

DOI <https://doi.org/10.30525/2592-8813-2025-2-9>

GAMBLING AS A TAXABLE OBJECT IN UKRAINE

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Abstract. The gambling market in Ukraine was opened in 2020, until now since 2009 gambling has been prohibited and recognized as a crime. But the tax legislation, which provided for the rules for taxation of this activity, adopted in 2010 under the conditions of the prohibition of gambling after its permission, has not been changed. An analysis of tax revenues from gambling for 2021-2024 showed the shadowing of this market, and therefore the need to change tax legislation. To formulate proposals for effective taxation of this industry, it is necessary to establish the legal nature of gambling. In Ukraine, there are no unified approaches to this concept, gambling is understood as a service, as a type of aleatory contract, as a financial activity. An analysis of EU legislation has shown that in the EU gambling is understood as a service, which requires Ukraine to also change its approaches to the regulation and taxation of gambling as a service sector.

Key words: gambling services, gambling business, taxation, tax administration, taxable object.

Introduction. In 2020, Ukraine allowed the organization and conduct of gambling (gambling business). However, it did not change the requirements for its taxation. Oddly enough, although gambling has been prohibited in Ukraine since 2009, with the adoption of the Tax Code of Ukraine (which entered into force on January 1, 2011), the issue of taxation of gambling activities was regulated. An unprecedented situation arose in Ukraine when gambling was a criminal offense, but the features of its taxation were defined in the Tax Code (Tax Code, 2010).

After the gambling business was permitted by the Law of Ukraine "On State Regulation of Activities Concerning the Organization and Conduct of Gambling" (Law No. 768, 2020) dated July 14, 2020 No. 768-IX (hereinafter referred to as Law No. 768), no changes were made to the Tax Code of Ukraine regarding taxation and the specifics of tax administration in the sphere of the already permitted gambling business, which negatively affected tax administration in this area.

Most scientific publications in Ukraine are devoted to the issues of the feasibility of legalizing the gambling business (written before 2020), or to individual issues of its administrative and legal regulation, in particular, these are the works of the following domestic scientists: Yu. V. Bodorov, O. P. Getmanets, D. O. Getmantsev, O. Z. Gladkikh, B. R. Kondratov, O. D. Kostyuchenko, D. V. Kutsevol, V. M. Matviychuk, S. V. Mykhaylov, E. V. Mykhaylova, O. M. Muzychuk, O. V. Parokhomenko-Kutsevil, M. M. Pogoretsky, O. V. Poluliakh, K. V. Profatilo, N. B. Savina, R. O. Stefanchuk, K. O. Torgashova, Z. M. Toporetska, S. V. Khomyuk, S. O. Shatrava and others. The issue of gambling taxation was only partially considered in the works of G. V. Bekh, O. A. Dmytryk, M. P. Kucheryavenko, and A. V. Statsenko. At the same time, there were no comprehensive scientific studies of the problems of gambling taxation after its legalization in Ukraine.

The purpose of the article is to study the legal nature of the gambling as an object of taxation under the legislation of Ukraine.

Methodology statement. The methodological basis of the study was the dialectical method of scientific knowledge of the phenomena of objective reality, which was used to learn the legal nature of gambling. The special methods of the study were comparative law, which was used in the study and analysis of the norms of national legislation on the legal regulation of the organization and conduct of gambling, as well as their comparison with the norms of the legislation of the European Union; system analysis – for the study of legal norms that regulate the legal principles of regulating the

gambling business from the standpoint of various branches of law; formal-logical (dogmatic) – for the formulation of the definition of legal concepts and the formation of the conclusions of this study.

Results of the study. Problems with the taxation model and tax administration in the gambling business are demonstrated by the statistics of tax payments by gambling organizers. In 2021, gambling organizers paid UAH 204.8 million in taxes, in 2022 – UAH 730.9 million, while after the activation of the temporary investigative commission of the Verkhovna Rada of Ukraine, tax revenues from the gambling business amounted to UAH 7.35 billion in January-October 2023. This is 10 times more than in the entire 2022 and 37 times more than in 2021. For the entire 2023, the gambling business paid UAH 10.4 billion in taxes to the budget. For 2024 – a record UAH 17 billion (Table 1).

