

ANNULMENT OF LICENSES FOR GAMBLING ACTIVITIES: EXPERIENCE OF THE REPUBLIC OF MOLDOVA

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INTRODUCTION

Gambling is a significant economic activity. At the same time, this activity raises serious risks to society. For these reasons, states have felt the need to establish rigorous and uniform regulations in this area.

In the Republic of Moldova, the legal framework for the organization and operation of gambling was established primarily by Law No. 285 of 18 February 1999 on Gambling¹ (hereinafter referred to as Law No. 285/1999).

This law made a distinction between: (a) games of chance—the results of which are entirely generated by random elements, when random numbers and their equally distributed combinations that influence the outcome of the game are determined by playing cards, roulette, dice, lottery tickets, gaming machines, or otherwise; (b) bets—the results of which are partly generated by random elements, when the player relies on the likeliness or unlikeliness of an

event, whilst the game organizer undertakes to pay the gain to the winner; and (c) skill games—the outcome of which partly depends on the physical ability of the player, and the minimum gain cannot be smaller than the stake.

Gambling activity was considered as an entrepreneurial activity and, thus, it was subject to licensing. Pursuant to Article 9(a) of Law No. 285/1999, the license for gambling activity was issued for one year to the legal entity carrying out any kind of gambling activity, provided that it was established as a limited liability company. *Per definitionem*, the license is a document granting the legal entity holding a state registration certificate an authorization to organize games of chance, bets, or skill games within their premises stated in the license, in compliance with the game rules and the law provisions. In other words, a license is a permissive act.

Also, the legal entity should have had a statutory capital (on the date of submitting an application for a license) in the amount of: MDL 600,000 for casinos; MDL 250,000 for national lotteries; MDL 200,000 for bets, halls with gaming machines; MDL 150,000 for regional lotteries; MDL 50,000 for skill games; and MDL 25,000 for gaming machines. According to the National Bank of Moldova official exchange rate, on 1 July 2018, MDL 1 was equal to USD 0.059.

In addition, pursuant to Law of the Republic of Moldova No. 451 of 30 July 2001 on Licensing of Entrepreneurial Activity (repealed),² the applicant for a gambling license was supposed to pay a fee, under the following conditions: (1) for the operation of cash-win gaming/slot machines—MDL 23,100 per machine; (2) for the operation of American roulette-type cash-win gaming machines—MDL 1,280,000 per machine; (3) for stakes on sports and other types of competitions—28% of the total amount of accepted stakes; (4) for the organization and operation of lotteries: (a) instant—28% of the total announced cost of lottery tickets; (b) numerical—28% of the total cost of sold lottery tickets; and (5)

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¹Law of the Republic of Moldova No. 285 of 18 February 1999 on Gambling (repealed), published in the Official Gazette of the Republic of Moldova, 1999, No. 50-52.

²Law of the Republic of Moldova No. 451 of 30 July 2001 on Licensing of Entrepreneurial Activity (repealed), published in the Official Gazette of the Republic of Moldova, 2005, No. 26-28.

for the maintenance of casinos—MDL 576,000 per game table.

Last but not least, it should be emphasized that only the pursuit of national lotteries used to be a state monopoly. Thus, in essence, Law No. 285/1999 governed, under certain conditions, an open market for the organization and operation of gambling in the territory of the Republic of Moldova.

Later, things took another turn. *In concreto*, on December 16, 2016, the Parliament of the Republic of Moldova enacted Law No. 291 on the Organization and Operation of Gambling³ (hereinafter referred to as Law No. 291/2016). In fact, this law replaced Law No. 285/1999 as of January 6, 2017—the date of its publication in the Official Gazette of the Republic of Moldova and, accordingly, the date of its entry into force.

According to Article 3 of Law No. 291/2016, the organization and operation of gambling activities in the territory of the Republic of Moldova, except for the maintenance of casinos, is a state monopoly and shall take place under the provisions of Law No. 291/2016. The state shall administrate gambling activities, which fall under its monopoly, through the National Lottery of Moldova. Moreover, the activity of the organizer of gambling—the National Lottery of Moldova, which is a state monopoly—is not subject to licensing. The National Lottery of Moldova is a joint stock company established by the government of the Republic of Moldova and is fully owned by the state.⁴

According to Article 6 of Law No. 291/2016, gambling is considered an activity related to: the maintenance of casinos; organization and operation of lotteries; organization and running of halls with cash-win gaming machines; bets on sports competitions/events; and organization of online gambling. However, only the casino maintenance area has not been monopolized by the state. Therefore, only this area is currently subject to licensing.

The final and transitory provisions of Law No. 291/2016 aiming to implement the new concept on gam-

bling provide that the holders of gambling licenses must bring their activity in compliance with the law's requirements within 30 days from the date of its publication. These provisions apply only to gambling operators involved in casino maintenance. Such operators shall take into account, *inter alia*, that the license for casino maintenance is issued to a legal entity which complies with the requirements for the organization of activities covered by Law No. 291/2016, and shall be valid for five years as of the date of issuance, subject to extension. The fee for the license issuance/extension shall be paid for each year of validity, being equal to MDL 600,000 per gaming table (the fee increased by 4% as compared to the fee previously established by Law No. 451 of 30 July 2001 on Licensing of Entrepreneurial Activity) and MDL 130,000 per roulette table.

