Pl. ÚS 28/16 of 14 February 2017

Blocking of Illegal Gambling on the Internet

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

The Constitutional Court has concluded that the contested provisions are not contrary to the constitutional order - neither Sections 82 and 84 of the Gambling Act, containing the legislation of blocking illegal Internet games of chance, nor the following provisions of Section 123 (5) of the same act defining the administrative offence committed by the Internet service provider by failing to make the necessary measures to prevent access to the Internet sites on which the games of chance are operated.

The Constitutional Court does not see as contrary to the constitutional order the fact that the power to decide on the inclusion of a specific Internet site in the list of illegal games of chance is conferred to the administrative authorities; this is done in the administrative proceedings - the final decision is subject to a standard review in the administrative court proceedings. The form of proper and two-stage administrative proceedings, with the subsequent judicial review, is constitutional in terms of both the procedural rights of the concerned entities and the ensuring of proper interpretation and application of the act. A similar procedural step - administrative proceedings with judicial review - applies in relation to the game of chance operator or a domain holder and inclusion of an Internet site in the list ("normal" administrative proceedings), and subsequently against the Internet service provider and its responsibility for any breach of duty while preventing access to the sites on the list (administrative offence procedure which is characterised by partially different procedural standards). The judicial review is an adequate safeguard of the legality of the practice of administrative authorities in the implementation of the act.

The contested legislation does not show such degree of ambiguity or uncertainty that it would not fulfil the basic requirements of legal certainty and predictability as required by the case-law of the Constitutional Court. The task of the Constitutional Court is not to substitute the work of the competent public authorities and interpret authoritatively the legal terms of the Internet service provider and the Internet site or even to anticipate partial aspects of application, such as at what level of a domain name the Internet site should be blocked or how the list of illegal games should work, what cooperation can be required from the Internet service providers or what method of blocking should be chosen by them.

JUDGMENT

The Constitutional Court has decided through the plenum composed of its President of the Constitutional Court Pavel Rychetský and its judges Jaroslav Fenyk, Josef Fiala, Jan Filip, Jaromír Jirsa as judge-rapporteur, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková, and David Uhlíř on the petition of 21 senators of the Senate of the Parliament of the Czech Republic, represented by

Mgr. Ing. Martin Lukáš, lawyer based at Prague 1, Na Florenci 2116/15, seeking the annulment of the provisions of Sections 82, 84, and 123 (5) of Act No. 186/2016 Coll., on games of chance, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic, the Senate of the Parliament of the Czech Republic (parties to the proceedings), and the Government of the Czech Republic, as an intervener, as follows:

The petition seeking the annulment of provisions of Sections 82, 84, and 123 (5) of Act No. 186/2016 Coll., on games of chance, is dismissed.

REASONING

I.

Petition seeking the annulment of provisions of the Gambling Act

1. Through the petition of 31 August 2016, 21 senators of the Senate of the Parliament of the Czech Republic sought, pursuant to Section 64 (1) (b) of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter referred to as the "Act on the Constitutional Court"), within the meaning of Article 87 (1) (a) of the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll., as amended by constitutional provisions, hereinafter referred to as the "Constitution"), the annulment of the provisions of Sections 82, 84, and 123 (5) of Act No. 186/2016 Coll., on games of chance (hereinafter referred to as the "Gambling Act"), by the Constitutional Court.

2. The provisions of Sections 82 and 84 regulate (simply put) the "blocking" of illegal Internet games: The Internet service providers in the Czech Republic are obliged according to the provisions above to prevent access to the Internet sites on the list of illegal Internet games (the so-called blacklist) kept by the Ministry of Finance (hereinafter also referred to as the "Ministry") that decides on the inclusion in the list *ex officio* and performs deletions from that list. The Internet sites on which the games of chance are operated, for which no permit has been granted or which have not been properly reported are included in the list. In the administrative proceedings concerning the inclusion in the list, the party to the proceedings (a game of chance operator or a domain holder) is delivered documents by a public notice, and if its address of residence or registered office is known also to such address. The Internet service providers are obliged to block access within 15 days of the publication in the list, which is available on the Ministry's Internet sites. Section 123 (5) defines an administrative offence consisting in the fact that the Internet service provider fails to make within the statutory period the necessary measures to prevent access to the sites on the list and is punishable by a fine of up to CZK 1 million.

3. The petitioner considers the legislation as inconsistent with the constitutional order; in view of the petitioner, it is vague and interferes with the legal certainty of addressees, the freedom of speech, and the right to information under Article 17, as well as the right to conduct business as enshrined in Article 26 of the Charter of Fundamental Rights and Freedoms (promulgated under No. 2/1993 Coll., as amended by constitutional provisions, hereinafter referred to as the "Charter"), and is contrary to the requirements of international treaties by which the Czech Republic is bound and the European Union law. To support its claims, the petitioner attaches an expert opinion dated 29 August 2016, No. 1483/2016, prepared by Ing. Jan Fanta, a forensic expert also in the fields of electronics, cybernetics, and computer technology.

