

## Intellectual and Industrial Property



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### Changes in the interpretation of the provisions regarding promotion and audiotele lottery

Pursuant to the Gambling Law of 19 November 2009, a promotion lottery means a lottery where “*participation is conditioned by acquiring goods, services or another game ticket, whereby participation in the lottery is free*” (article 2 sec 1 point 10 of the Gambling Law). On the other hand, audiotele lotteries mean lotteries where “*participation is conditioned by a payable phone connection or short text messages (SMS) via the public telecommunications network*” (article 2 sec 1 point 11 of the Gambling Law), whereas both in a promotion, as well as in an audiotele lottery, the entity organizing the game offers cash or material prizes. However, unlike a promotion lottery, in an audiotele lottery, the condition for participation does not involve the purchase of goods or services indicated by the organizer of such a lottery. Participants take part in an audiotele lottery only by sending a payable text message or by making a payable phone call within the time limit specified in the rules of a given audiotele lottery.

However, in the previous practice of the Customs Chamber, related to issuing permits for carrying out the said lotteries under the Gambling Law, the fact of using text message communication in a particular lottery (i.e. making the application via text message) was insufficient basis to consider a lottery as an audiotele lottery, i.e. with ‘payable participation’. Therefore, if the participant of the lottery purchased any goods or services and then sent an application to take part in the lottery via SMS, and, additionally, if the organizer did not receive any financial benefit from the sms traffic in the lottery, the lottery was still considered a promotion lottery, and not an audiotele lottery. Therefore, in such cases when qualifying the type of lottery, the purchase of goods or services as the basic condition qualifying a lottery as a promotion lottery prevailed against the fact of using, or not using, a text message.

At present, despite the fact that the provisions of the Gambling Law in the scope of the promotion and audiotele lottery definition remain unchanged, their interpretation has changed to the benefit of a strictly literal interpretation. According to the new guidelines of the Ministry of Finance, submitted to Customs Chambers in late July, the very fact of entering a lottery by a text message, even when the purchase of goods or services is still a basic condition to participate in the lottery, and even when the organizer does not receive any financial benefit from the sms traffic in the lottery, this classifies a lottery as an audiotele lottery. This is caused by the fact that this circumstance is, according to the new guidelines *“participation by a payable phone connection or short text messages (SMS) via the public telecommunications network.”* and so it fulfills the definition of an audiotele lottery provided in article 2 sec 1 point 11 of the Gambling Law.

Hence, according to the new guidelines, the main condition, which determines whether a lottery is an audiotele or a promotion lottery, is the manner of applying to take part in such a lottery, regardless of whether the lottery participant is required to purchase any goods or services in order to take part in such lottery, apart from sending a text message or making a phone call. Therefore, if a lottery involves a payable text message or a phone call (regardless of whether the organizer obtains any financial benefit from this text message or phone call), this lottery is considered to be an audiotele lottery.

As a result of changing the interpretation of the legal provisions of the Gambling Law regarding the definition of an audiotele and promotion lottery, more lotteries may now be qualified as audiotele lotteries.

The main consequence of qualifying a lottery as an audiotele lottery, rather than a promotion lottery, is the obligation of an organizer of an audiotele lottery who receives an income from the lottery to pay the tax on games provided for in Article 71 of the Gambling Law. This tax (which is due only in the case of an audiotele lottery, not a promotion lottery) is quite high, as under Article 73 in connection with Article 74 point 4) of the Gambling Law, it amounts to 25% of the income of the audiotele lottery organizer.

The change in the interpretation of the provisions of the Gambling Law also forces lottery organizers who want to avoid the possibility of the tax, referred to in Article 71 of the Gambling Law, being imposed on them, to receive applications only via the Internet or more traditional means of communication, such as by post, which significantly reduces the attractiveness of a promotion lottery.

Qualifying a lottery as an audiotele lottery also involves the obligation of an organizer to verify the age of the persons participating in such lotteries. The organizer must also visibly place the information concerning the prohibition of the participation of persons under 18 because Article 27 of the Gambling Law prohibits persons under 18 from participating in audiotele lotteries.

Finally, the new interpretation of the provisions of the Gambling Law also leads to the possibility where there may exist on the market for some time terms and conditions of lotteries in which, although the same rules apply, the Custom Chamber may qualify one as an audiotele lottery and another as a promotional lottery.

According to information obtained from the Customs Chamber in Warsaw, the new guidelines of the Ministry of Finance have already been applied in issuing permits since the end of July this year. However, what is interesting is that no official document or statement informing of the change has been issued by the relevant bodies, which certainly contributes to the uncertainty of someone applying for permission to organize a lottery as to whether it will be qualified as a promotion lottery, or an audiotele lottery. This situation may last some time until the new practice in this field is well-established.

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