In addition, the licenses issued for carrying out activities, which were monopolized by the state, were declared null and void. Thus, on January 6, 2017, by operation of law, the licenses issued to gambling operators were annulled. Hence, the following types of activities were banned: organization and operation of lotteries; organization and operation of gambling halls with cash-win gaming machines; organization and operation of bets on sports events or on events of a different nature (such as Oscar and other film awards, Miss World, Eurovision, TV shows and music shows, TV reality shows, political events, financial events, etc.⁵); and organization of online gambling. Nonetheless, was this legislative measure justified? Was indeed the property right infringed?

Hereinafter we intend to look for the answers to these questions. To this end, it is important to take a closer look at the events that preceded the enactment of Law No. 291/2016 and the annulment of licenses held by gambling operators.

ANNULMENT OF THE GAMBLING LICENSES

It seems that the whole story began with a case reported on June 28, 2016, by a political party

³Law of the Republic of Moldova No. 291 of 16 December 2016 on the Organization and Operation of Gambling, published in the Official Gazette of the Republic of Moldova, 2017, No. 2-8.

⁴Decision of the Government of the Republic of Moldova No. 371 of 24 May 2011 on the Establishment of Joint Stock Company "National Lottery of Moldova," published in the Official Gazette of the Republic of Moldova, 2011, No. 87-90.

⁵SERGIU BRINZA AND VITALIE STATI, *TREATY OF CRIMINAL LAW. THE SPECIAL PART* 107 (Central Printing House, 2015); VITALIE STATI, *ECONOMIC CRIMES: COURSE NOTES* 217 (CEP USM, 2nd ed., 2016).

representative. The case revealed the difficult situation a family was going through due to the fact that a family member, namely, a 15-year-old boy, got addicted to gambling. The teenager started to borrow money and had committed a series of illegal deeds to indulge himself with that scourge. Moreover, it was mentioned that, according to the findings of a study on the manner of operation of casinos and gambling halls and their impact on children, this was not an isolated case, but rather a common phenomenon that was spreading throughout the Republic of Moldova. Gambling venues had sprung up like “mushrooms after the rain.” Such halls opened on the ground floors of apartment blocks and other places unsuitable for such activities, which are dangerous for teenagers. The disclosure of this story served as a way to convey a clear and blunt message to the authorities: “It’s time to protect children from gambling addiction.” To achieve this goal, the aforementioned politician proposed to enact appropriate legislative measures, as well as an effective action plan (rigorous control by police and tax authorities), promising to get “personally involved to arrange things”⁶ in the given field.

This speech was given full media coverage and most likely raised the awareness of many people. The state authorities soon got involved and carried out numerous inspections at gambling companies. Following those inspections, on October 22, 2016, the licensing authority (Licensing Chamber) decided to suspend 61 licenses (out of the total number of 65 licenses; thus, four gambling operators remained untouched), and filed an application with the court for the confirmation of and control over the undertaken measure.

In the Republic of Moldova, the authorities and institutions empowered by law to issue permissive acts in the field of entrepreneurial activity may request, as provided for by law, the suspension or, where appropriate, withdrawal of licenses. This makes it impossible to continue the entrepreneurial activity.

Referrals should be submitted to the court within three working days, according to Article 278¹⁰–278¹⁴ of the Civil Procedure Code of the Republic of Moldova. In case of failure to meet the aforementioned deadline, the suspension or, where appropriate, the license withdrawal shall be canceled. The court shall consider the application for the suspension or withdrawal of the permissive act related to entrepreneurial activity within five working days from the date of its receipt. Following the application review in general terms, the court shall decide whether to accept or reject it. However, the decision of the licensing authority on the suspension or withdrawal of the license is enforced prior to the court’s pronouncement of the final judgment. This decision shall cease its effects if it is canceled by the court judgment.

Thus, on October 22, 2016, over 200 police officers broke into and sealed the casinos and gambling halls throughout the country and stopped their activity.

Later, on November 17, 2016, Centru Court, Chisinau Municipality, ruled on temporary suspension of 61 licenses issued to gambling operators, of which 14 were licenses for gambling activities—stakes on sports competitions, and the other 47 licenses were for the operation of cash-win machines.⁷

While deciding so, the court held that the gambling operators concerned had committed a number of violations, for instance, failure to pay the annual license fee within the prescribed time limit;⁸ failure of the licensees to comply with the deadline set out for the submission of an application requesting the issuance of a duplicate for the lost or damaged license; carrying out the licensed activity by the subsidiary or other subdivision of the licensee in the absence of a certified copy of the license; organization of gambling in venues not envisaged by the terms of the issued license; noncompliance of the gambling venues stated in the authorization for the organization thereof with the requirements referred to in Law No. 285/1999 (deployment of a larger number of gaming machines than the number stated

⁶*It’s Time to Protect the Children against Gambling Addiction* [translated from Romanian], BLOGOSFERA.MD (July 4, 2018), <http://blogosfera.md/view-post-v-353101-0-romana.html>.

⁷Judgment of Centru Court, Chisinau Municipality of 17 November 2016, Casefile No. 2c-934/16 (July 4, 2018), https://jc.instante.justice.md/ro/hot?solr_document=20-2c-23209-26102016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

⁸As a digression, it should be noted that as of September 30, 2016, the state budget of the Republic of Moldova received “license fee” revenues in the total amount of MDL 90,461,546 for 2016, of which MDL 76,769,837 was collected from the fees paid for gambling, which represented about 85% of the total receipts. As compared to the similar period of 2015, gambling receipts increased by MDL 2,609,183, or by 3.1%. This implicitly shows the increase in the number of gambling operators.

in the permissive act, etc.); admission to gambling of persons under the age of 18.⁹

Most of the ascribed violations are misdemeanors, and appropriate penalties shall apply. Thus, as per Article 277¹ paragraph (2) of the Contravention Code, the pursuit of gambling in the absence of a license or under a suspended/withdrawn license, or under an invalid license shall be penalized with a fine of 60–120 conventional units (a conventional unit is equivalent to MDL 50, which equals approximately USD 2.96) imposed on the person in charge, and a fine of 120–180 conventional units imposed on the legal entity.

