. SK 37/01, OTK ZU No.1/A/2003, item 3).

What requires emphasis is the fact that the principle of protection of existing interests may not be perceived as a guarantee of the constancy of law, and in particular the

"eternal" enjoyment of certain rights and privileges. The addressees of law must take account of the fact that the law is subject to change that may be justified or even forced by a change in social and economic conditions. The legislator can restrict or revoke them, and rights the enjoyment of which is not limited in time may be subject to modifications (see the judgment of 16 September 2003, ref. no. K 55/02, OTK ZU No. 7/A/2003, item 75).

The Constitutional Tribunal states that the principle of protection of acquired rights and the principle of protection of existing interests, which arise from the principle of protection of citizens' trust in the state and its laws, make it possible for individuals to decide what actions to take on the basis of complete knowledge of grounds for the activity of the organs of the state as well as the legal consequences of certain actions. Subjective rights and maximally formed legitimate expectations in the light of the previous regulation may not – within the meaning of the principle – be arbitrarily eliminated or restricted, although this is admissible, as what weighs in favour of that is another constitutional value.

The principle of protection of existing interests safeguards projects – e.g. economic and financial ones – that were commenced under the rule of previous provisions and those that are on-going at the time of a change in provisions. The principle guarantees that the individual will be protected in a situation where the provisions of law delineate a certain time-limit for carrying out particular projects that span over a period of time and that actually were commenced at the time when the provisions were binding. The legislator should establish that transitional provisions make it possible to complete the projects that have been commenced in compliance with provisions that are binding at the moment of the commencement of a project or create another possibility of making adjustment to amended legal regulation (see the judgment of 5 January 1999, ref. no. K 27/98, OTK ZU No. 1/1999, item 1). The essence of the change in question is that – within the set time-limit – the "rules of the game" have not been changed (see the judgment of 20 January 2010, ref. no. Kp 6/09, OTK ZU No. 1/A/2010, item 3).

3.3. What is of key significance to the determination of the issue presented to the Constitutional Tribunal is to provide an answer to the question as to whether – under the rule of the previous Act – the rights of the legislator to relocate low-prize gaming machines to another place in accordance with the procedure for changing permits. The case would be obvious if such a right on the part of a person that has been granted a permit for making gaming machines available for use for a certain period (6 years) resulted from substantive

law, e.g. from the previous Act, then it should, in principle, be respected. However, the situation is more complicated. Indeed, the previous Act did not comprise a provision that explicitly referred to the change of the location of gaming machines; for several years, the said issue was the subject of major doubts in court jurisprudence.

As it has already been indicated in part III point 2.2 of this statement of reasons, an administrative decision issued upon a request by a given entrepreneur indicated the location of low-prize gaming machines (specified the names and addresses of premises where such machines were sited). Thus, the change of the location of such gaming machines, after the decision has become legally effective, would require a change on the basis of Article 155 of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2013 item 267; hereinafter: the Code of Administrative Procedure): "A final decision by which a party has acquired rights can at any time with the consent of the party be revoked or amended by a public administration authority which issued it, if special provisions do not forbid such revocation or amendment and if this is in the public interest or the legitimate interests of the party". However, the admissibility of changing a given permit for carrying out gambling activity was the subject of controversy.

There were two contradictory stances. In accordance with the first one, a change of a permit for making gaming machines available for use in the part concerning the location of the machines in accordance with Article 155 of the Code of Administrative Procedure was inadmissible. In the statement of reasons for its judgment of 28 February 2007 (ref. no. II GSK 267/06), the Supreme Administrative Court stated *inter alia* that since one permit was granted to provide a certain number of places with low-prize gaming machines then: "it follows from the content of the permit (…) that the essential element thereof is the (precise) indication of places where low-prize gaming machines are made available for use". At the same time, in the opinion of the Supreme Administrative Court, although it follows from the permit that there is a right to carry out activity involving low-prize gaming machines, it is "restricted (…) to specific locations (places) where the said activity will be carried out. Such indication constitutes (…) an essential element of the decision, for it delineates the scope of the decision". The Supreme Administrative Court rejected the view that the permit makes it possible to carry out the said activity in a certain territory, and specifically the indication of locations where it is carried out constitutes only a requirement of that activity and may be amended in accordance with Article 155 of the Code of Administrative Procedure. Furthermore, it also

