

CASE STUDIES

Judicial Review of Municipal Legislation on Hazard Games in the Czech Republic

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Abstract: The aim of the article is to discover fundamental regulating legislative activities of municipalities in the field of hazard games. For several recent years there have been a lot of problematic cases relating to authorisations to carry on hazard games in the Czech towns and villages that have had to be decided by the Ministry of Finance and later by administrative courts and the Constitutional Court. Some of the decisions can be considered fundamental and very relevant for fundamental principles of municipal legislation making. The authors focus on elected court decisions with the aim to evaluate the practise of municipalities in the field.

Keywords: gambling; hazard games; legislation; municipality

1. Introduction

Seen through the eyes of the regulator, hazard games (hereinafter also referred to as gambling), at minimum, is a debatable area of social relations as is the operation of gambling itself. Unless gambling is allowed by the authority, the legal relationships arising out of gambling are not protected under the law. Indeed, at some point in time, an insignificant number of countries banned gambling completely. Even when the authority allows gambling, it is subject to countless restrictions. From the beginning of the existence

of the Czech Republic, gambling caused negative reactions particularly on the municipal level where there were relatively large numbers of small gambling establishments with just a few slot machines. Those establishments differ from casinos, not only in the scope of gambling, but particularly in the type of the customer who is frequently a source of issues to local public safety and social cohabitation. This paper aims to shortly define solutions for the legislative regulating administration of gambling on local level, to describe actual challenges of this legislative and its application but also to bring up opinions on the procedural process of application of local ordinances forbidding the administration of slot machines.

2. Constitutional Grounds

The authority of municipality councils of each municipality is based on Article 104 par. 3 of the Constitution of the Czech Republic (hereinafter referred to as the “Constitution”): “[R]epresentative bodies may, within the limits of their jurisdiction, issue generally binding ordinances.” The underlining problem of this formulation is that any other articles of the Constitution do not define what is the limit of the jurisdiction of the representative bodies, as Article 104 par. 1 of the Constitution sets forth: [T]he powers of representative bodies shall be provided for only by statute. Therefore, the Constitution does not protect the autonomous competence of the municipalities. A general definition of the municipality competence is described in section 10 of the Law on Establishment of Municipalities (128/2000 Coll.), which delimits three areas of autonomous competence, where the municipalities are allowed to impose duties: 1. for the purpose of safeguarding local affairs in public order; especially it may stipulate which particular activities that could disturb the public peace in the municipality or could run counter to the good morals, protection of safety, health and property can be performed solely on sites and at times specifically determined by a binding ordinance, or stipulate that such activities are prohibited in some public premises in the municipality; 2. for the purpose of organizing, holding and terminating publicly accessible sporting and cultural events, including dances and discotheques, by stipulating binding conditions to an extent necessary to secure public order; 3. or the purpose of maintaining the cleanliness of streets and other public spaces, for the protection of the environment, greenery in built-up areas and other public green space, and for using the municipality’s amenities serving public needs. In other areas, municipalities can impose duties only if specifically allowed by a special act. This absence of a general scope of autonomous competence that would allow municipalities to enact ordinances causes disputes subsequently scrutinised by the Constitutional Court. The prime example might be the disputes regarding the regulation of the administration of gambling.

The extent of autonomous competence, where the municipality can impose duties, was the subject of many decisions of the Constitutional Court. In the beginning, following the establishment of the Czech Republic, its Constitution and the Constitutional Court, the Constitutional Court had a rather restrictive view. In this matter, the case Pl. ÚS 5/93 was essential, where the Constitutional Court found that in order to impose specific duties,

a generally binding ordinance must have a statutory basis. Even though the Constitutional Court found a generally binding ordinance to be the underivative juridical norm, the Court still required a concrete statutory basis which are typical for a secondary juridical norm (not primary, as that is usually considered the synonym to the term underivative). After more than 10 years of its existence, the Constitutional Court's restrictive view began to change possibly also because of the personal changes within the Court. In its case Pl. ÚS 63/04 the Constitutional Court first used the four-level test to measure constitutionality of municipalities' generally binding ordinances. This test of abstract control of juridical norms enacted within the autonomy of municipalities, when the Constitutional Court scrutinises the conformity of these norms with the Constitution and laws, consists of four successively asked questions: 1. whether the municipality has the authority to enact the disputed provision of a generally binding ordinance; 2. whether the municipality while enacting the disputed provision of the generally binding ordinance did not exceed the limit of its statutory subject-matter authority (if the municipality did not act *ultra vires*); 3. whether the municipality while enacting the generally binding ordinance did not abuse the statutory entrusted authority, and 4. whether the municipality enacting the disputed provision did not act evidently unreasonably.