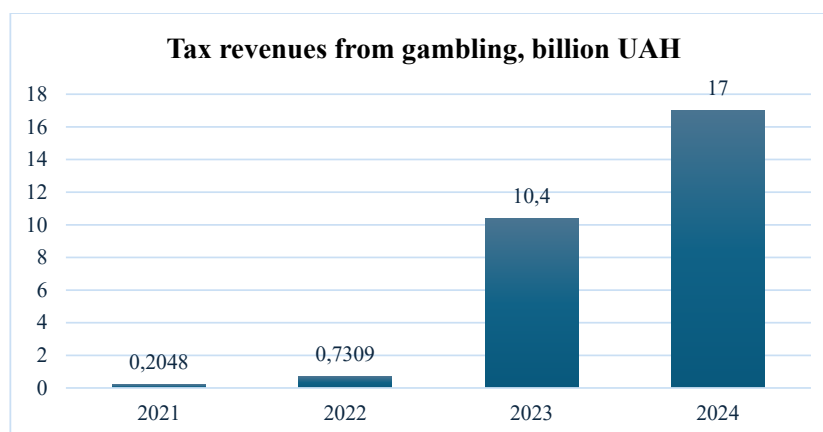


Table 1. Tax revenues from gambling, billion UAH (prepared by the author)

The indicated statistical data indicate a high level of shadowing of the gambling market and the insufficiency or inefficiency of existing state instruments for tax administration in the gambling sector, as the tax system has not changed, but instead the investigative commission of the Verkhovna Rada of Ukraine has intensified its work.

The Tax Code of Ukraine in subparagraph 14.1.1-1 of paragraph 14.1 of Article 14 defines the administration of taxes, fees, customs payments, a single contribution to mandatory state social insurance and other payments in accordance with the legislation, the control over compliance of which is entrusted to the regulatory authorities as a set of decisions and procedures of regulatory authorities and actions of their officials that determine the institutional structure of tax and customs relations, organize the identification and accounting of taxpayers and payers of a single contribution and objects of taxation, provide service to taxpayers, organize and control the payment of taxes, fees, payments in accordance with the procedure established by law (Tax Code, 2010).

It is well known that taxes are compulsory payment, that is, they are not collected on a voluntary basis, therefore any state must resolve issues regarding tax rates, objects and subjects of taxation, tax exemptions, and optimization of administrative costs for their administration to obtain benefits from taxation of a certain sphere of activity, rather than losses. At the same time, tax rates do not have a direct relationship with the costs of their administration; it cannot be argued that a low tax rate requires small costs for its administration, while a high one requires significant costs. In fact, not only the tax rate, but also the instruments of its administration affect the efficiency of collecting certain taxes, therefore, in each case of establishing taxes for a certain industry, the state must choose the optimal solution between the tax rate and effective administration instruments that enable the state to obtain it.

We agree with Toporetska Z. M., who rightly states that the gambling business has always been and remains a high-risk activity that requires special instruments of state management and control over this market (Toporetska, 2022a: 25). The same rules apply to the taxation of the gambling business,

since in the absence of effective tax administration instruments in the gambling business, it begins to be used by criminals to finance criminal activities (Toporetska, 2017: 134), tax evasion, legalization of corruption proceeds through gambling winnings (Toporetska, 2022b: 291) and much more.

Socially harmful activities have always had a taxation model characterized by a significantly higher tax burden on the industry than other activities. For example, alcohol, tobacco, mining, pawnshops, currency exchange, lottery activities, etc. usually have higher tax rates than other sectors of the economy (production of goods or provision of services).

However, a sharp significant increase in the tax rate for any industry without reasonable calculations usually leads to significant shadowing of the industry and requires the state to spend additional money on combating crime in this area. For example, Lutsyk A. I. clearly indicates the close dependence of the size of budget revenues on the degree of development of entrepreneurial activity and at the same time notes that the potential for increasing tax revenues from the income tax cannot be achieved by varying the rate of this tax alone (Lutsyk, 2006: 14).

Scientists have considered gambling business from the standpoint of civil, administrative, financial, and criminal law, but first, it is necessary to consider the question of what is meant by the activity of organizing and conducting gambling from the standpoint of tax law.

The current legislation does not contain a definition of gambling business or activities related to the organization and conduct of gambling. The Law of Ukraine "On the Prohibition of Gambling Business in Ukraine" (repealed in 2020) defined gambling business from the perspective of a prohibited (criminal) type of activity and defined it as "activity related to the organization, conduct and provision of access to gambling in casinos, on slot machines, computer simulators, in bookmakers, in interactive establishments, in an electronic (virtual) casino regardless of the location of the server" (Law No. 1334, 2009).