4. According to the petitioner, the Gambling Act is vague as it does not clearly define the entities that are obliged - it does not precisely define the term of the "Internet service provider"; in particular, it is not clear whether it applies only to businesses or to other persons who makes the Internet available to end-users, e.g. restaurants, universities, municipalities or natural persons enabling connection via the so-called hotspot. On the contrary, it does not apply (although it should) to the provision of Internet services from abroad, e.g. via satellite or through the internal networks of multinational corporations. The legislation is also unclear as regards the term of "Internet site" - in practice, the website is used, which, however, has a shifted meaning. It is not implied clearly by the Gambling Act whether the domain address as a whole or just the domain name of second or lower order should be blocked or how the list is to be made available, to what extent the cooperation of Internet service provider will be required, and whether it will also apply to the sites carrying advertisements for illegal games of chance.

5. In addition to the indefinite terminology, the petitioner refers to the uncertainties of procedural regime - according to the petitioner, the blocking should only occur based on a court order, or a decision of competent authority, e.g. the Czech Telecommunication Office. The Gambling Act inadequately regulates the proceedings for the removal from the list of illegal Internet games and the obligation of Internet service providers to make the site (again) available. The implementation of standards will incur substantial costs, which can result in the liquidation of an establishment; in addition to the games of chance, also the legal content posted on the Internet site will have to be blocked in a number of cases. Further, people with advanced digital literacy will be able to find ways to bypass the blockage, and the act should further define the responsibilities requirements and liberation reasons.

6. The petitioner perceives the institution of blocking of illegal games of chance operated on the Internet as constitutionally inadmissible censorship carried out without adequate legal boundaries - arbitrarily by an executive power authority. The Gambling Act interferes with the constitutional and international obligations of the guaranteed freedom of speech and right to information, while the legislation cannot be subject to limits under Article 17 (4) of the Charter because it is not a legitimate measure necessary in a democratic society. The legislation is not capable of achieving the declared objectives part of which should be the guarantee of fundamental rights and freedoms.

II.

Comments by interveners, petitioner's reply

7. The Chamber of Deputies of the Parliament of the Czech Republic focuses in its comments on the description of the legislative process. The Gambling Bill was discussed by the Chamber as Document of the Chamber of Deputies No. 578; it was put forward by the Government of the Czech Republic and was passed on 13 April 2016, while out of 175 deputies present, 149 deputies voted for and 2 voted against. The contested provisions were not altered in any way compared to the government bill. The discussion in the Chamber of Deputies dealt with the variants under consideration by the Government, in particular, whether the decision on the inclusion in the list of illegal Internet games should be entrusted to the Ministry with a review by the administrative courts or whether this should be decided by a court exclusively. There were doubts raised in the Chamber of Deputies about the concept of blocking - both from the ideological (the issue of censorship) and technical (legislation efficiency) perspective. The legislative process also included the professional community - the representatives of bookmakers support the possibility of blocking as they consider preventing illegal operators

from accessing the market a key issue. The Association for Internet Development railed particularly against the blocking being decided by the Ministry of Finance which, by contrast, emphasised the high costs and an increase in the agenda of the courts if the decision was directly entrusted to them, while such solution would be at the expense of fast and efficient blocking of illegal games.

8. The Senate of the Parliament of the Czech Republic made its comment on 12 October 2016. As to the legislative process, it mentions that the Senate was assigned the Gambling Bill by the Chamber of Deputies on 2 May 2016, while the bill was kept under document number 256, for the 10th electoral term of 2014 to 2016. The Organising Committee ordered the bill to be discussed by the Committee on National Economy, Agriculture and Transport as the guarantee committee and by another three committees. Neither the Guarantee Committee nor the Committee on Regional Development, Public Administration and the Environment adopted any resolution on the bill; the Committee on Legal and Constitutional Affairs and the Committee on Education, Science, Culture, Human Rights and Petitions recommended that the Senate approve the bill in the version passed in the Chamber of Deputies. Subsequently, the Senate passed the bill in the version passed in the Chamber of Deputies at the 24th meeting held on 26 May 2016 through its Resolution No. 452. In voting No. 48, out of 65 senators present, 42 senators voted for and none voted against.

9. Through its resolution dated 17 October 2016, No. 1013, the Czech Government approved its entry into the proceedings in accordance with Section 69 (2) of the Act on the Constitutional Court. In its comment made on 31 October 2016, as an intervener, it proposes that the petition be dismissed; it denies the vagueness of the concept of Internet service provider because in practice it is normally used and an abstract approach is necessary given the dynamics of the development of information technology. The Government sees the Internet service providers as a subset of providers of information society services within the meaning of Section 2 (a) and (d) of Act No. 480/2004 Coll., on certain information society services, as amended (hereinafter referred to as the "Information Society Services Act"), and also points out to their responsibility for the content of information under Sections 3 to 6 of the same Act.

10. The contested legislation must be interpreted restrictively according to the Government: The responsibility for the administrative offence relates solely to legal and natural persons - entrepreneurs within the meaning of Section 2 (1) (b) of Act No. 634/1992 Coll., on consumer protection, as amended (hereinafter referred to as the "Consumer Protection Act"), who offer the Internet service as part of their line of business. Further, it only relates to the original provider; on the contrary, the responsibility is not given for the person who is the recipient (customer) of the service even if it is subsequently provided to other users. Within the meaning of Section 9 (3) of the Information Society Services Act, the legislation applies to the operators from other Member States of the Union which provide the Internet service in the Czech Republic.