According to paragraph (3) of the same Article, the admission to gambling (except for lotteries and skill games) of persons under the age of 18, the admission to gambling of persons who, under the influence of alcohol, narcotic drugs, or other strong effect substances, or due to other reasons, are obviously unconscious of their actions, as well as allowing such persons to enter the game venue, shall be penalized with a fine of 48–72 conventional units imposed on the individual, a fine of 150–270 conventional units imposed on the legal entity with or without deprivation in both cases of the right to conduct a particular activity for a period of at least five months to the maximum of one year.

Finally, according to paragraph (4) of the foregoing Article, failure to comply with the rules of the game or the organization of gambling according to rules that do not meet the requirements of the legislation on gambling and other regulatory acts, including the use of more than 10-year-old gaming machines or failure to declare, upon licensing, all structural units and/or equipment used (all cash-win gaming machines and tables), is to be penalized with a fine of 120–180 conventional units imposed on the person in charge, and with a fine of 240–300 conventional units imposed on the legal entity.

In this case, although there were no documents that could have allowed the application of sanctions un-

der the aforementioned rules, the alleged violations committed by the gambling operators were established by an act issued by the Financial Inspection under the Ministry of Finance of the Republic of Moldova. That circumstance was sufficient for the court to ascertain the occurrence of unlawful facts. Further, the court pointed out that

suspension of licenses must be regarded not as an act of deprivation of property [. . .] but rather as a measure to control the use of property [. . .]. The measure taken by the Licensing Chamber in respect of the license holders is legal and serves the public interest (preventing prejudices to the state, to the interests of citizens and to public health). In addition to that, the principle of proportionality is also observed in this case, since the suspension of the license would have temporary effect until the removal of all identified deficiencies.¹⁰

The court thus concluded, in light of the particular circumstances of the case, that the suspension of licenses was a necessary measure in a democratic society.

This conclusion was endorsed by Chisinau Court of Appeal in its judgment of November 7, 2017.¹¹ By that judgment, the appellate court dismissed the appeals submitted by 23 gambling operators¹² and confirmed the judgment issued by the first instance court.

In the explanatory part of that judgment, the appellate court underlined that

in the modern society, gambling is a form of socially accepted entertainment; however, the risk that the practicing of this activity might degenerate into an uncontrolled habit, with many negative consequences, is high under the circumstances when the State does not ensure compliance by both organizers and gamblers with the requirements of the current legislation to

⁹Judgment of Centru Court, Chisinau Municipality of 17 November 2016, Casefile No. 2c-934/16 (July 4, 2018), https://jc.instante.justice.md/ro/hot?solr_document=20-2c-23209-26102016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

¹⁰*Id.*

¹¹Judgment of Chisinau Court of Appeal of 7 November 2017, Casefile No. 2ac-1153/16 (July 4, 2018), https://cac.instante.justice.md/ro/hot?solr_document=02-2ac-26789-01122016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

¹²Implicitly, it follows that the other 38 gambling operators, the licenses of which were also suspended, have not questioned the legality of the first instance verdict.

mitigate and even eliminate the negative effect of the violations, which occur in this field.¹³

The court mentioned that, under particular circumstances, participation in gambling can degenerate into addiction, while the main task of the state is to ensure public health not only in medical, but also in social terms, given that the economic situation in the country negatively influenced both the gamblers and their families. The provision of special conditions regulating gambling activities pursues the aim of ensuring social protection, and any violation thereof shall be deemed contrary to the public interest, which in the present case is superior to the personal interest of the gambling operator.¹⁴

In support of the above, the appellate court noted that, according to the information held by the National Health Management Center, over 10% of high school students in the Republic of Moldova, coming from disadvantaged families, were attracted by gambling or had ascertained they participated in online gambling. Thus, there can be noted a progressive increase in the categories of people attracted by gambling, and the most advanced degree of addiction was noted among teenagers who spent more time in gaming rooms or playing video games. According to statistics, over 10,000 Moldovan youths were addicted to gambling.¹⁵

Also, according to the data of the Association of Entrepreneurial Business Associations, in 2015, the owners of gambling halls in the Republic of Moldova collected over MDL 350 million.¹⁶ This means that Moldovans suffering from this addiction spent circa MDL one million each day on gambling. This amount is sufficient to buy a three-room apartment

in the center of the capital of the Republic of Moldova¹⁷ (i.e., Chisinau Municipality).

Thus, one of the possible conclusions would be that the measure applied by the court sought to combat gambling addiction. However, as the appellate court further noted, “this measure [suspension of licenses] has been applied to protect public order and to increase the level of responsibility of license holders in this field.”¹⁸ Protection of public order¹⁹ is a generic goal, which also includes combating gambling addiction. On the contrary, “increasing the level of responsibility of license holders” denotes that it would rather serve to prevent the future unlawful deeds. Indeed, these are legitimate purposes.