Law No. 768 defines the concept of gambling: "any game, the condition of participation in which is the player placing a bet, which gives the right to receive a win (prize), the probability of receiving and the size of which depend entirely or partially on chance, as well as the knowledge and skill of the player" (Law No. 768, 2020). But it is legally incorrect to define the term by analogy: gambling is a game. Therefore, problems arise with understanding the legal nature of gambling and the legal nature of the activity of organizing and conducting gambling as a type of activity subject to taxation.

In domestic legal science, there is no unity regarding the legal nature of gambling. For the first time in domestic legal science, the legal nature of the game was studied by Maidanyk N. I. The scientist claims that the game contract is a risk-based contractual transaction for winnings, concluded by two or more participants among themselves or with the organizer of the game according to the rules established by the organizer of the gambling establishment. Under this contract, the organizer of the game organizes and conducts a gambling game for the player, and the player, in confirmation of participation in it, makes a bet (cash contribution), which as a result of the game, if the circumstances coincide (or do not coincide) with the rules established by the executor, brings a certain gain or loss for each of the parties (Maidanyk, 2007: 68). Maidanyk N. I. refers the game contract to contracts for the provision of services, the scientist claims that the game is organized by a gambling establishment as a type of entertainment, and in the relationships created on the occasion of games, all the signs of services are present, that is, there is no material result, and the consumption of these services coincides with the process of their provision. The result is the satisfaction of a person's needs in gambling and betting. At the same time, the author qualifies the receipt of winnings as a sign of a specific type of services, which leads to a certain materialized result in the form of winnings (Maidanyk, 2005: 32).

Getmantsev D. O. disagrees with Maidanyk's N. I. view, arguing that a contract for the provision of a service provides for a certain equivalence between the funds paid by a person and the service (a certain purposeful activity existing in the form of a useful effect of labor) that he receives from the performer. At the same time, in a contract for a game, there is no performance of any equivalent action

in favor of the customer at all. The subject of the contract is the right to participate in the game and, accordingly, the right to receive a prize in case of victory (Getmantsev, 2008: 30).

Therefore, he examined in detail the nature of an aleatory agreement using the example of gambling. Getmantsev D. O. noted: “the difference of this type of contract is that the emergence of the rights and obligations of the parties to the contract is directly dependent on an event that is completely independent of the parties, random or simply objectively unknown to the parties”, no added value is created in the process of the game. Therefore, the scientist defined a game contract as a reciprocal bilateral aleatory agreement concluded between individuals, and in the case of organized games between individuals and legal entities, the subject of which is the right of an individual to participate in the game and to keep the winnings in case of victory (Getmantsev, 2008: 32).

The term "aleatory" comes from the Latin "alea" – dice, gambling, risk, chance, danger, bold aspiration. Risk in civil law and aleatory risk are related as generic and specific concepts. That is why aleatory risk is inherent in all the signs of ordinary risk in law: aleatory risk is associated with overcoming uncertainty in a situation of the need to make a certain choice in the conditions of the probability (permissibility) of the occurrence of a certain event, the consequences of which are unknown. However, considering the nature of such a type of risk as aleatory, it is possible to determine a few special (specific) characteristics inherent in it. Aleatory risk is a mandatory element of transactions under a special condition in the form of the possibility (probability) of the occurrence of a certain event, the moment and consequences of which are not reliably known. The occurrence of such an event may be a desirable phenomenon for a participant in a legal relationship of this kind (for example, winning the lottery) or, conversely, undesirable (the occurrence of an insured event, which in turn led to the insurer's obligation to make payments) (Andreyeva, 2015: 57). In gambling, the realization of risk leads to the achievement of the goal of entering the relevant relationship.

A similar position was later supported by Green O. O., who identified the following features of gambling obligations: “a special risk that arises from the game (aleatory obligatory risk); the formation of the prize fund of the game by its participants by combining the contributions of the players for their subsequent uneven distribution; the participants or party to the game and bet agreements are its organizer, unless otherwise provided for by the rules of the game or the law; the intention of the game participants to voluntarily put themselves in dependence on chance in order to receive pleasure from the game process and material benefit from the winnings. The scientist proposed the following features of a gambling agreement: consensual or real, retributive, bilateral, accession, risky (aleatory)” (Green, 2012: 194).