11. The Government further stated that the term of Internet site is generally used as a synonym for a website, even in other legal regulations, e.g. in Section 7 of the Business Corporations Act, Section 1830 of the Civil Code or Section 195 (4) of Act No. 280/2009 Coll., the Tax Code, as amended (hereinafter referred to as the "Tax Code"). It must always be based on a specific Internet site address, as included in the list; the blocking shall always be performed at the domain level to the extent affecting the least possible amount of additional (legal) content and shall only apply to the sites offering access to illegal games of chance, not those only advertising them. The inclusion in the list - as well as the deletion of it from the list - shall be

decided in the administrative proceedings and in the form of an administrative decision against which an appeal may be lodged. The obligation to block is then not established on the date of legal force of decision but only as late as the publication of the addresses in the list, while for each Internet site the data with the exact time of publication from which it is possible to calculate the statutory period for blocking is kept.

12. The Government emphasises that the form of administrative proceedings with the possibility of judicial review was chosen after careful consideration and in accordance with Union law and international law. Due to the unavailability of operators established abroad, the blocking may only be performed the most effectively by the Internet service providers have the tools for the automated tracking of changes in the list, with which the specialists in the field are familiar. As to the nature of strict liability, it refers to the liberation reasons provided for in Section 128 of the Gambling Act. It is upon the provider's discretion to choose the specific way of blocking, in relation to the efficiency and expended costs; the act has no ambition to interfere with that choice.

13. According to the Government, the contested institution does not meet the defining characteristics of censorship and does not interfere with the freedom of speech and the right to information; if it implies certain limitations, it does so in accordance with Article 17 (4) of the Charter. The illegal games of chance are a dangerous social phenomenon adversely affecting the lives of individuals concerned and the public health and endanger the order and safety. The legislation is also adequate in relation to the limitation of the right to conduct business, meets the requirements of Article 26 (2) of the Charter, and complies with the free movement of services within the meaning of Article 52 (1) in connection with Article 62 of the Treaty on the Functioning of the European Union.

14. The Government's additional comment received on 9 December 2016 performs the comparison with the methods applied abroad as they became apparent in the communication of the Ministry of Finance with the competent authorities of other Member States of the European Union or the European Economic Area. As for the countries that provided the relevant information, the legislation allowing the blocking of Internet sites with illegal gambling has been adopted by Belgium, Bulgaria, Denmark, Estonia, Cyprus, Latvia, Lithuania, Hungary, Portugal, Slovenia and Spain; the adoption of the legislation in the Slovak Republic and Poland is in the legislative process. Similar instruments are also used in France, Italy, Romania, and Greece. The Government further states that the powers of the administrative authorities to decide on blocking are enshrined in the legal systems of Belgium, Estonia, Cyprus, Latvia, Lithuania, Hungary, Portugal, and Spain; the amendments proposed in Poland and the Slovak Republic will implement this concept. On the contrary, the court deciding based on the petition of the administrative authority is solely entrusted by the act with such decision-making in Slovenia; other countries combine both methods, e.g. Denmark or Bulgaria. Only the legislation proposed in Poland contains specific rules as to how the Internet service providers are to carry out the blocking.

15. Pursuant to Section 69 (3) of the Act on the Constitutional Court, the Public Defender of Rights said that it did not use its right to intervene in the proceedings as an intervener.

16. In its reply filed on 14 November 2016, the petitioner insists on its petition and additionally argues against an interference with the protection of property rights under Article 11 (1) of the Charter. Beyond the claims in the petition, the petitioner sees a deficit of the administrative proceedings consisting in the service of documents by a public notice. It emphasises that the

obligations are imposed upon the Internet service providers, although a wrongful act is actually committed by the operators of illegal games of chance.

III.

Text of the contested provisions

17. The provisions of Sections 82, 84, and 123 (5) of the Gambling Act read as follows:

Section 82
Blocking illegal Internet games

(1) The Internet service providers in the Czech Republic are obliged to restrict access to the Internet sites on the list of Internet sites providing illegal Internet games (hereinafter referred to as the "List of Illegal Internet Games").

(2) The List of Illegal Internet Games is to include any Internet site on which an Internet game is operated contrary to Section 7 (2) (b).

(3) The obligation under paragraph 1 shall be complied with by the Internet service providers within 15 days of the date of publication of the Internet site in the list of illegal Internet games.

Section 84
List of illegal Internet games

(1) The List of Illegal Internet Games is kept by the Ministry deciding on an inclusion in the list *ex officio*.

(2) The list of illegal Internet games contains:
(a) The address of the Internet site on which any Internet game is operated contrary to Section 7 (2) (b);
(b) A unique payment account identifier which is used to operate an Internet game contrary to Section 7 (2) (b); and
(c) The date of entry and deletion of information referred to in subparagraphs (a) and (b).

(3) The Ministry shall immediately delete the Internet sites or payment account from the List of Illegal Internet Games if the reasons for their inclusion in this list cease to exist.

(4) The Ministry shall publish on its Internet site the data from the List of Illegal Internet Games pursuant to paragraph 2 (a) and (b).

(5) In the proceedings under paragraph 1, the party to the proceedings shall be delivered the document by a public notice, with a copy also to the party to the proceedings with the known address of residence or registered office.

Section 123

(5) The Internet service provider in the Czech Republic has committed an administrative offence if it fails to take measures within the prescribed period to prevent access to the Internet sites according to Section 82.