Regarding the proportionality of the interference, the appellate court reiterated that the suspension of licenses was temporary and a consequence of the violations committed by gambling operators.²⁰ Here, further clarifications are required since “temporary measures are less restrictive than permanent ones.”²¹ From this perspective, the suspension of licenses was supposed to generate legal effects until the removal of circumstances that had conditioned it. The regulatory support for this conclusion derives from the provisions of Article 278¹⁴ of the Civil Procedure Code of the Republic of Moldova, according to which

[f]ollowing the remedy of the circumstances that led to the suspension of the permissive act referring to the entrepreneurial activity, the court which issued the appropriate judgment, at the request of the entrepreneur or of the competent authority, shall initiate the proceedings within five working days and deliver a judgment

¹³Judgment of Chisinau Court of Appeal of 7 November 2017, Casefile No. 2ac-1153/16 (July 4, 2018), https://cac.instante.justice.md/ro/hot?solr_document=02-2ac-26789-01122016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

¹⁴*Id.*

¹⁵*Id.*

¹⁶The highlighted reports are silent regarding the margin of error. We doubt that in the Republic of Moldova it could have been possible to spend one million MDL on gambling every day. These figures seem to be inflated. Eventually, it may be a question of money laundering.

¹⁷*Surprising Statistics! How Much Money Do Moldovans Daily Spend on Gambling* [translated from Romanian], PUBLIKA.MD (July 4, 2018), https://www.publika.md/statistica-surprinzatoare-cati-bani-cheltuie-zilnic-moldovenii-impatimiti-de-jocurile-de-noroc_2473361.html.

¹⁸Judgment of Chisinau Court of Appeal of 7 November 2017, Casefile No. 2ac-1153/16 (July 4, 2018), https://cac.instante.justice.md/ro/hot?solr_document=02-2ac-26789-01122016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

¹⁹Jacqueline Duteil de la Rochère, *Betting, Monopolies and the Protect of Public Order, in FROM SINGLE MARKET TO ECONOMIC UNION, ESSAYS IN MEMORY OF JOHN A. USHER 103–117* (Niamh Nic Shuibhne and Laurence W. Gormley eds., Oxford University Press, 2012).

²⁰Judgment of Chisinau Court of Appeal of 7 November 2017, Casefile No. 2ac-1153/16 (July 4, 2018), https://cac.instante.justice.md/ro/hot?solr_document=02-2ac-26789-01122016&solr_document_2=&DenumireDosar=&Tematica=&solr_document_3=All.

²¹Eva Brems and Laurens Lavrysen, “*Don’t Use a Sledgehammer to Crack a Nut*”: *Less Restrictive Means in the Case Law of the European Court of Human Rights*, 15 HUM. RIGHTS L. REV. 1–30 (2015).

dismissing the suspension of the permissive act. Under this judgment, the competent authority shall issue the decision to resume the entrepreneurial activity.

However, such a solution is quite uncertain. We believe that in this case the court was required to set a fixed period within which the person would be required to remove the circumstances that led to the suspension of the license. Suspension of the license cannot be perpetual. A fortiori, pursuant to Article 20 (3) of Law No. 451 of 30 July 2001 on Licensing of Entrepreneurial Activity, the suspension of a license cannot exceed two months. The courts failed to take account of this provision.

At the same time, the courts overlooked the fact that the gaming halls owned by the gambling operators concerned were closed and sealed by the police when the licensing authority issued the decision to suspend the licenses. It follows that, *ab absurdo sensu*, some imputed violations could not be remedied from the start. How was it possible, for instance, to display the copy of the license in a visible place or to withdraw extra tables or game machines since access to the gaming halls was forbidden? It is obvious that the gambling operators did not have any effective opportunity to remedy those violations. *Per a contrario*, other violations could have been resolved with no need to access the gaming halls, e.g., payment of the license fee. The courts thus should have performed a more comprehensive analysis and not put forward mere legal fictions. To be clear, the author is not advocating tolerance of violations committed by the gambling operators, but rather believes that they should be held liable for their illicit conduct in the presence of guarantees ensuring the right to defense and the right to a fair trial.

In the context of the above, the following part of the appellate court judgment cannot be ignored:

[. . .] the applicants' arguments relating to the fact that the decision of the Licensing Chamber

would be a consequence of political statements made prior to the election campaign have not been supported by evidence since the publication of such statements in the media is not related to the subject of this dispute. No relevant evidence has been submitted to contradict the commission of the imputed violations and exclude the offending conduct of the appellants.²²

Most likely, the quoted passage referred to statements of the aforementioned politician. Gambling operators made a connection between the politician's statements and the license suspensions. This assumption is supported by the fact that the day after the closure of gaming halls by the police, the person under discussion posted a reaction on his blog and took sole credit for solving the gambling problems: "[y]ou have pointed out the issue, and the authorities acted fairly and categorically. Things have been solved by closing down the [gaming] halls, and this activity will be resumed only after severe regulations are enacted and well-established control arrangements, both in terms of venues and payment of state fees or full compliance with the ban on children's access to such facilities, are in place."²³ Against this background, the appellate court emphasized that there was no rationale on the one hand, between the alleged infringements imputed to gambling operators which led to the suspension of licenses and, on the other hand, the statements under discussion. Indeed, it was not the said political discourse that served as catalyst for the infringements committed by the gambling operators concerned. At the same time, as it results from the appellate court judgment, the gambling operators would not have placed themselves on a probation field to overturn the imputed facts. Finally, it's possible that there was no political interference in the decision to suspend the gambling licenses. In other words, that was not a "telephone justice" in which the telephone was pointless and the justice hilarious.²⁴ Otherwise, the situation would be worrying. But who knows what really happened?