emphasised that "a permit for carrying out activity that involves making low-prize gaming machines available only on those premises for which a given permit has been issued. The indicated location of the machines delineates the framework of the permit". Also, the Supreme Administrative Court analysed whether there was a special provision that ruled out the revocation or change of a final decision and concluded that "provisions that prohibited changing final administrative decisions (…) would be (…) provisions that specified the essence of matters under regulation". In the opinion of the Supreme Administrative Court: "Since (…) a given permit is issued for making low-prize gaming machines available for use on particular premises, then it is impossible, in accordance with the procedure set out in Article 155 of the Code of Administrative Procedure, to grant a permit for carrying out such activity on other premises", and such 'extension' would in fact constitute the subject of a new administrative case, whereas – pursuant to Article 155 of the Code of Administrative Procedure - a given decision may be modified only within the scope of the facts of the 'original' case". A similar stance was presented by the Supreme Administrative Court in the statement of reasons for its judgments of 26 February 2008 (ref. no. II GSK 383/07), where it held that: "the right to select premises where gaming machines (…) will be made available for use is limited to a range of enumerated locations. Thus, this constitutes an essential substantive and legal element of the decision, delineating its scope". Consequently, a change of that element in accordance with Article 155 of the Code of Administrative Code is not possible, for: "The addition of new locations on the basis of Article 155 of the Code of Administrative Procedure is tantamount to extending the scope of the decision", i.e. that would be "the subject of a new administrative case", whereas a change to the said decision in accordance with the procedure set out in Article 155 of the Code of Administrative Code may be made only within the scope of the facts of the original case. The Supreme Administrative Court rejected the view that in such situations one dealt with the same administrative case, and that "the change of the location was only technical in character", since "provisions prohibiting any changes to administrative decisions in accordance with the said procedure were provisions that specified the essence of activity under regulation and they undoubtedly included the location where gaming or betting machines were made available for use".

By contrast, according to the other view, a decision that included a permit for setting up and making low-prize gaming machines available for use could – in principle – be changed as regards the location where the said machines are sited, pursuant to

Article 155 of the Code of Administrative Procedure. In the statement of reasons for the judgment of 3 July 2008 (ref. no. II GSK 233/08), the Supreme Administrative Court stated that the said provision exhaustively determined grounds for changing a given administrative decision, and "what followed from its essence was that the said change might not go beyond the limits of a given administrative decision resolved by the decision which was subject to change". The Court indicated that although the specific location of low-prize gaming machines constituted an essential element of a permit, then it did not follow from the permit that it might not be subject to change in accordance with the procedure set out in Article 155 of the Code of Administrative Procedure. The Court stated that: "an essential ground for issuing a permit is the fact that a given entrepreneur has specific premises for the location of gaming machines, and not the specific address of the premises (…). Specifying (…) the location(s) where gaming machines are made available for use or the number of those places falls within the scope of rights and obligations", but "it does not determine the essence of a given permit", as authorities grant the permit due to the fact that a given applicant holds certain premises that meet certain requirements, and not because the said premises are at a particular address. In this context, in the view of the Supreme Administrative Court, "a change of the location of gaming machines or a change of the number of those machines, specified in a given permit, constitutes a change in rights and obligations that arise from the permit, and may fall within the scope of the same permit (…) as it does not exclude old elements or include new elements – rights or obligations that make up a permit".

Given the existence and escalation of presented discrepancies in stances presented by the Supreme Administrative Court, which are also visible in the extensive jurisprudence of voivodeship administrative courts, the President of the Supreme Administrative Court – on the basis of Article 36(1) and (2) of the Act of 25 July 2002 – the Law on the Organisational Structure of Administrative Courts (Journal of Laws - Dz. U. No. 153, item 1269, as amended) – proposed that an explanatory resolution should be adopted. The said resolution was adopted by the bench of 7 Justices of the Supreme Administrative Court on 3 November 2009 in the case II GPS 2/09 (ONSA and WSA No. 1/2010, item 4; hereinafter: the resolution of the Supreme Administrative Court). The Court explained that, on the basis of Article 155 of the Code of Administrative Procedure, it was permissible to change a decision granting a permit to set up low-prize gaming machines and make them available for use as regards the location of those machines, as referred to in Article 9(3) of

the previous Act. In the statement of reasons, the Court stated that Article 155 of the Code of Administrative Procedure regulated one of extraordinary procedures in administrative proceedings which comprised the instances of changing legally effective decisions, which constituted an exception to the rule that they were long-lasting. Proceedings conducted on the basis of that provision may not lead to the substantive re-examination of a case in which final determination was issued, but are carried out "in the same administrative case, from the point of view of substantive law, in which the original proceedings were conducted". The Supreme Administrative Court indicated that: "as long as we deal with the same rights and obligations of the same subjects which are delineated by a binding decision, the same legal regulations or regulations that preserve the continuity of law, and facts which remain the same in respect of their legal significance, then a case may be regarded as identical from the point of view of substantive law".