18. Sections 82 and 84 are included in Chapter II, Part Four of the Gambling Act governing the remote access via the Internet. Any Internet game "for which the permit has not been granted or which has not been duly notified under this Act" shall be included in the list of illegal Internet games (the blacklist) in accordance with Section 7 (2) (b) of the Gambling Act. Section 123 is included in Chapter II, Part Eight of the Gambling Act, entitled Supervision and Administrative Offences. "A fine of up to CZK 1 million" is imposed for a breach of the Act in accordance with paragraph 11 of the same provision.

IV.

Locus standi and the conditions of proceedings

19. According to Section 64 (1) (b) of the Act on the Constitutional Court, the petition seeking the annulment of any act or its individual provisions may only be filed by at least 17 senators. *Locus standi* is thus given because the petition has been filed by 21 senators; in accordance with Section 64 (5), the list of signatures on which each senator individually confirmed acceding the petition is attached to the list of signatures.

20. The petition contains all the elements required by law, it is not inadmissible under Section 66 of the Act on the Constitutional Court, and there are no reasons given for suspending the proceedings under Section 67 of the same act. The Constitutional Court decided on the petition without ordering a hearing because it did not carry out the production of evidence and, in accordance with the first sentence of Section 44 of the Act on the Constitutional Court, the further clarification of the matter could not be expected from the hearing.

V.

Legislative process of passing the contested provisions

21. In accordance with Section 68 (2) of the Act on the Constitutional Court, the Constitutional Court examined whether the contested provisions of Sections 82, 84, and 123 (5) (the Gambling Act as a whole) were adopted and issued within the limits of the constitutionally provided competence and in a prescribed manner. The Constitutional Court has concluded that in this respect no objections can be raised; in addition, the petitioner, other parties to the proceedings or an intervener do no mention any deficiencies.

22. For the sake of briefness, the Constitutional Court refers to the legislative process as described in the comments by the Chamber of Deputies and the Senate of the Parliament of the Czech Republic and adds the following: The Government's Gambling Bill was sent to the deputies on 28 August 2015 as Document of the Chamber of Deputies No. 578 (7th electoral term starting from 2013). The first reading took place on 30 September 2015, the bill was then assigned to the Budget Committee as the guarantee committee which discussed it on 13 January 2016 and 18 February 2016 and issued resolutions delivered to the deputies as documents No. 578/1 and 578/3; further, it was discussed by the Committee on Public Administration and Regional Development which issued on 5 February 2016 its resolution on the bill, delivered to the deputies as document No. 578/2. The second reading took place on 1 March 2016 and proposed amendments were prepared as document No. 578/4. The third reading took place on 13 April 2016 at the 44th meeting and the bill was passed by the Chamber of Deputies by its resolution No. 1155.

23. Upon approval by both Chambers of the Parliament, the Gambling Act was delivered to the President of the Republic on 1 June 2016 and signed by him on 7 June 2016. Subsequently, on 10 June 2016, it was delivered for signature to the Prime Minister, and on 15 June 2016, it was promulgated in the Collection of Laws - in Chapter No. 71/2016 on page 2962 under No. 186/2016 Coll. The provisions of Sections 86 to 89, Sections 91 and 92, Sections 97 to 100, and Sections 109 to 112 came into force on the date of its promulgation; the remaining provisions - including those now contested - came into effect on 1 January 2017.

VI.

Review of the petition on the merits

24. The Constitutional Court has concluded that the petition is not justified.

25. The objective of the contested regulation may be described as follows: Unlike standard (brick-and-mortar) establishments, the games of chance operated on the Internet (generally) are much less controllable and more dangerous, also due to the fact that one can connect to the Internet game, in the absence of effective regulation, virtually from anywhere, children or pathological gamblers may participate in them easily, and playing games is faster and involves a greater amount of money. The illegal games of chance on the Internet often avoid any taxation, both in the destination country where they are offered and in the country where they are operated. By not being subject to the regulation or taxation, they offer better odds (winnings), are attractive for players who are not limited in terms of age, betting limits, etc. - this should be prevented by the contested provisions.

26. The states, therefore, choose probably the only effective (although not perfect) solution, namely blocking access to the Internet sites where the illegal games of chance are offered. The games of chance are usually operated from a remote foreign country, the responsible persons are virtually unreachable (and non-punishable) and individual countries, therefore, often impose the obligation to block access to the harmful websites upon the Internet service providers whose task is to block its customers access to illegal gambling on the Internet effectively, while making reasonable efforts and expending reasonable costs.

27. The Constitutional Court approves those objectives of the legislation which are the protection of the interests of the state and the prevention of tax evasion and money laundering. The objectives of the legislation were defined in the explanatory memorandum for the Gambling Bill (Document of the Chamber of Deputies No. 578/0, 7th electoral term starting from 2013, Special Part, K Section 82, available at www.psp.cz, hereinafter referred to as the "Explanatory Memorandum"). It states that "currently, 8 companies that have a permit from the Ministry of Finance operate games of chance on the Internet". The proposed legislation will allow legal access to the market also for other companies from other EU Member States. This could, at first glance, increase competition for the existing operators. Given that foreign companies already run their business in the Czech market, albeit illegally, the impact on existing companies should be rather positive since the market conditions, particularly in the area of paying taxes, will be levelled." The Explanatory Memorandum refers to the views of experts who have quantified an annual tax loss due to illegal business of foreign operators of Internet games of chance at CZK 600 million (according to the Supreme Audit Office) or CZK 716 million (analysis of KPMG Czech Republic, s.r.o., cf. General Part, Sections 3.3 and 3.6 of the Explanatory Memorandum).