Turning to the facts of the present case, it should be noted that whether the gaming operator fails to

²²Judgment of Chisinau Court of Appeal of 7 November 2017, Casefile No. 2ac-1153/16 (July 4, 2018), <https://goo.gl/ZETA1W>.

²³*This Is Our New Victory!* [translated from Romanian], (July 5, 2018), <https://goo.gl/HUnErG>.

²⁴European Court of Human Rights, partly dissenting opinion of Judge Bonello, Case of *Flux (No. 2) v. Moldova*, Application No. 31001/03, Judgment of 3 July 2007 (July 5, 2018), <https://goo.gl/Uihyqv>.

remedy the circumstances that led to the suspension of the license, the licensing authority may request the court to withdraw the license. The fact is that, in the meantime, there was no need in the case under consideration to submit a request to withdraw the licenses from 61 gambling operators. This was due to the fact, as noted above, that Law No. 291/2016 had annulled licenses for gambling activities, except for the maintenance of casinos.

Even though the court judgment on license suspension became final on November 7, 2017 (the date when the judgment of Chisinau Appeal Court was passed), as of January 6, 2017 (when Law No. 291/2016 was enacted), the licenses in question were annulled *ope legis*. In other words: following the enactment of Law No. 291/2016, the court judgment on suspending the licenses of gambling operators became “outdated.” Strange situation, is not it? Perhaps, the suspension of the licenses in question was just a (preliminary) measure to prepare the “ground” in the area of gambling, i.e., for the adoption of Law No. 291/2016. Fleshing out the foregoing statement, one has to admit that the court judgment on suspending the licenses of gambling operators is not challengeable anymore and, therefore, it cannot be quashed. Moreover, in this particular case, even Law No. 291/2016 cannot be appealed by gambling operators at the Constitutional Court. Eventually, the Moldovan president, government, minister of justice, Supreme Court of Justice, general prosecutor, member of Parliament (MP), or the ombudsman may require the Constitutional Court to check the constitutionality of Law No. 291/2016. It remains to be seen if one of the aforementioned officials would refer the matter to the Constitutional Court.

The fact that all domestic legal remedies (available for gambling operators) have been exhausted shall open the path to refer the case to the European Court of Human Rights (hereinafter referred to as ECtHR).

As a rule, the ECtHR considers the submitted applications within four to six years.

DISCUSSION

A brief journey through the ECtHR jurisprudence entails ascertaining that the license to conduct a particular activity has been consistently considered (by ECtHR) as a “good” within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereafter referred to as “the Convention”).²⁵ Accordingly, the annulment of a license to conduct certain commercial activities, including those relating to gambling,²⁶ represents an interference with the exercise of the right to property, as provided by Article 1 of Protocol No. 1 to the Convention.²⁷

Thus, the annulment of licenses could deprive the gambling operators of a “legitimate expectation” to carry out an activity and, consequently, to gain profit. However, it is well known that property rights may be subject to limitations that should be provided for by law, be reasonably justified, and be necessary and proportionate to the intended purpose.

As to the first matter—whether the interference is provided by law—it should be noted that when the national legislature revokes licenses that allow their holders to exercise an economic activity, it must provide, for the benefit of those holders, a transitional period of sufficient length to enable them to adapt to the new legal requirements. A trader who has made costly investments in order to comply with the scheme adopted previously by the legislature could see his interests considerably affected by the withdrawal of that scheme before the date announced, all the more so if that withdrawal takes place suddenly and unforeseeably, without leaving enough time to adapt to the new legal situation.²⁸

In the case of the Republic of Moldova, the draft law, which preceded Law No. 291/2016 was registered by

²⁵European Court of Human Rights, Case of *Bimer S.A. v. Moldova*, Application No. 15084/03, Judgment of 10 July 2007, § 49 (July 4, 2018), <https://goo.gl/CgxxHq>; Case of *Megadat.com SRL v. Moldova*, Application No. 21151/04, Judgment of 8 April 2008, §§ 62-63 (July 4, 2018), <https://goo.gl/EbQpWL>.

²⁶European Court of Human Rights, Case of *Laurus Invest Hungary KFT and Continental Holding Corporation and Others v. Hungary*, Decision of inadmissibility of 8 September 2015, § 29 (July 4, 2018), <https://goo.gl/zXr7Jq>.

²⁷European Court of Human Rights, Case of *S.C. Antares Transport S.A. and S.C. Transroby S.R.L. v. Romania*, Application No. 27227/08, Judgment of 15 December 2015, § 39 (July 4, 2018), <https://goo.gl/UMJ35H>.

²⁸Court of Justice of the European Union, Case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft et al.*, Judgment of 11 June 2015, § 85, § 87 (July 5, 2018), <https://goo.gl/8AqNrR>.

the secretariat of the Parliament on December 5, 2016, and was adopted in final reading on December 16, 2016, i.e., 11 days later. By “a strange coincidence,” this law was promoted by a group of MPs of the same political party as the politician who urged the authorities to enact appropriate legislative measures on gambling. Following this digression, as it has been already mentioned, Law No. 291/2016 entered into force on the date of its publication, January 6, 2017. Correspondingly, the licenses held by gambling operators (except for those ensuring casino maintenance) were canceled without any transitional period. The absence of a transitional period could negatively affect the principle of legal certainty²⁹ and, therefore, it can be argued that such interference was not prescribed by law. As a rule, when the test on the quality of law fails, any analysis related to the justifiable nature and/or proportionality of the interference is superfluous. Nevertheless, the core issue is to know whether the annulment of gambling licenses constitutes an excessive burden for gambling operators. Thus, the mere existence of such a legislative measure in itself is questionable.

