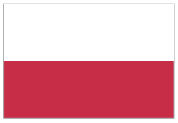

POLAND
波兰

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IP OVERVIEW OF POLAND

Recent developments in IP field in Poland

The year 2014 marked a year of not-so-little change in terms of legal requirements towards marketing in general and online game marketing in particular.

Implementation of the Consumer Rights Directive

This is naturally mostly associated with the Consumer Rights Directive being implemented throughout the EU. Poland was no exception. The landmark legislative act transposing the directive – pol. ustawa o prawach konsumenta, came into force on Christmas day, 2014.

The Act did not however come as a welcome Christmas gift for entrepreneurs, especially for on-line gaming providers. The Act, in line with the Directive outlined a wealth of precontractual information to be provided prior to distance contract conclusion.

What is more troublesome, as usual with implementations, there were minor, but significant divergences from the language of the Directive.

For instance, the Directive lists the precontractual information by saying:

"Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner: […]",

whereas the Polish Act begins the list with:

"No later than in the instance of the consumer expressing his will to be bound by a distance or off-premises contract, the trader is obliged to inform the consumer in a clear and comprehensible manner about: […]".

This means that in particular eCommerce schemes, the precontractual information needs to provided earlier than in other EU countries.

Moreover, whether done intentionally or not, adding the word "about" may in some cases act to the benefit of the trader and limit his obligation to provide direct information to the consumer.

These and other discrepancies mean that documents such as Terms of Service need to be tailor-cut to the national requirements. And again, depending on the case, the inconsistencies may act both to the benefit or detriment of the service provider.

Warsaw court fines marketing firm for advertising an F2P game as "free"

Moreover, 2014 brought upon us a decision by a regional court in Warsaw imposing a fine (approx. €10K) on a marketing firm responsible for SMS advertisements of a popular tank MMO. This has made marketing F2P games more difficult.

The court ruled that advertising a game as "free" to play when in reality, full use of the game is possible only after some in-game purchases, was contrary to collective consumer interests.

The court had ruled as an appellate body and approved a likewise decision of the President of the Office of Competition and Consumer Protection from 2012.

Naturally, the Polish legal system being a continental one, does not know the concept of court precedence. However, this decision has already had an impact on similar cases in practice. Publishers and other firms contracted to market such services no longer use expressions like "Play for free" without adding a specific disclaimer.

Restrictive rules on gambling still haunt publishers

Although not a new development in the recent years, the 2009 Gambling Games Act introduced a flurry of activity of customs officials. Game publishers, especially those publishing on-line games still feel the impact this regulation has had. This is for the reason of on-line games often employ chance-based schemes in order to appeal to broader audiences and develop a steady MAU base. These schemes allow for a user to benefit from certain parts of a game, e.g. by playing card games, lotteries or slot machines users receive items or virtual currency to be used in the game's mechanics.

These virtual currency (or VC, for short) schemes are often based on the premise that the players will not be able to cash out the VC (and thus not obtain real-world currency from entering into a chance-based scheme of the game). Unfortunately, this is irrelevant with regard to the Gambling Games Act, because gambling games, by definition of the Gambling Games Act may be games for monetary or in-kind prizes. Therefore, the VC or virtual goods within a game, which may be obtained through a chance-based scheme, may be considered by authorities or courts as in-kind prizes and the entire game itself as a gambling game.

Under Article 3a[1] of the e-Commerce Act, Polish law would be applicable to basically any gambling game scheme provided on-line. The Gambling Games Act provides for different requirement for operating specific gambling games. For example, for the operation of card games, a casino license is required, and in order to obtain such a license, one must produce a vast array of documents, follow a strict procedure, pay high fees and taxes, and establish a business presence in Poland of significant share capital (4,000,000 PLN, approx. 1 million EUR). In particular, playing poker out of casinos is illegal, regardless whether for monetary or in-kind prizes, in tournaments or on single tables.

Carrying out a gambling scheme within a game, should it be considered as a game of chance, within the meaning of the Gambling Games Act, without meeting the requirements of the Act, may result in criminal liability of both the game operator and the participants.

Non-compliance with the gambling games requirements is subject to fines amounting to 100% of either the winnings of the participant, or the total profits received by the gambling game operator.

Alternatively, the game operator (the persons managing the entity) may be criminally liable and fined by a court up to 720 daily rates (a daily rate is the amount of 1/30 to 400x the amount of minimal remuneration – 1600 PLN as of 2013, which equals to fines ranging from 533 PLN to 460.800.000 PLN– approx. 140 million USD) or up to 3 years of imprisonment or both–as per art. 107 sec. 1 of Fiscal Penal Code. Independently, the participation in foreign gambling games may be subject to the same criminal liability–as per art. 107 sec. 2 of Fiscal Penal Code.

Moreover, under the Gambling Games Act, operating and participating in gambling games on the Internet is prohibited,

save for mutual bets by bookmakers.

It is therefore self-evident that proceeding with gambling and VC schemes in games requires much caution. There is a possibility of applying for the Minister of Finance to conclude in a decision, whether a chance based scheme is to be considered a game of chance, with the meaning of the Gambling Games Act. Nonetheless, such actions have to be preceded with a thorough legal analysis of the game itself, as the Ministry may issue a decision whose conclusions are negative to the publisher.

Provided by Aleksandra Auleytner and Jakub Kubalski from the Domański Zakrzewski Palinka sp.k. law firm in Poland.