VI./a

Constitutionality of blocking Internet games

28. The Constitutional Court has concluded that the contested provisions are not contrary to the constitutional order - neither Sections 82 and 84 of the Gambling Act, containing the legislation of blocking illegal Internet games of chance, nor the following provisions of Section 123 (5) of the same act defining the administrative offence committed by the Internet service provider by failing to make the necessary measures to prevent access to the Internet sites on which the games of chance are operated.

29. The task of the Constitutional Court is solely the review of constitutionality and, in this respect, the institution of blocking illegal games of chance offered on the Internet is constitutional. The mentioned institution cannot be compared to the limits of restrictions on the freedom of speech and the right to information under Article 17 (4), the right to conduct business within the meaning of Article 26 (2), and the protection of property right within the meaning of Article 11 (3) of the Charter. The property right is an obligation, it must not be used in violation of law, and its enforcement must not endanger human health, which is happening in the case of operation of illegal Internet games of chance, if they are freely accessible to children or persons registered in the register of natural persons excluded from participation in the games of chance pursuant to Section 16 of the Gambling Act. The operators of illegal games of chance may not, even conceptually, enjoy the protection by the constitutionally protected values, because their activity is an illegal one that endangers a number of important interests of society; moreover, it is often connected with serious criminal activities. The purpose of the contested act is to protect the public interests; it cannot be compared to the Internet censorship as (systematic) controlling or limiting the disclosure of information - this is a technical measure aimed at preventing illegal activities, which must be applied so as to avoid interference with the lawful Internet content. The blocking is mainly carried out in accordance with the budgetary interests ("in the interests of fiscal policy") and justified by the fight against money laundering (i.e. a predicative offence).

30. The above-mentioned does not alter the obligation to ensure the constitutionally conforming interpretation and application of the act in the administrative proceedings concerning the inclusion of a specific Internet site in the list of illegal games of chance and in the possible review proceedings before administrative courts. Pursuant to the Gambling Act, the blocking is possible only to the extent necessary, while excluding any interferences with other (lawful) Internet content. In this context, the principle of subsidiarity of the decision-making of the Constitutional Court and the principle of discretion and minimizing interference in the activities of other public authorities shall apply - if the contested provisions may be interpreted and applied in a constitutional manner, there is no need to annul them due to their conflict with the constitutional order.

31. In this context, the continuity of the contested legislation with Section 252 of the Criminal Code, which regulates the criminal offence of illegal operation of games of chance, cannot be overlooked. While the institution of blocking the illegal Internet games constitutes the administrative branch of controlling (combating) games of chance and its purpose is primarily to prevent effectively access to it, the regulation under the Criminal Code enshrines the subsequent punishment for such criminal activities, which applies to both natural persons and to legal persons within the meaning of Act No. 418/2011 Coll., on the criminal liability of legal

persons and proceedings against them, as amended. Given that pursuant to Section 252 (1) of the Criminal Code a criminal offence is committed by whoever "illegally operates, organises, promotes or facilitates a game of chance", that provision does not preclude even sanctions against the Internet service provider who is actively involved in the spreading of access to such game. The competent public authority should always consider whether it is appropriate to file a criminal complaint pursuant to Section 8 (1) of the Criminal Procedure Code, especially when it comes to an intentional fault.

32. The Constitutional Court does not even consider as unconstitutional the possibility of an obligation to restrict effectively access to the Internet sites with illegal games of chance for the Internet service providers, not for the game operators. The illegal games are regularly offered from (distant) foreign countries, in many cases intentionally or even just formally, so that it is difficult for the enforcement authorities of the state to reach the operators. Therefore, the legislature imposed an obligation to prevent access to the harmful content upon the Internet service providers who can ensure the blocking effectively and, at the same time, are available both for communication with administrative authorities concerning the effective application of the act, as well as for any sanction for violating the act. In relation to the operators of illegal games of chance and, especially, to the Internet service providers which the responsibility for blocking access to it is *de facto* transmitted to; however, it must be such form of decision which is subject to the regular review in administrative court proceedings, which is also the case of the contested legislation, as explained further.

33. There are conditions allowing the Internet service providers to carry out the continuous (automated) monitoring of changes in the list of illegal Internet games; the Ministry is obliged to provide them in this respect with effective support and cooperation, which is also mentioned by the Explanatory Memorandum which stresses that the list must be kept in electronic form and in the continuous manner, allowing remote access; the providers cannot be seen as entities responsible for the illegal operation of game of chance, but at most as responsible for partaking in the unlawful activity (Special Part, K Section 82). The implementation of the act should not be connected with a greater administrative burden for the providers because after a certain stabilisation of the situation the blocking in tens or at most hundreds of Internet sites can be expected, on an ongoing basis in the longer term (in this context, the Explanatory Memorandum states that in total 12 sites are blocked in Denmark and around 180 sites are blocked in France). It will be up to individual providers to choose the technically best method of blocking.