As to whether the interference was justified, it should be noted at the outset that legislation on games of chance is one of the areas in which there are significant moral, religious, and cultural differences amongst the EU member states³⁰ (membership in which is intended by the Republic of Moldova). In the absence of harmonization³¹ at the EU level, the member states are, in principle, free to set out the objectives of their policy on betting and gaming according to their own scale of values and, where appropriate, to define in detail the level of protection sought.³² The EU member states have retained a certain margin of discretion in terms of gam-

bling regulation. However, this discretion is subject to compliance with four basic principles established by the Court of Justice of the European Union (hereinafter referred to as CJEU). These principles are: (1) non-discrimination, (2) consistency, (3) proportionality, and (4) transparency (of gambling licensing procedures).³³

Thus, in *Berlington Hungary and Others*, the CJEU mentioned that restrictions on freedom to provide services (organization and operation of gambling) concern the right to render services as stated by the CJEU,³⁴ which may result from national legislation, and

can only be justified by overriding reasons in the public interest if the national court finds, after an overall assessment of the circumstances surrounding the adoption and implementation of that legislation:

that it actually pursues, primarily, objectives relating to the protection of consumers against gambling addiction and the prevention of criminal and fraudulent activities linked to gambling; the mere fact that a restriction on gambling activities incidentally benefits, through an increase in tax revenue, the budget of the member state concerned, does not prevent that restriction from being considered actually to be pursuing, primarily, those objectives;

that it pursues those goals consistently and systematically, and

that it meets the requirements arising from general principles of European Union law, in particular, the principles of legal certainty and the protection of legitimate expectations and the right to property.³⁵

²⁹In that regard, it must be pointed out that the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, inter alia, that rules of law be clear and precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings. *Id.* at § 77.

³⁰Court of Justice of the European Union, Case C-347/09, *Dickinger and Ömer*, Judgment of 15 September 2011, § 47 (July 6, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109604&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=568528>.

³¹Sue Schneider, *Towards a Comprehensive European Framework on Online Gaming*, 17 GAMING L. REV. 6–7, 7 (2013).

³²Court of Justice of the European Union, Case C-156/13, *Digibet and Albers*, Judgment of 12 June 2014, § 24 (July 6, 2018), <https://goo.gl/nuHgjk>.

³³Martin Lycka, *Recent Developments in European Union Gambling Case Law—Post Santa Casa Decisions of the Court of Justice of the European Union*, 16 GAMING L. REV. 488–499 (2012).

³⁴For more details, see Anastasios Kaburakis, *European Union Law, Gambling, and Sport Betting: European Court of Justice Jurisprudence, Member States Case Law, and Policy*, in SPORTS BETTING: LAW AND POLICY 27–97 (Paul M. Anderson et al. eds., ASSER International Sports Law Series, 2012); Thomas Papadopoulos, *The Evolution of the European Court of Justice’s Case Law on Gambling and Sports Betting: An Internal Market Perspective*, in SPORTS LAW: AN EMERGING LEGAL ORDER, HUMAN RIGHTS OF ATHLETES 415–429 (Dimitrios P. Panagiotopoulos ed., Nomiki Vivliothiki, 2009).

³⁵Court of Justice of the European Union, Case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft et al.*, Judgment of 11 June 2015, § 92 (July 6, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=exploatarea%2Bjocurilor%2Bde%2Btip%2Bslot-machine%2B&docid=164955&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=226154#ctx1>.

This method of scrutiny bears close resemblance to that applied by the ECtHR for the purposes of Article 1 of Protocol No. 1 to the Convention, and was ascertained even by the ECtHR in *Laurus Invest Hungary KFT and others v. Hungary*.³⁶ In essence, the ECtHR case law³⁷ requires that, in order for an interference to be compatible with Article 1 of Protocol No. 1, it must be lawful, in the general interest, and proportionate, that is, it must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden. The existence or lack of compensation terms under the relevant legislation may be a material factor in the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on an applicant.³⁸

In this regard, it should be noted that in one of the preparatory acts that preceded the enactment of Law No. 291/2016, it was emphasized that

following the analysis of the current situation and of the legislation regulating the gambling activity, the following reasons were identified as the main issues:

1. low level, even complete lack, of social responsibility of gambling operators, which is expressed by the chaotic placement of gaming venues nearby the institutions of social importance (e.g., educational institutions), which often do not meet the basic requirements of sanitary and technical norms and safety requirements. This contributes to attracting minors to gambling, which in itself is a negative factor in educating the young generation and the citizens of the Republic of Moldova;
2. lack of adequate state control in regulating gambling in the Republic of Moldova,

which jeopardizes the principle of equity (justice) towards all participants in this process both the organizers and the gamblers;

3. lack of transparency while carrying out economic and financial activity of gambling operators, which leads to tax evasions;
4. import of second hand gambling equipment, which in most cases does not meet the modern requirements and represents a barrier to solving the problem of online control of electronic gaming connected to the single tax system;
5. lack of developed infrastructure in the field, which exerts a negative influence on tourism and leisure time of Moldovan citizens and guests.³⁹

Under such circumstances, it has been stated⁴⁰ that the establishment of a state monopoly on gambling (except for casino maintenance, for which it is claimed that drastic regulatory conditions were foreseen) will ensure: (a) a system of rigorous control and monitoring over the sector that would mitigate the negative social impact registered lately; (b) preventing and combating unauthorized gambling; (c) reducing tax evasion and increasing the state budget revenues; (d) protecting the public interest and preventing addiction to gambling and consumer protection, in general, and among young people up to 21 years of age, in particular.

