

Romania's Gambling Law Amendments: A Lawyer's Analysis

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Introduction

The Romanian government recently passed Government Decision No. 823/2011 which amends and supplements the functioning of Government Emergency Ordinance No. 77/2009 on the organisation of gambling activities - the primary piece of legislation for the sector. This new enactment had a particular focus on the online gambling market and has introduced, for the first time, conditions for the licensing of online gambling operators and for the organisation of online gambling activities.

Government Decision No. 823/2011 entered into force on August 31, 2011.

Before proceeding with an outline of the most important changes brought about by this new law, it is worth making certain comments on the position of the Romanian Government in relation to online gambling from a historical perspective.

Background

With the publication of Government Emergency Ordinance No. 77/2009, Romania managed to replace its former gambling legislation dating back to 1998.

The 2009 law did not include provisions concerning the organisation of online gambling. The law, however, qualified the activity of organising gambling activities through the internet or intranet communication systems, as well as through other communication systems (landline or mobile telephony), as a criminal offence.

To the best of our knowledge, this restriction has never been enforced. It is also questionable whether this restriction was even applicable to foreign-based operators offering online gambling to Romanian customers.

In any event, the restriction was removed in 2010 when the government voiced its intention to adapt the legislative framework to permit online gambling, in effect – reflecting the market reality in Romania.

New Legislation

In December 2010 the government passed Law No. 246/2010 to legalise and regulate online gambling. The following categories of online gambling activities were first regulated with the passing of this law:

- Fixed-odds betting (including sports and other fixed-odds betting).
- Other online gambling products. Here the wording of the law is very broad and may include, inter alia, casino, poker and skill games.
- Bingo games.

Note: online mutual betting and lottery are also permitted under Romania's legal framework, though such gambling activities may be performed only by the state-owned company Loteria Romana. However, Loteria Romana does not yet offer such products.

Lack of Licensing Conditions, Secondary Regulations

While the December 2010 law sought to legalise and regulate the online market, the law did not contain any specific conditions related to the licensing and operation of online gambling in Romania.

It was, however, expressly stated that such licensing conditions would be provided through secondary regulations, implementing the provisions of the Government Emergency Ordinance No. 77/2009, as amended through Law No. 246/2010.

On November 30, 2010, Romania notified draft implementing secondary regulations to the European Commission and other member states in accordance with the notification procedure provided under Directive 98/34/EC. These draft implementing secondary regulations received detailed opinions from both the European Commission and Malta, while the UK issued comments.

This development expressed serious concerns on the compatibility of the secondary regulations with EU law.

Despite the criticism received from the European Commission and from other EU member states, the Romanian government adopted the long expected secondary regulations, through Government Decision No. 823/2011, in a form which is generally similar to the one which was notified to the European Commission and other member states.

As noted above, these secondary implementing regulations entered into force on August 31, 2011.

Licensing Conditions for Online Gambling Operators

Among the licensing conditions, applicants are required to be set-up as a Romanian legal entity and to hold directly or indirectly (through a shareholder/partner) a Romanian offline licence for gambling activities.

These two conditions raise serious concerns as to their compatibility with the EU principle of free movement of services by creating discrimination on grounds of nationality. Moreover, the condition obviously favours the existing operators licensed for offline gambling activities versus the operators that intend to enter the Romanian online gambling market.

Various legal methods of challenging this provision may be construed, but, in principle, none appears to ensure an expeditious and satisfactory outcome for those operators that do not meet this requirement.

Another provision requires the applicant to hold all the technical equipment which support the organisation and the streaming of the online gambling activities in Romania, except for the operators who are licensed in an EU member state and hold their equipment in an EU member state. Nonetheless, the latter are obliged to connect their equipment to the system of the public or private bodies that will monitor online gambling activities in Romania.

Apparently, compliance with this provision cannot be ensured even if the applicant is licensed in another EU member state which does not impose conditions for holding technical equipment in an EU member state.

Also, Government Decision No. 823/2011 lays down specific obligations for applicants whose affiliates are non-EU based licensed online gambling operators. One obligation is to provide the Romanian Gambling Authorisation Commission with information about the accounts opened by players holding Romanian citizenship on their respective foreign gambling platforms and to, furthermore, transfer the gaming accounts registered by such Romanian nationals on gaming platforms pertaining to non-EU licensed operators, or to operators which do not hold their technical equipment in an EU member state (only if the accounts are accessed from Romania), to the gaming platform pertaining to the online gambling operator licensed in Romania within one month as of the date of commencement of its gambling activities in Romania.

It should be noted that the term "affiliated entities" is not used in a consistent manner and may leave room to different interpretations.

The Monitoring and Reporting Operator

The Romanian online gambling market is going to be monitored by one or several monitoring and reporting operator(s). Such prerogatives may be entrusted to both public authorities or to privately-owned companies. The conditions for the establishment of these operators, especially private operators, remain unclear as Government Decision No. 823/2011 does not make any reference to the procedure for their appointment.

What strikes us the most are the effects of the requirement which obliges the applicants for a Romanian online gambling licence to have a valid contract (as endorsed by the Romanian Gambling Authorisation Commission) concluded with a monitoring and reporting operator to be able to organise online gambling on Romanian soil.