34. The legislature has not overstepped the constitutional framework of its activities, not even by defining the prerequisites and conditions of relieving from responsibility (liberation) as set forth in Section 128 (1) and (3) of the Gambling Act. By its very nature, it is an objective responsibility, but not an absolute one (for a result), while the fundamental liberation reason is exerting all efforts which can (reasonably) be requested from the Internet service providers. The specific steps of the provider to prevent access to harmful sites, the demanding character of circumventing the blocking, and the cost effectiveness are decisive for the application of liberation reason.

VI./b

Decision-making by an administrative authority and a judicial review

35. The Constitutional Court does not see as contrary to the constitutional order the fact that the power to decide on the inclusion of a specific Internet site in the list of illegal games of chance

is conferred to the administrative authorities; this is done in the administrative proceedings - the final decision is subject to a standard review in the administrative court proceedings. The form of proper and two-stage administrative proceedings, with the subsequent judicial review, is constitutional in terms of both the procedural rights of the concerned entities and the ensuring of proper interpretation and application of the act. A similar procedural step - administrative proceedings with judicial review - applies in relation to the game of chance operator or a domain holder and inclusion of an Internet site in the list ("normal" administrative proceedings), and subsequently against the Internet service provider and its responsibility for any breach of duty while preventing access to the sites on the list (administrative offence procedure which is characterised by partially different procedural standards). The judicial review is an adequate safeguard of the legality of the practice of administrative authorities in the implementation of the act.

36. The chosen concept has better prerequisites for efficiency due to the enormous dynamism, which is typical of the world of the Internet and the development of games of chance. Through the administrative proceedings, the inclusion in the list may be decided upon in a faster and more flexible manner. From the perspective of compliance with the relevant procedural standards, the Constitutional Court finds no substantial difference in whether the Ministry of Finance or any other public administration body decides in the administrative proceedings, e.g. Czech Telecommunication Office mentioned by the petitioner. It is essential that the blocking is decided by the administrative authority competent to do so, based on its adequate specialisation and staff. In this context, the decision by the Ministry is convenient also because the inclusion on the list and the deletion from it are directly linked to whether the necessary licence has been granted to operate a game of chance, or whether the game of chance has duly been reported - even these tasks fall within the powers of the Ministry of Finance.

37. The Explanatory Memorandum presents a comparison of various options of deciding on the inclusion of an Internet site in the list of illegal games of chance, while delegating the decision-making power to the Ministry of Finance seems to be the most appropriate manner. It states that "an essential aspect when considering the implementation of blocking measures was the speed of response due to the fact that illegal providers of games of chance can use a variety of measures that will restrict or make impossible the response by state authorities. (...) Selecting a solution that is based on the administrative proceedings by the Ministry of Finance in this area is not only efficient in terms of the speed of implementation and updates, but also causing the least burden on the state budget as it does not involve any additional costs incurred by other state authorities" (General Part, Subsection 2.9.4, ad Option 2: Blocking the Internet connection).

38. The discrepancy between the act and the constitutional order cannot even be caused by the absence of detailed regulation of removal from the list after the reasons for the inclusion in the list have ceased to exist. Whether this will be done informally, immediately after the granting of a licence or notification of game of chance in accordance with Section 7 (2) (b) or again in the full administrative proceedings (as suggested by the Government), it is especially essential to comply with the requirement under Section 84 (3) of the Gambling Act, i.e. the deletion must occur immediately after the termination of disappearance of the reasons for the inclusion in the list. The administrative courts will be requested to review the Ministry's procedure also in this case.

39. The Constitutional Court has not omitted the modification of the administrative proceedings pursuant to Section 84 (5) of the Gambling Act either - the parties to proceedings (the Internet

site operator with the illegal game of chance or a domain holder if it is a different person) receive the documents by a public notice, with a copy to the address of residence or registered office if known to the administrative authorities. Also in this regard, the specific nature of blocking illegal games of chance, the speed and efficiency of which is decisive, must be taken into account.

40. If it is an entity with a known address - in the Czech Republic and abroad - it will become aware of the acts of administrative proceedings also upon the delivery of documents to its address, even if the legal effects are already linked to the publication of the notice. In this context, it is necessary to appeal to the administrative authorities so that they are active in identifying valid addresses of the parties to the proceedings and send the documents to them immediately following the publication of the notice; especially for the entities with the data box - which should be the primary means of communication between businesses and public authorities - this modification should not pose a threat to procedural rights. In addition, a consistent procedure of administrative authorities in delivery shall be subject to review activities of the administrative courts.

VI./c

Comparison with foreign countries and the European Union law

41. For the sake of completeness, the Constitutional Court mentions that the documents submitted in the proceedings clearly imply that the institution of blocking access to the Internet sites on which the illegal games of chance are operated is quite common in other Member States of the European Union or European Economic Area, bringing together the Member States of the European Union and the European Free Trade Association (except Switzerland). Without the need to perform a more detailed analysis (or even conduct the evidence production), based on the filing of the participants and the search carried out by the Analytical Department of the Constitutional Court, it can be concluded that blocking the Internet sites with illegal games of chance has been introduced into the legal systems of e.g. Belgium, Bulgaria, Denmark, Estonia, France, Italy, Latvia, Lithuania, Hungary, Portugal, Romania, Greece, Slovenia, and Spain; in the Slovak Republic and Poland, it is in the legislative process.