The annulment of licenses is a logical consequence following the monopolization of the gambling sector. For this reason, the aforementioned allegations can be extrapolated to the annulment of licenses. However, it should be mentioned there were people who remained unconvinced by those arguments. In particular, the Anti-Corruption Expert Report (prepared by the National Anti-Corruption Center of the Republic of Moldova) to draft Law No. 291/2016 argued that the reasons provided in the Informative Note (explanatory memorandum) were too

³⁶European Court of Human Rights, Case of *Laurus Invest Hungary KFT and Continental Holding Corporation and Others v. Hungary*, Decision of inadmissibility of 8 September 2015, § 41 (July 6, 2018), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%7B%22001-157683%22%7D%7D>.

³⁷*Id.*

³⁸European Court of Human Rights, Case of *Jahn and Others v. Germany* [GC], Applications Nos. 46720/99, 72203/01, and 72552/01, Judgment of 30 June 2005,

§ 94 (July 6, 2018), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%7B%22001-69560%22%7D%7D>.

³⁹Informative Note to Draft Law No. 459 of 5 December 2016 (July 6, 2018), <http://www.parlament.md/ProcesulLegislativ/Proiectedeacteleislativ/tabid/61/LegislativId/3506/language/ro-RO/Default.aspx>.

⁴⁰*Id.*

vague.⁴¹ It was noted that although the state monopoly on gambling represented a radical change in the way the area was operated at that moment, there was a risk that the current gambling problems would persist. Also, the level at which the National Lottery of Moldova (entity in charge of state gambling activities) was prepared to manage the gaming sector was uncertain, as well as why certain limits were not established with a view to expand and develop games in order to reduce the number of participants and the negative social consequences of that type of activity. Even though the damage caused by gambling has been allegedly addressed, in fact, the new regulatory framework creates conditions for their development and expansion outside the municipalities inhabited by low-income citizens who are tempted by the opportunity for potential gain.

Also, it was noted that the authors of draft Law No. 291/2016 did not specify whether other regulatory options for the gaming sector were considered. It was also pointed out that an economic and financial analysis, as well as a regulatory impact analysis (including the entrepreneurial activity) to serve as grounds for cost-benefit analysis, needed to adopt the normative act were also required. However, such analyses were missing.⁴²

In the same pursuit of ideas, the lack of a regulatory impact analysis and expert opinion regarding the legislative initiative to monopolize the gambling sector was mentioned by the Legal Directorate of the Parliament of the Republic of Moldova,⁴³ as well as by some members of Parliament during the debates and approval of Law No. 291/2016.⁴⁴

According to the rules of legislative procedure, the Informative Note (i.e., the explanatory memorandum) to a draft normative act must include, inter alia, the following items: the conditions that required the development of the draft normative act and the

pursued goals; a description of the degree of compatibility in case of drafts aimed at harmonizing the national legislation with the European Union law; economic and financial reasoning; the manner in which the act shall be incorporated into the existing regulatory framework; opinions of public authorities and public consultation of the draft law; findings of the anti-corruption expert opinion; findings on the compatibility with the European Union legislation; legal expert findings; or any other findings and expert opinions.

The promoters of monopolization in the field of gambling in the Republic of Moldova failed to take into account all these requirements. In this context, it is noted that only anti-corruption expert opinion was conducted in respect to the draft law, which, in fact, revealed a number of inconsistencies, implicitly suggesting abandoning the idea of monopolizing the gambling sector. However, this expert opinion was presented *post factum* (Law No. 291/2016 was adopted on December 16, 2016, while the aforementioned expert opinion was submitted on January 23, 2017) and, therefore, remained both unanswered and unheard.

The means chosen must be “tightly suited” to contribute to the fulfillment of the legal purpose, but also to satisfy the situation of the persons concerned.⁴⁵ From this perspective, despite the fact that the annulment of licenses held by gambling operators leads to combating the dangers of gambling, it is an *ultima ratio* measure. The legislature could eventually use it only if other measures were ineffective in achieving the goal pursued. It was necessary to take into account the principle of minimal interference expressed by the English dictum “Don’t use a sledgehammer to crack a nut,”⁴⁶ which suggests that nuts can be cracked with a hammer, not necessarily with a sledgehammer. However, the authors of Law No. 291/2016 failed to conduct an analysis

⁴¹Anti-Corruption Expert Report No. EL017/3874 of 23 January 2017 to the Draft Law on the Organization and Operation of Gambling (July 6, 2018), <http://www.parlament.md/ProcesulLegislativ/Proiectedeacteleghislativ/tabid/61/LegislativId/3506/language/ro-RO/Default.aspx>.

⁴²*Id.*

⁴³Opinion of the Legal Directorate of the Parliament of the Republic of Moldova on the Draft Law on the Organization and Operation of Gambling (No. 459 of 5 December 2016) (July 4, 2018), <http://www.parlament.md/ProcesulLegislativ/Proiectedeacteleghislativ/tabid/61/LegislativId/3506/language/ro-RO/Default.aspx>.