Using this test, the Constitutional Court subsequently scrutinised a generally binding ordinance in a case that became the subject of the decision Pl. ÚS 45/06 where the original restrictive approach of the statutory basis underwent a major change setting forth that the generally binding ordinance must be in accordance with the subject matter authority of the municipality.

3. The Right of Municipalities to Regulate Hazard Games

In the field of regulation of gambling using the generally binding ordinances, the Constitutional Court found two fundamental cases, first the Pl. ÚS 56/10 where the Court scrutinised the ordinance of Frantiskovy Lazne and second the Pl. ÚS 29/10 where the Court scrutinised the ordinance of Chrastava.

The town of Chrastava enacted its generally binding ordinance, based on an express statutory delegation pursuant to 202/1990 Coll., the Law on Gambling (hereinafter the "Gambling Act", this act is null and void as of now), on designated places where interactive slot machines may be administrated, with the purpose to ensure public safety.

It might be necessary, at this point, to explain that at that time the general opinion was that there is a difference between a so-called slot machine, where the game itself is happening within the machine, and a so-called video-lottery terminal, where the game itself does not happen within the machine but on a central computer, and thus the machine is just an access point. This distinction was based on a restrictive interpretation of the then positive law.

The existing interpretation of the authorities found a difference between those types of gambling machines and asserted that the municipalities are (based on the express statutory authority of the Gambling Act) able to regulate just the slot machines. However, the city of Chrastava in its generally binding ordinance set forth that the interactive video-

lottery machines are included within the sort of slot machines and thus those machines are under the authority of a different Chrástava's generally binding ordinance that regulates the operation of those slot machines within the town that was the first time any municipality came with such interpretation.

Although the Constitutional Court agreed with the interpretation that from the point of view of the positive law, there is a difference between the slot machine and the video-lottery terminal, it did not find that the authority of the municipalities to regulate those gaming machines would be limited just to the slot machines. Quite the opposite, the Court found that the express statutory authority found in the Gambling Act can be used in local regulation on all types of gambling machines.

The generally binding ordinance of the town of Frantiskovy Lázně was enacted "in order to ensure the safety of local matters and concerns in the field of gambling limitation". This town argued the above mentioned general definition of autonomous competence in section 10 of the Municipality Act, when its gambling regulation enacted with the goal of ensuring public safety as opposed to the above mentioned statutory authority encompassed in the Gambling Act. Thus, the town used the more general formulation with the goal to increase its possibilities of gambling regulations.

At first, the town of Frantiskovy Lázně in its generally binding ordinance found the operation of gambling using technical machines – slot machine as a potentially public order disturbing conduct, subsequently found just one specific address, namely just one building, where gambling can be operated. This approach, showing the peak of the efforts of the municipalities to regulate slot machines on its premises, was one of the first that in the shape of the general binding ordinance was scrutinised by the Constitutional Court. The Constitutional Court found that the regulation of technical machines – slot machines is within the subject matter authority of the autonomy competence of municipalities.

The Constitutional Court further scrutinised the specificity of the local ordinance, namely the permission to operate the slot machines only on one address within the town (on this address a casino was located), in other words limiting this type of business to a single entrepreneur. According to the Constitutional Court, this limitation stands rather for individual regulation than a general one, and as such, typical for authority decisions as opposed to legal norms. Regulation by a legal norm should respect "the requirement of universality of regulation that the zoning must be based on a neutral and non-discriminatory rational regarding specific persons who are influenced by the regulation". In this very case, rational reasons for limiting the administration of gambling must have had existed. The Constitutional Court found that in this case the rationale was the character of Frantiskovy Lázně as a spa town and the ongoing existence of a casino at that address where the goal was to concentrate gambling into the already existing casino. The Constitutional Court thus confirmed that the generally binding ordinance in question limiting slot machines into one concrete place in the town is constitutional.

The practice of the Constitutional Court based at first upon those two cases helped to open a door for the municipalities to regulate gambling on multiple types of gambling machines on the local level to keep public safety in order. Based on the case regarding the town of Frantiskovy Lázně, municipalities subsequently began to not only completely ban gambling within its premises, but also to delimit so called allowed addresses, in other words

places where the administration of gambling is allowed and consequently limit the administration of gambling in this way.