42. On the contrary, the blocking is not performed, for example, in Croatia, Ireland, the Netherlands, and the UK; in other countries, it is excessive in relation to the state monopoly on the operation of games of chance (Finland and Sweden). In Germany, it is the subject of the so-called state contract between all the federal republics; in the previous version of this source of law, the institution has been included but was subsequently removed, also due to doubts whether its implementation can fairly be transferred to the Internet service providers. In Austria, the blocking covers solely an infringement upon intellectual property rights. The blocking is decided in administrative proceedings for example in Belgium, Estonia, Italy, Latvia, Lithuania, Hungary, Portugal, and Spain; the same should be followed in Poland and the Slovak Republic. On the contrary, in Slovenia, the blocking is carried out exclusively within the competence of the court that decides based on the proposal of the administrative authority. Both concepts combine the legislation of Bulgaria, Denmark or France.

43. As for the European Union law, the blocking of illegal content is governed by the Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access; paragraph 13 of the Preamble identifies as permissible restrictions on access to the open Internet in the cases covered by “measures of

general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such Union legislative acts or national legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content)".

44. A more detailed regulation is contained in Article 3 of the mentioned Regulation. The EU leaves the specific practices in the fight against illegal games of chance up to the Member States and focuses instead on the aspects related to the free movement of services within the meaning of Article 56 et seq. of the Treaty on the Functioning of the European Union and the protection of participants in the games as consumers. This is especially dealt with by Commission Recommendation 2014/478/EU of 14 July 2014 on the principles for the protection of consumers and players of online games of chance services and for the prevention of minors from online games of chance. Paragraph 5 of the Preamble points out to the absence of harmonisation at the Union level and to that the Member States are in principle free to set the objectives of their policy on games of chance and to define the level of protection sought for the purpose of protecting the health of consumers. While the Member States may restrict or limit the cross-border supply of online games of chance services on the basis of public interest objectives that they seek to protect, they have a duty to demonstrate that the public interest objectives are being pursued in a consistent and systematic manner. In Paragraph 15 of the Preamble, the Commission puts emphasis on providing consumers with information about online games of chance, in particular, to prevent minors from accessing games of chance and discourage consumers from availing of offers which are not allowed. Paragraph 17 of the Preamble requires that the Member State should act effectively against online games of chance services which are not allowed according to the law of the Member State; provision of Article X then calls upon the Member States to set up regulatory authorities to monitor effectively and ensure compliance with the national measures to regulate the games of chance services offered online.

45. Relevant standards are also included in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market (the "Directive on electronic commerce"). Although games of chance are excluded from its scope, the Directive can be referred to in relation to the general liability of intermediary service providers for the transmission of information; under Article 12 (3), the Member States are obliged to incorporate into their legal systems the powers of the judicial or administrative authorities to require the service provider to terminate or prevent an infringement. For the sake of completeness, we can also point to Article 11 of the Council of Europe Convention on combating the manipulation of sports competitions, approved on 9 July 2014 and now in the ratification process. The Contracting Parties shall adopt the most appropriate means to fight operators of illegal sports betting and the appropriate measures, consisting *inter alia* in restricting remote access (via the Internet).

46. The Court of Justice comments on the blocking of illegal Internet games only in general terms, and even then it is clear that it accepts the institutions similar to those which have been introduced into Czech law. In its judgment of 8 September 2009, Case C-42/07 Liga Portuguesa de Futebol Profissional (all of the decisions mentioned here are available at http://curia.europa.eu), the Court of Justice stated that the freedom to provide services does not preclude the Portuguese legislation which prohibits the operators which are established in other Member States where they lawfully provide similar services, from offering the games of chance via the Internet in its territory. The Court of Justice pointed out to the specific character of

offering games of chance via the Internet and identified restrictions in Portugal as justified by the fight against fraud and crime; the court took into account that the online gaming industry is not the subject of harmonisation at the EU level and that it brings different and more substantial risks (paragraphs 69, 70, and 72) as compared to traditional markets. In its judgment of 3 June 2010, Case C-203/08 Sporting Exchange, the Court of Justice even approved the Netherlands legislation, which subjects the organisation and promotion of games to the exclusivity right in favour of a single operator for a game of chance and prohibits others from offering via the Internet these services, including the operators from other Member States.

47. The judgment of 27 March 2014 in Case C-314/12 UPC Telekabel Wien related to the specific Austrian legislation of blocking Internet sites with the content that is infringing upon copyright; however, its conclusions are also applicable to the present case. The Court of Justice concluded that the fundamental rights recognised by EU law does not prevent prohibiting the Internet service providers - in the case of Austria, through the order issued by the court - from providing customers with access to the Internet sites on which the subjects of protection are made available online without the consent of the rights holders. An obligation could thus be imposed upon UPC Telekabel Wien to block for its customers access to the websites on which the films produced by the companies Constantin Film and Wega were illegally "downloaded". The Court of Justice further explained that while in the blocking it is not possible to determine what measures are to be adopted by the Internet service provider - it is solely at the discretion of the provider who, in addition, must be able to discharge itself of liability if it proves that he has taken all the measures which may reasonably be required from it and that do not impede access to other (legal) information inadequately.