In the opinion of the Supreme Administrative Court, the mere fact of granting a permit "is not related to the fact that a given applicant has premises that are situated at a given address", but to the fact that "s/he has premises that meet certain statutory requirements". Therefore, "when premises situated in a specific location will be replaced by other premises which meet statutory requirements and do not exceed the number of low-prize gaming machines prescribed in a permit, rights that have been granted will not be modified". In those circumstances, the change of the location of gaming machines does not affect the content of an administrative relation shaped by the original decision, and thus it does not determine that a given case remains identical. The Supreme Administrative Court pointed out that "the change of actual circumstances may take place for various reasons, which are often beyond the control of a subject to whom the permit has been granted, such as e.g. damage to premises where low-prize gaming machines were sited. The Supreme Administrative Court stressed that a decision issued on the basis of Article 155 of the Code of Administrative Procedure may not clash with the binding legal order, and thus must correspond to all the requirements specified in the provisions of substantive law. The Court indicated that the requirements of the public interest or a party's legitimate interest referred to in Article 155 of the Code of Administrative Procedure: "must be determined and assessed in a given case. It is hard to generalise what considerations weigh in favour a change of a final decision due to the legitimate interest of the party", and "the examination of that ground will be carried out in the light of Article 7 of the Code of Administrative Code". In the view of the Supreme Administrative Court, the legislator did not, in the

previous Act, explicitly exclude the possibility of applying Article 155 of the Code of Administrative Procedure – i.e. the principle of *lex specialis derogat legi generali* is not applicable. Furthermore, there are no grounds that would allow one to deem that the regulations of that Act constitute an exception to Article 155 of the Code of Administrative Procedure. Since the legislator has not clearly excluded the application of Article 155 of the Code of Administrative Procedure in the light of the previous Act, then such a possibility exists.

3.4. In the light of the above-mentioned findings, it should be stated that it did not follow from the previous Act that a given entrepreneur had the right to change the location of low-prize gaming machines to demand a change specified in the permit. However, there was no prohibition against a change within that scope. In the context of such substantive law, the admissibility of an appropriate change of a permit for carrying out gambling activity became the source of controversy. In the jurisprudence of administrative courts, it is more often negated than approved, but ultimately the Supreme Administrative Court, in its resolution by the bench of 7 Justices, determined the interpretation of Article 155 of the Code of Administrative Procedure, as a norm of procedural law and a norm which did not have the character of universally binding law.

The Constitutional Tribunal states that entrepreneurs that carry out activity involving gaming machines – when filing applications in compliance with terms set out in the previous Act and obtaining permits before the day the said resolution was adopted by the Supreme Administrative Court – could not presume that final decisions issued in their cases could be changed on the basis of Article 155 of the Code of Administrative Procedure. The fact that entrepreneurs assumed such a business strategy – by investing in the creation of a maximum number of locations with low-prize gaming machines, without verifying the long-term consequences of such activity in particular locations (instead of being granted permits for making gaming machines available for use only in those locations in the case of which it was certain or at least highly probable that they will operate throughout the period provided for in the permit) –was a question of their free choice the correctness of which they could not be sure of. It did not follow from the norm expressed in Article 155 of the Code of Administrative Procedure that they had a substantive right. Thus, the said entrepreneurs could not be certain as to determination, by competent administrative authorities and the competent organs of administrative courts, in

their individual cases. At the same time, it should be noted that "a legitimate interest of a given party" as well as a "public interest" established in Article 155 of the Code of Administrative Procedure as a ground for changing a legally effective decision in the case of changing a permit for carrying out activity involving low-prize gaming machines will in principle clash, which clearly stems from reasons for enacting the Gambling Act, which enhanced restrictions on gambling.

Consequently, the Constitutional Tribunal deems that the legislator has not infringed the principle of protection of existing interests. On the contrary, out of respect for that principle, although he ultimately prohibited the activity involving gaming machines outside casinos, he still authorised that activity – on the basis of the transitional provisions – as long as it is carried out on the basis of a permit issued under the rule of the previous Act, until it expires and in locations specified therein. Therefore, neither the legislator nor the organs applying the law will restrict the rights of entrepreneurs that carry out gambling activity, which results from a permit for carrying out that activity. The situation is different: some of those entrepreneurs apply for the change of permits they have been granted – i.e. for the modification of established substantive-law relations, so that they could be granted a possibility of carrying out activity in other locations, although such actions are not permitted by the Gambling Act. However, this is not tantamount to an infringement of acquired rights or the principle of protection of existing interests.

The Constitutional Tribunal deems that the clear exclusion of an exceptional possibility of modifying an administrative decision as regards the change of the location of gaming machines, which has been derived from procedural provisions, does not infringe the rights of persons that carry out activity which consists in making gaming machines available for use; the said rights have not been infringed in the context of the subject of the activity or the period of its duration, or the continuation thereof in certain locations indicated in permits. Therefore, the regulation challenged by the court referring the question does not lead to the restriction of acquired rights and does not infringe the principle of protection of existing interests, and thus it does not infringe Article 2 of the Constitution.

For these reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.