This development in reaction on the decisions of the Constitutional Court was subsequently supported by the legislator by Act 300/2011 Coll. which amended the Gambling Act and authorised the municipalities to regulate even by a complete ban, all types of gambling machines. Consequent problems are still rotating around the question in what way and for what reason can be the so called allowed addresses chosen.

4. Types of Limitation on Operating Gambling Machines

As time advanced, municipalities, supported by the success of the towns of Chrastava and Frantiskovy Lazne, began to regulate the operating of gambling in local establishments, which was often just a separated part of common restaurants, on a higher scale. It is apt to note, that for the operation of those gambling machines its entrepreneur needed permission which was issued by Ministry of Finance, those permissions in some cases (relatively quite often) were issued for up to 10 years. Villages and towns thus had to cope with the situation when in a specific place within the town an entrepreneur operates a gambling business based on a correct permission issued for a long term, the change, or revocation of which was according to the corresponding statute legal, but the decision must have been made by the Ministry of Finance. The reason for change or revocation of the permission might have been in conflict with the generally binding ordinance which regulates the specific address regarding the operation of gambling machines. Municipalities therefore had to, if they wanted to limit or forbid the operation of gambling games, enact a specific generally binding ordinance. And the municipalities started to do so, after the decision of the Constitutional Court in the above-mentioned cases.

Municipalities chose one of the variants, either forbid gambling on slot machines completely on its entire cadastre or allow it on just specific addresses. In both cases however, the municipalities interfere with the valid permissions to operate and conduct such a business. The first approach as seen from the regulatory view is much better, because the entrepreneurs cannot assert discrimination and it is not necessary to weight and reason the choosing of specific addresses.

The disadvantage of completely banning the administration of slot machines on the premises of the municipality is mainly the impact on its budget, because the taxation on operating slot machines within the premises of the municipality brings significant income to its budget. Another drawback is the possibility of sparking a black market on operating slot machines, which means that the negative social influence of gambling stays without the corresponding income that would come with the taxation, or the possibility that the adjacent town will allow gambling, but the social problems will remain within the first town which forbade gambling.

The ban to operate slot machines on different than certain addresses (done by allowing a certain, named address) keeps the income from the taxation and does not spark the black market but is problematic when it comes to the justification as per why those addresses

were chosen and when it comes to conservation of the free competition of entrepreneurs, when some of them may feel the negative impact of the partial ban.

5. The Procedure of Partial Ban on Gambling Machines

No matter how the local ban of gambling duly allowed by another authority might be considered negative and the due expectations might be generally argued when it comes to the regulation of gambling, it is necessary to weight the underlining principles, where the interest of the society to regulate the negative impact of gambling stands against the due expectations principle.

In the field of gambling regulation, the Gambling Act contained in its section 43 express authority to alter the issued permission: “the body which licensed the lottery or other like game shall withdraw the license if there occur or become known any circumstances for which it would not have been possible to license the lottery or other like game or if it proves later that the data according to which the license was granted are inaccurate.”

Because of the existence of this section, the argument of the entrepreneur of gambling machines that the once issued permission allows him to administrate the gambling machines for the time the permission is set forth cannot be accepted. The entrepreneur should have known that there is a possibility of substantial impact, for example the above-mentioned enactment of the generally binding ordinance regulating the operation of gambling machines following the issuance of the permit that might cause alternation of the permission.

Much more problematic is, however, the partial ban done by specifying the so called allowed addresses and that is because, as outlined above, the argument of discrimination of the entrepreneurs on the excluded addresses. It is undisputed that choosing the allowed addresses should be based on rational and duly justified arguments. The question however is, who should be inquiring into this justification and rationalisation of the generally binding ordinance.

The generally binding ordinance is a normative act of the local authority, and by its due process of enactment the conditions for its general authority are fulfilled. From the beginning of its due publication of the accepted generally binding ordinance all persons must act accordingly.

The Czech Republic recognises the process of the government control of the generally binding ordinances of municipalities, when every single ordinance shall be sent to the Ministry of the Interior of the Czech Republic, which scrutinises the ordinance and if the ordinance is not in compliance with the statutory requirements, the Ministry will command the municipality to correct the ordinance; further the Ministry can suspend and subsequently propose the Constitutional Court to scrutinise the ordinance in order to check its specific provision or completely rescind it.

This is how the abstract scrutiny of the municipalities’ regulation works. This proceeding however might take a long time and its process, if the ordinance is not suspended, does not impede its effects on the influenced persons.