VI./d

Objection of uncertainty of legislation

48. The petitioner sees the unconstitutionality of the Gambling Act in that it does not properly define the terms "Internet service provider" and "Internet site". Moreover, according to the petitioner, it is not clear whether the domain address should be blocked as a whole (i.e. URL) or as a domain name of second or lower order, how the List of Illegal Internet Games should be made available, and to what extent the active cooperation of Internet service providers will be required.

49. The contested legislation does not show such degree of ambiguity or uncertainty that it would not fulfil the basic requirements of legal certainty and predictability as required by the case-law of the Constitutional Court - cf. for example, the judgments of 13 May 2014, file No. II. ÚS 3764/12 (N 91/73 of the Collection of Judgments of the Constitutional Court 517), of 3 June 2009, file No. I. ÚS 420/09 (N 131/53 of the Collection of Judgments of the Constitutional Court 647), of 15 February 2007, file No. Pl. ÚS 77/06 (37/2007 Coll., N 30/44 of the Collection of Judgments of the Constitutional Court 349), of 20 September 2006, file No. II. ÚS 566/05 (N 170/42 of the Collection of Judgments of the Constitutional Court 455), or of 21 January 2003, file No. Pl. ÚS 15/02 (40/2003 Coll., N 11/29 of the Collection of Judgments of the Constitutional Court 79). The task of the Constitutional Court is not to substitute the work of the competent public authorities and interpret authoritatively the legal terms of the Internet service provider and the Internet site or even to anticipate partial aspects of application, such as at what level of a domain name the Internet site should be blocked or how the list of illegal games should work, what cooperation can be required from the Internet service providers or what method of blocking should be chosen by them.

50. The alleged deficiencies of the passed legislation and the terms used clearly fall short of constitutional relevance. Moreover, it is a misconception that the casuistic legislation will solve everything - the opposite is true: The more detailed legislation, the more space for obstructions and circumvention of law. In this context, it can also be highlighted how the contested provisions are interpreted by the Government (the author of the bill) in its comment. The term of the Internet service provider is seen as a subgroup (subcategory) of information society services providers within the meaning of Section 2 (a) and (d) of the Information Society Services Act.

51. The extent of liability for an administrative offence while preventing access to harmful Internet sites is then only applied by the Government strictly to the businesses within the meaning of Section 2 (1) (b) of the Consumer Protection Act, who provide Internet services as part of their line of business. In other words, if a person is the recipient of Internet services and a misconduct occurred on the part of the provider, it is thus relieved of its liability for an administrative offence even if the Internet service (with a deficit blocking of illegal games of chance) within its business activity is subsequently provided by the person to other users.

52. The blocking should relate solely to the Internet sites that provide access to the illegal games of chance, not e.g. those containing only the advertising of illegal games of chance. Regarding foreign entities, the Government states that the liability for blocking access to the illegal games of chance applies, within the meaning of Section 9 (3) of the Information Society Services Act, also to foreign persons providing the Internet service in territory of the Czech Republic, including those from other EU Member States, e.g. via satellite or within the internal networks of multinational corporations. The Constitutional Court notes that even if the legislation against foreign Internet service providers is less enforceable, this will only affect a minority group of users, because e.g. the satellite connection is relatively costly and, through the networks of multinational companies used by their employees, is subject to the internal mechanisms of control that prevent participation in the games of chance generally much more efficiently than the state supervision bodies.

53. Nor does the term of Internet site mean that the legislation is in conflict with the constitutional order due to uncertainty. In its comment, the Government puts the mentioned term on an equal footing to the (more accurate) term of website and points out that the phrase of Internet site is used for example by Section 7 of the Business Corporations Act, Section 1830 of the Civil Code or Section 195 (4) of the Tax Code. As to the doubts about the level of blocking, i.e. whether the domain name as a whole (e.g. www.hry.cz) or the name of a second or a lower order (e.g. www.hazard.zabava.eu) is affected, this matter cannot be defined generally; on the contrary, such detailed legislation would probably prove to be non-functional; according to the Government, the list will include, on a case by case basis, the address of that domain order which corresponds to the requirement for the effective prevention of access to the illegal game of chance and, at the same time, the minimising of interference with another (lawful) content. The Gambling Act, however, does not specify other methods of remote access to games of chance than through the Internet, for example through the applications on mobile phones.

54. The absence of detailed regulation of the availability of the list, the mandatory cooperation of providers or a specific blocking method is constitutionally irrelevant. Moreover, as the Court of Justice emphasised in the judgment UPC Telekabel Wien, the Internet service providers may not be ordered to use such methods and the choice of specific and effective methods of blocking

must be upon their discretion, in terms of efficiency and costs optimisation. Also the liberation reasons under Section 128 (1) of the Gambling Act are in accordance with the requirements of the Court of Justice.

VII.

Conclusion

55. Based on the above reasons, the Constitutional Court has concluded that the contested provisions of Sections 82, 84 or 123 (5) of the Gambling Act are not contrary to the Constitution and there are no reasons given for their annulment. Therefore, the petition is not justified and the Constitutional Court dismissed it under Section 70 (2) of the Act on the Constitutional Court.

Appeal: No appeal is admissible against the judgment of the Constitutional Court.

In Brno 14 February 2017

Pavel Rychetský, m.p.
President of the Constitutional Court