This likely means that the Romanian online gambling market will be de facto blocked until the licensing of the first monitoring and reporting operator.

Online Gaming Accounts

Government Decision No. 823/2011 lays down certain requirements which apparently are not consistent with generally accepted practices in the online gaming industry.

For instance, it states that deposits and cash outs to/from the players' accounts must be made through a bank account opened with a Romanian or EU-based bank and, in the same respect, lists the personal bank account among the mandatory information to be provided by players when opening a gaming account.

Online secured payment systems such as Moneybookers and Neteller are not accepted, which may be considered as a significant drawback in the process of attracting players who do not wish to disclose their personal bank account details.

Moreover, online gambling operators are prevented from transferring credits in players' accounts/bank accounts. Again this would hamper current methods of promoting online gambling services in view of attracting new players or maintaining the interest of existing players, as cash and points bonuses and tickets are a commonly used marketing practice of online gambling operators across the world.

On a related matter, the enactment does not allow the transfer of money or chips between players' accounts.

Taxation

Government Decision No. 823/2011 provides for the obligation of operators to freeze the amount representing the player's obligation to pay tax on winnings and to calculate, withhold and pay to the state budget the tax on the transactions made by each player, with the observance of the Romanian taxation legislation.

The income tax rate for revenues made from gambling amounts to 25 percent and applies on the net amount gained by the players. The net amount is calculated as the difference between the total amount gained by the player in one day and a fixed non taxable amount of RON 600 (approximately €140). Normally, the gain should be considered as realised (by the individual) at the moment of payment. However, the relevant norms related to the taxation of the income, made by individuals from gambling activities, have been designed for offline gambling income and, hence, it is unclear how it will apply to the income made by Romanian tax residents from online gambling.

In addition, the new regulation includes certain provisions purported to protect the players' funds placed in their accounts - which remain rather unclear. Briefly, it states that funds existing in the players' accounts must be deposited into a bank account that cannot be frozen and shall be kept separate from the funds of the online gambling operator - the latter being the sole person entitled to have access to such funds. It is unclear which funds may be subject to this obligation, for instance, balance of the gaming accounts or including the amounts related to the ongoing placed bets? Also, the aforementioned provision wishes purportedly to create an impossibility to freeze the bank account where the players' funds are placed, though it is unclear if such provision is enforceable.

Indirect Enforcement Strategies: ISP and Payments Blocking

Being conscious of the fact that the direct enforcement of the administrative and criminal sanctions against illegal foreign content, as laid down in the relevant legislation, may prove to be difficult, the Romanian government seems to envisage various indirect enforcement strategies by targeting not the foreign online provider, but the local intermediaries (internet services providers (ISPs) and banks) or the end-users.

For instance, Romanian laws now criminalise the participation of Romanian nationals in online gambling not licensed in Romania or the use of devices which disguise the identity of the player.

Government Decision No. 823/2011 provides that the monitoring and reporting operators shall have the power to identify websites operating games of chance without a licence in Romania as well as websites advertising such activities, and notify such information to ISPs "in order to allow the blocking of access to such websites". There seems to be no obligation for the ISPs to actually block access, but the same provisions mention that in case ISPs fail to block access to illegal websites for which the blocking was requested, the monitoring and reporting operator will "inform" the Romanian Gambling Authorisation Commission.

In Romania there is currently no regulation directly addressing the blocking or filtering of internet content, and no regulation allowing for an authority to impose on an ISP the obligation to block a certain website or type of internet content. Under such circumstances, the practical application of the provisions in Government Decision No. 823/2011 referring to the blocking of websites remains unclear.

Analogous provisions are included in the specific legislation concerning the operation of credit institutions where the latter may be obliged to refuse to process any payment order from Romanian nationals to foreign online gambling providers by the relevant supervising authority, that is, the National Bank of Romania.

Outlook

As a general impression, we may conclude that the recent secondary regulation, Government Decision No. 823/2011, has been enacted in haste and without due consideration to the comments made by the European Commission and by other EU member states in the context of the notification procedure provided under Directive 98/34/EC and by the online operators interested in the Romanian market during the consultation phase.

Therefore, the implementation of these norms appears to be a problematic issue, with the future legal outlook for the Romanian gambling market uncertain, due, in part, to the legal and practical implementation issues highlighted in this article.



About the Author

Cristian Radu is a managing associate at Tuca Zbarcea Asociatii. He graduated in 2003 and was admitted to the bar in 2004. His areas of practice are corporate and commercial, employment, competition, energy and natural resources, and mergers, acquisitions and privatisation.

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About GamblingCompliance

Founded in February 2007, GamblingCompliance has very quickly established itself as the leading publisher in the global gambling industry – specialising in legal, regulatory, political and market information. Our independent and impartial analysis, delivered daily to a worldwide client base of over 800 top gaming executives and regulatory bodies via a cutting-edge technology platform, has ensured that we have become an essential information service for the industry.

We help clients and their advisors reduce exposure to regulatory and market risk by providing timely information on an advanced web-based platform, allowing clients to monitor, track and receive updates on regulation, compliance, competitors and market developments around the world.

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