Toporetska Z. M. points out that “from the point of view of the legal nature of gambling, a game is a relationship between certain subjects, to which the participants and organizers of the game belong. The object of the game is the winnings, that is, money or other property, including property rights, which are transferred free of charge to the player who won when the result stipulated by the rules of a particular gambling game occurs. The legal relationship between the participants in the game is expressed in the performance of certain actions that must be regulated by the rules of the game. The author defines a gambling game as a risk-based agreement between the player and the organizer of gambling games, within which the player agrees to participate in the game for a fee according to the rules established by the organizer, and in case of victory to receive a prize, while the outcome of the game depends entirely or partially on chance, and the game itself is accompanied by the player's emotional tension from the expectation of victory and the delight of victory (gambling)” (Toporetska, 2022a: 25).

There is a position that gambling is a financial activity, usually proving this with the example of lotteries. Thus, O. A. Muzyka refers lotteries to methods of financial activity of the state (a method of voluntary accumulation of funds), because the essence of the game relations is precisely the redistribution of players' funds (to other players, to the state – it does not matter) (Muzyka, 2005: 18). We agree that this can be applied to lotteries in the case of a state monopoly, then lotteries really perform

the function of accumulating private funds of players into public funds and spending them for public purposes (Pohoretskyi & others, 2022: 357). In Ukraine, lotteries are not gambling (Toporetska, 2023: 99), and the lottery market has developed (Toporetska, 2019: 79) according to different principles and approaches than the gambling market (Toporetska, 2021: 515). Gambling is conducted by private organizers (state-owned enterprises are prohibited from such activities), therefore gambling cannot be considered a financial activity.

Petrychko N. O. defines gambling as games, the conduct of which is associated with obtaining material gain in the form of money, valuables, things or the right to own and dispose of movable and immovable property, and at the same time the scientist does not associate them with their conduct in a specific place (Petrychko, 2010: 15). However, the scientist considered gambling from the perspective of studying illegal activities, and therefore did not investigate the legal nature of legal gambling.

Since Ukraine has declared its desire to become part of the European Union, it is necessary to pay attention to the approaches that are in force in the EU.

In 2004, the European Commission attempted to bring gambling into the scope of the EU Directive on Services in the Internal Market recognizing gambling as a service. But already in 2006, amendments were made to the Directive, one of which (No. 59) provided for a direct rule that: "This Directive does not apply to gambling involving the placing of bets for money, including lotteries, the taking of bets... As stated in the Directive itself, gambling activities, including lotteries and betting, should be excluded from the scope of this Directive in view of the specific nature of these activities, which involve the implementation by Member States of policies on public policy and consumer protection" (Directive No. 123, 2006). But the said Directive does not concern and does not apply to taxation issues.

Taxation issues are regulated by the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. The document states in Art. 135 (i) that, as a general rule, "Member States shall exempt from tax the following transactions: betting, lotteries and other forms of gambling, under the conditions and subject to the limitations laid down by each Member State", but in Art. 401 states that: "without prejudice to other provisions of Community law, this Directive shall not prevent any Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, in general, any taxes, duties and charges which cannot be characterized as turnover taxes, provided that the retention of such taxes, duties and charges does not give rise to formalities when trade between Member States crosses frontiers (Directive No. 112, 2006) However, the said Directive does not specify the legal status of gambling for the purposes of taxation or exemption. The issues of corporate income tax on the activities of business entities engaged in the organization and conduct of gambling and the issuance and conduct of lotteries, the issues of licensing the gambling business, as well as the issues of taxation of payers of personal income tax in the European Union are regulated at the level of national legislation of the member states.