⁴⁴Verbatim Report of the Parliament of the Republic of Moldova of 8 December 2016 (July 4, 2018), <http://www.parlament.md/ProcesulLegislativ/Proiectedeacteleghislativ/tabid/61/LegislativId/3506/language/ro-RO/Default.aspx>.

⁴⁵Teodor Papuc, *The Principle of Proportionality and Its Test: Exploring Motivations*, 3 NEW J. HUM. RIGHTS 12–28, 22 (2017).

⁴⁶Eva Brems and Laurens Lavrysen, “Don’t Use a Sledgehammer to Crack a Nut”: *Less Restrictive Means in the Case Law of the European Court of Human Rights*, 15 HUM. RIGHTS L. REV. 1–30 (2015).

of whether there were other, less restrictive but equally effective and cost-free measures.

Moreover, it seems that the National Lottery of Moldova is not a reliable alternative to organize gambling activity, which falls under the state monopoly. This assumption can be derived from the approval by Government Decision No. 639 of 14 August 2017 of the objectives and conditions for setting out a public-private partnership to develop the scope of work of the Joint Stock Company “National Lottery of Moldova,” as well as the general requirements regarding the selection of the private partner.⁴⁷

Following several adjournments of the deadline for the submission of offers by private investors with a view to sign public-private partnership agreements for developing the scope of work of the National Lottery of Moldova, finally, on April 23, 2018, public-private partnership agreements were signed with: (1) Novo Gaming M Technologies GmbH (on behalf of the association of economic operators Novo Gaming M Technologies GmbH, Novomatic Gaming Industries GmbH, and Novomatic AG) to develop the scope of work of the National Lottery of Moldova related to the sector of cash-win gaming machines, including online gambling; and 2) NGM SPC Limited (on behalf of the economic operators New Games AD, National Lottery AD, and NGM SPC Limited) to develop the scope of work of the National Lottery of Moldova in the field of lotteries and sports betting, including online betting.⁴⁸

However, even if, *de jure*, the National Lottery of Moldova is the only entity entitled nowadays to organize and manage online lotteries, bets for sports events, and gambling, as well as to organize the activity of halls where cash-win gaming machines have been installed, *de facto*, by the date of writing this article, the National Lottery of Moldova has dared to offer the players the possibility to take part in lotteries only (and to “satisfy their gambling craving”).

Therefore, since the suspension of licenses held by gambling private operators (November 17, 2016) and up until now (October 2018), the National Lottery of Moldova has just organized lotteries throughout the territory of the Republic of Moldova. It seems that public-private partnerships failed to produce the expected results. This state of affairs can make people choose unauthorized and clandestine gambling. As a matter of fact, it is well known that a limited or forbidden thing becomes more attractive. The authorized operators must represent a reliable and attractive alternative to a prohibited activity. So, we may conclude that the National Lottery of Moldova was not ready and did not have the necessary resources to manage gambling when monopolized by the state. In this respect, it’s curious why the state monopoly on the gambling sector was established if the state was not ready to take over the management of this field. Why were the licenses of gambling operators annulled without any transitional period if the state was not able to offer a reliable alternative?

Last but not least, it should be mentioned that the licenses of gambling operators have been annulled without compensation. In fact, this matter was sufficient for the ECtHR in *Vékony v. Hungary*,⁴⁹ as well as in *S.C. Antares Transport S.A. and S.C. Transroby S.R.L. v. Romania*,⁵⁰ to consider that the applicants have suffered an excessive individual burden and, therefore, to find that there has been a violation of Article 1 of Protocol No. 1 to the Convention. To avoid the naming and shaming not only at the international level, but also the probability of payment of material and moral damages ordered by the ECtHR for the violation of Article 1 of Protocol No. 1 to the Convention, it is imperative to take into account the ECtHR case law. Regretfully, it shall be stated that the Parliament of the Republic of Moldova failed to take into account the guiding principles that are emphasized in the ECtHR case law.

⁴⁷Decision of the Government of the Republic of Moldova No. 639 of August 14, 2017 on the approval of the objectives and conditions of the public-private partnership to develop the scope of work of the National Lottery of Moldova, as well as of the general requirements regarding the selection of the private partner, published in the Official Gazette of the Republic of Moldova, 2017, No. 301-315.

⁴⁸Press release regarding the actions undertaken to implement the Private-Public Partnership Project “Services in the domains covered by state monopoly administered by the National Lottery of Moldova” (July 6, 2018), <https://app.gov.md/ro/content/comunicat-privind-actiunile-intreprinse-vederea-implementarii-proiectului-ppp-serviciile-0>.

⁴⁹European Court of Human Rights, Case of *Vékony v. Hungary*, Application No. 65681/13, Judgment of 13 January 2015, §§ 34–35 (July 6, 2018), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-149201%22%7D>.

⁵⁰European Court of Human Rights, Case of *S.C. Antares Transport S.A. and S.C. Transroby S.R.L. v. Romania*, Application No. 27227/08, Judgment of 15 December 2015, §§ 49–51 (July 6, 2018), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-159198%22%7D>.

CONCLUSION

In conclusion, the annulment of licenses for gambling activities in the Republic of Moldova has been done hastily, without broad public debate, lacking empirical studies, in the absence of a transitional

period, and without a reasonable compensation system in place. All of the above failed to appear to be the “fruit” of a mature reflection process and, as a consequence, could gently bend the balance towards finding a violation of the gambling operators’ property right.