波兰在知识产权领域的最新发展

2014年，波兰对市场营销领域的法律法规进行了不小的调整，尤其是在网络游戏营销方面。

《消费者权益指令》的实施

这多半与欧盟正在实施的《消费者权益指令》有关。欧盟成员国都遵循《消费者权益指令》，波兰也不例外。波兰《消费者权益法案》，这一具有里程碑式的法案，替换了《消费者权益指令》，于2014年的圣诞节开始生效。

但是，这个法案对于企业家，尤其是网络游戏提供商而言，并不是一份受欢迎的圣诞节礼物。与《消费者权益指令》总体一致，该法案概述了很多在远程合同达成之前就应提供的先合同信息。

令人烦恼的是，与《消费者权益指令》相比，新的法案在语言上有许多细微但很重要的差别。

例如，《消费者权益指令》规定先合同信息时写到：

“经营者与消费者签署远程合同或者远程服务合同或者任何相应契约之前，经营者必须以清晰而全面的方式向消费者提供以下信息[…]。”

然而，波兰新法案规定：

“经营者需提前或在消费者表达签署远程合同或远程服务合同的意愿之时，就有义务向消费者以清晰而全面的方式提供以下信息，它们涉及在[…]。”

这意味着，在特定的电子商务规划中，波兰需要提供的先合同信息早于其他欧盟国家。

而且，无论故意与否，增加了“涉及”这个词，在一些情况下，可能有利于经营者，没有明确指出经营者向消费者提供直接信息的义务。

这些差别意味着诸如《服务条款》的文件需要修改得当以符合国家要求。而且，这也视具体情况而定，这些差异可能对服务提供者有益，也可能有害。

华沙法院因某营销公司宣传某免费游戏是“免费”的游戏，对其处以罚款

2014年，某营销公司公司为一个广受欢迎的装甲战争游戏做短信手机广告，波兰华沙的一个地区法院对该营销公司处以一万欧元的罚款。这使得营销F2P游戏变得更加困难。

该法院裁定，在现实中，只有在游戏中进行付费

之后，才可能充分地享用这一游戏，而宣传这一游戏为免费游戏，不符合整体的消费者权益。

这家法院作为一个上诉机构，对2012年波兰市场竞争和消费者保护局的局长作出同样的判定表示支持。

波兰的法律体系属于大陆法系，没有法庭主导的概念。但这个决定已经对相似案件产生了影响。游戏发行人或者其他营销类公司在没有进行免责声明时，已不再使用“免费游戏”这样的表达。

博弈游戏的法规仍然影响着发行人

2009年的《博弈游戏法案》，尽管不是最近几年修订的新法案，但是游戏发行者，尤其是那些网络游戏发行者现在仍然受到这一法规带来的影响。这是由于网络游戏经常采用主要依靠概率决定胜负的机制来吸引更广泛的受众群体，发展稳定的主要用户群。这种机制的设置可以让用户从游戏的某个部分受益。比如说，在玩纸牌游戏，博彩，投币机时，用户可以获得物品或虚拟货币,以使游戏正常运行。

设置虚拟货币机制的前提经常是：玩家不可以把虚拟货币兑换成现金（因此，不能通过进入靠概率来决定输赢的游戏机制而获得真实货币）。不幸的是，这与《博弈游戏法案》毫无关联。根据《博弈游戏法案》的定义，博弈游戏可能是指那些为获得货币或者实物奖励的游戏。因此，在一个游戏中，通过基于概率机制而获得的虚拟货币或物品可能被当局或者法院认为是实物奖励，并且整个游戏本身就是一个博弈游戏。

根据《电子商务法案》的条款3a[1]，波兰法律基本上适用于任何基于网络平台的博弈游戏机制。针对经营特定的博弈游戏，《博弈游戏法案》提出了不同的要求。比如，对于开设纸牌游戏的赌场而言，必须具有许可证。要想获得许可证，经营者必须提供一系列文件，遵照严格的程序，交付高昂的费用和税费，并且在波兰设置拥有大量的股本（四百万兹罗提，约合人民币690万元）的赌场。而且，在赌场外玩扑克游戏也是违法的，不论是为了赢得货币还是实物奖励，不管是参加比赛，还是个人组局都是这样。

如果一个游戏的规则设定被认为是靠概率获胜，属于《博弈游戏法案》规定的定义范畴，但不符合法案的要求，那么实施这一博弈机制可能导致参与者和游戏运营者受到刑事责任追究。

若不遵守博弈游戏的要求，那么将对参与者和经营者处以罚款，罚款金额是参与者游戏所得和经营者全部收益。

除此之外还有一种处罚方式就是：游戏经营者可能要受到刑事责任的追究，法院对其处以720日率的罚款（1日率等于1/30到400倍的最小酬劳，到2013年为止是1600兹罗提（约合人民币2760元），浮动的范围是533兹罗提（约合人民币920元）到4.608亿兹罗提（约合人民币7.95亿元）或处3年有期徒刑，或两者兼有（据财政刑法相关规定）。除此之外，参与国外博弈游戏可能也要追究其刑事责任。

此外，《博弈游戏法案》还规定，禁止经营及参与网上博弈游戏，有博彩公司参与的活动除外。

显然，游戏中的博弈和虚拟货币机制需要谨慎对待。一个基于概率的机制是否是一个靠概率取胜的游戏，是否属于《博弈游戏法案》规定的范畴，这可能需要向财政部长提出申请，请求作出判定。但是，财政部可能最后宣布的判定对发行人不利，因此在申请判定前应该先对游戏本身进行全面的法律分析。

本文由波兰Domański Zakrzewski Palinka律师事务所的Aleksandra Auleytner及Jakub Kubalski提供。