It should be noted here that the position of interpreting the legal status of gambling due to the lack of unity in the EU was taken by the ECtHR. In the case of *Schindler v. the United Kingdom*, the EU Court of Justice confirmed for the first time that the provision and use of cross-border gambling is an economic activity falling within the scope of the Treaty (although the case concerned lotteries, in most EU countries lotteries are classified as gambling). Interestingly, the court's decision describes in detail the ambiguity of the EU's approaches at that time. Thus, in paragraphs 16 and 17 of the Decision, the court states: "*In assessing whether Articles 30 and 59 of the Treaty apply, the Belgian, German, Irish, Luxembourg and Portuguese governments argue that lotteries are not 'economic activities' within the meaning of the Treaty. They argue that lottery has traditionally been prohibited in the Member States or are organized either directly by public authorities or under their control, exclusively in public interest. They consider that lotteries do not have an economic purpose, since they are based on chance. In any event, lotteries are recreational or entertaining in nature and not economic. The Spanish, French and United Kingdom Governments and the Commission argue*

that the operation of lotteries constitutes a 'service' within the meaning of Article 60 of the Treaty. They argue that such an activity concerns services which are normally provided for remuneration to the operator of the lottery or to its participants, but which are not covered by the rules on the free movement of goods" (Her Majesty's, 1994).

From the point of view of taxation, the ECtHR's decision in case C-124/97 "Leere v. Finland" is interesting, where the Court not only confirmed the classification of gambling as a service (the case concerned slot machines) but also recognized that the State may legitimately receive from gambling not only taxes, but also additionally take part of the company's profits. Thus, the Court indicated in paragraph 41: *"It is true that the amounts thus obtained by the State for the public interest may be obtained in other ways, such as by taxing the activities of various operators authorized to carry them out within the framework of non-exclusive rules; however, the obligation imposed on a licensed public authority, requiring it to pay the proceeds of its activities, is a measure which, taking into account the risk of crime and fraud, is certainly more effective in ensuring the establishment of strict limits on the profitable nature of such activities."* (Markku Juhani Läärä, 1999).

The Court has subsequently issued similar rulings, consistently confirming that various types of gambling are services. In particular, in 2003, the ECtHR in the Gambelli v. Italy case concerned online gambling, the Court ruled that *"online gambling is covered by the concept of a service and that national legislation which prohibits operators established in a Member State from offering online gambling services to consumers in another Member State, or which impedes the freedom to receive or use services offered by a provider established in another Member State, constitutes a restriction on the freedom to provide services"* (Criminal proceedings, 2003).

In 2011, the Commission launched a debate on the challenges of regulating online gambling by issuing a Green Paper on online gambling in the internal market. In this document, the Commission confirmed that *"under EU law, as confirmed by the Court of Justice of the European Union, gambling services fall under Article 56 TFEU and are therefore subject to the rules on the provision of services."* Although gambling services are not regulated by sectoral EU legislation and are excluded from horizontal acts such as the Services Directive (2006/123/EC) or the E-Commerce Directive (2000/31/EC), they are subject to several rules of secondary EU law (Green Paper, 2011). Such secondary legislation are: the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive, the Privacy and Electronic Communications Directive and the Directive on the Common System of Value Added Tax.

In 2014, the European Commission issued recommendations on the principles of protecting consumers and gamblers online and preventing underage gambling online (2014/478/EU), in which it defined: *"online gambling service"* means any service that involves a bet with monetary value in games of chance, including those with elements of skill such as lotteries, casino games, poker games and betting, provided by any means at a distance, by electronic means or by any other technology to facilitate communication and at the individual request of the recipient of the services." (Recommendation No. 478, 2014).

Finally, the 2015 Directive defined gambling as a service for the purposes of financial monitoring. Thus, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC defines in Art. 3 (14) *"gambling services"* means services that involve the acceptance of monetary bets in games of chance, including games with an element of skill, such as lotteries, casino games, poker and betting, and are carried out at a specific physical address or remotely, by electronic means or any other technology to facilitate communication, and at the indivi-

dual request of the recipient of the services”. (Directive No. 849, 2015). Here, in part 3 of Article 48, it is stipulated that the competent authorities must have enhanced supervisory powers in relation to credit institutions, financial institutions and providers of gambling services. That is, here providers of gambling services are placed in the same line as providers of financial services.

Thus, for the purposes of taxing the gambling market, gambling should be equated with services, as is done in EU legislation

Conclusion. In the legal literature in Ukraine, there is no unity in approaches to understanding the legal nature of gambling: it is considered as a service, as a type of aleatory contract or as a type of financial activity for the provision of financial services. EU legislation clearly states that the gambling business involves the provision of services for participation in a gambling game. Given the obligations of Ukraine that arose with the receipt of the status of a candidate for EU membership, it is important to bring Ukrainian legislation into line with EU requirements, and therefore to understand the contract for participation in a gambling game as a service.

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