Enacting the ordinance forbidding the operation of slot machines which were previously duly allowed on the location where they are operated, should have an impact on the entrepreneur of the machines that should end in stopping the operations of such machines. In practice, it most certainly started the administrative proceeding of the issuer of the permission (the Ministry of Finance) pursuant to Article 43 section 1 of the Gambling Act, which result should be the cancelation of the issued permission based on the change of factors, that is the enactment of the generally binding ordinance.

Because of the double instance of the administrative proceeding, this process might take up to one year and for the whole time of the proceeding the slot machine is being operated. A substantial question is whether the Ministry of Finance is allowed in the proceedings to scrutinise the reasons why the generally binding ordinance was enacted. As said above, the duly enacted generally binding ordinance has authority against all and thus is binding for the Ministry of Finance as well, as long as it is not proceeded by the above-mentioned process of suspending effectiveness of the generally binding ordinance which may be done however only by the Ministry of the Interior.

The request that the administrative authority (namely the Ministry of Finance) scrutinises the rationality of the enactment of the original legal norm (in this sense the originality of the legal norm, the generally binding ordinance is on the same level as an act) is unacceptable. The administrative authority in case of its acceptance would be authorised to impact the legislative power on the local level but by comparison on the national level. In the end even, the Constitutional Court in its above-mentioned case Pl. ÚS 56/10 touched this question when according to the Court: "The administrative authority is authorized to scrutinize all individual conditions of the case, moreover even if the municipality by including the concrete real estate into the text of the ordinance did not act arbitrarily or in a discriminatory way."

Argument that this scrutiny should be done by the Ministry of Finance while deciding the issuance of the permission to operate the gambling machines is also refuted by the Constitutional Court: "[W]hen the Ministry of Finance finds a collision of permission with the generally binding ordinance it must pursuant to a statute begin the proceeding on the scrutiny of those permissions and proceed in the intention of article 43 section 1 of the Gambling Act. This article assumes revoking the issued permissions not only upon the emerging of new factors for which it would not be possible to permit the lottery of different game, but also when those factors happened after the issuance of the permission. If the Ministry of Finance does not follow this process it acts against the constitutional right of the municipalities for autonomous competence."

Evident drawback of this proceeding which however is in accordance with the current law is the fact that in case that the court finds that the generally binding ordinance was discriminatory when it comes to the local limitation of the allowed addresses, it generally happens at the time when the permission on behalf of which the slot machine was operated is already void and so the administration itself should have ended and the machine should not be making any money to the entrepreneur.

This consequence can be limited only by the act of court that deals with the action against the decision of the Ministry of Finance, which would exclude the effects of such decision and so keeps the validity of such decision (this is however in practice a rather theoretical possibility).

6. Conclusion

The effort of municipalities to regulate gambling within their territories, within its scope of authority, is rational, understandable, and definitely in conformity with the general function of municipalities to provide for public welfare, as operating gambling establishments negatively influence the social cohabitation. The actual impact of those efforts, when the municipalities impose duties using the generally binding ordinances, banning gambling entirely or in chosen localities of the municipality causes numerous disputes as the entrepreneurs operating those slot machines defy the negative impacts of the generally binding ordinances on their business.

Banning gambling entirely in the whole territory of the municipality is quite effective and from the legal point of view less problematic, nevertheless it supports the creation of illicit gambling environment and excludes the possibility of not insignificant income from the taxation of operation of the slot machines. On the other hand, banning gambling in some localities of the municipalities creates more legal issues, in particular such a ban is apt to create a discriminatory environment in operating this sort of business between the entrepreneurs.

Proceedings, when the entrepreneurs influenced by the ban imposed by the generally binding ordinance defend against the rescind of the permit to operate slot machines, are at the moment subject of administrative proceedings judicial review. Generally, the petitioners argue that the reasonableness of the ban delimiting particular parts of the municipality where the operating of slot machines is forbidden should be reviewed with regard to the corresponding generally binding ordinances. They argue that such review should be done rather by the Ministry of Finance in the proceeding where such permit is rescinded, than an administrative court.

But it is impossible to agree with such argument as the Ministry of Finance does not have the authority for such review, indeed neither does the Ministry of the Interior which is the pivotal authority supervising the autonomous regulation. Even the Ministry of the Interior can only submit the generally binding ordinance to the Constitutional Court for its review but cannot invalidate such generally binding ordinance. Such authority of the Ministry of Finance would interfere with the right of municipalities for autonomous government and it would be in breach of the constitutional separation of powers.