


Is the Gambling affiliate marketing industry at tipping point?

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Taking place in the cradle of the gambling industry, a fast-paced competitive arena where both operators and B2B suppliers must keep up with ongoing regulatory challenges, but also in today's rapidly growing digital space with people increasingly using the Internet, the gambling affiliate marketing industry is now crossing a climate of concern with awareness being raised more and more on consumer protection and social responsibility, as well as on the long-debated need of specific regulation.

Living in an accelerated era of technological progress, where most of people are never more than a fumble in their pocket away from portable communication devices, which allows affiliate marketers to expose them to targeted messages seamlessly, it cannot be however denied that this is an industry which has a future. Indeed, the ecosystem for gambling affiliates is at present under a dark sky, but despite the current obstacles and uncertainty, affiliates will continue to play a vital role in the online gambling sector.

Being an important source of new players, and therefore an important source of income, marketing affiliates may be perceived as the lifeblood of gambling operators and hard to see them becoming redundant, a known fact to operators and regulators alike throughout all jurisdictions. This does not mean however that such are immune to regulatory compliance. The question of whether or not specific regulation is (or is becoming, in those jurisdictions where it does not exist) an absolute must in order to stay compliant emerges again, as the market forces the affiliate space to mature into a diligent source of business.

Currently, the European space is quite fragmented in terms of regulation, each country having its own rules and licensing regimes, where the most important first step for affiliates is to understand the targeted regulated market and its local requirements. In this context, there are jurisdictions where affiliates are not required to hold a license in order to provide

marketing services for remote gambling operators (such as the UK, Malta, Denmark) and jurisdictions where, on the contrary, affiliates can only perform such activity after having obtained a specific license (as required in Romania).

In all jurisdictions, marketing affiliates can only advertise the online gambling operators' products if staying within the boundaries of the local marketing and data privacy legislation and consumer protection regulations. Nevertheless, identifying affiliates providing their marketing services in breach of such regulations in a market where offering such services is not subject to licensing may often prove to be difficult, which has led the authorities to go after the operators since they were the ones benefiting of such marketing services.

In this context, where the authorities demand that gambling operators must take responsibility for the misdemeanours of their marketing partners, one may say that affiliates do not seem to have any responsibility or liability of their own before the regulators. This is the case in UK, where the Gambling Commission has made quite clear to gambling operators that they are responsible for the actions of their affiliates, where recent cases show that, despite the affiliate acting in breach of its contract with the operator and releasing the unlawful advert without the operator approving or condoning it, the Advertising Standards Authority (ASA) ruled against the operator, rather than the affiliate. Such examples include the ASA rulings against Sky Betting & Gaming, Casumo Services Limited, 888 Holdings and Ladbrokes for "socially irresponsible" promotions (disguised as news articles that "targeted vulnerable people" with claims about a gambler who cleared his debts and funded medical treatment by playing online casino games), which the operators blamed on affiliates.

The same pattern is also seen in Denmark, where the Danish Online Gambling Association has called on regulators to consider stricter affiliate liability rather than focusing on gambling operators as an "easy target".

Such regulatory pressures bearing down on the gambling industry inevitably has its consequences, with gaming operators starting to act as the regulators' extended arm in order to avoid their potential liability for offenses committed by their marketing suppliers. For example, in the UK, this has led to operator Sky Betting & Gaming ending its UK affiliate programme, a seismic decision which sent ripples throughout the industry. Other operators followed suit shortly afterwards, Paddy Power Betfair announcing a "one strike policy" whereby a single breach of internal policy by an affiliate will result in its engagement being suspended, and 888 and Ladbrokes also deciding to scale back their affiliate programmes. LeoVegas has also announced it is cutting ties with many of its affiliate partners in the UK with a view to comply with the increasing standards on advertising and consumer protection.

As such, much of the recent tension over the future of affiliates originates from regulators' increasing persistence that operators are responsible for the actions of their marketing partners. One can't help but wonder if a system where affiliates are required to hold a license in order to carry out their activity changes anything. In this regard, we can take the example of Romania, a jurisdiction where affiliates are obliged to apply and obtain a specific license in order to be able to legally provide marketing services to remote gambling operators (with operators having in their turn the obligation to only contract with licensed affiliates).

While the licensing procedure is not cumbersome in Romania (but only consists of several corporate and operational documents), the official fee to be paid in order for the license to become effective is

rather onerous (amounting to EUR 6,000). Such license fee must be paid annually in order to keep the license valid and continue to carry out the activity. In such a market, the transparency in what regards the affiliates is indeed much greater (and therefore such are easier to be located in case of potential breach of advertising and consumer protection regulations), given that, as part of the licensing file, affiliates are required to provide a list with all the websites they intend to use in providing their marketing services to remote gambling operators. Thereafter, once they have been licensed, the affiliates are bound to update the list of websites regularly and also inform the regulator on such websites which they no longer use. The affiliates have also the obligation to report and submit to the regulator any agreement they conclude with a remote gambling operator (and the gambling operator in its turn has the obligation to inform the regulator of any new supplier – be it affiliate, software provider, payment processor, etc – that it starts working with). Such a system would only lead to the conclusion that, in case of breaching the gambling, advertising and consumer protection legislation and acting against the terms agreed with the gambling operators, the liability stands with the faulty affiliate, or with the faulty affiliate also, depending on the particular case.

Nevertheless, even though Romanian affiliate market is still at its nascent stage (with only 30 affiliates being currently licensed), considering the mandatory license fee in the amount of EUR 6,000, a question arises: is there still room for the smaller affiliates? While the license fee is of no concern to big affiliates which have the necessary resources to penetrate this market,

such fee greatly limits the opportunities that exist for smaller affiliates to enter the market and make it more competitive. In the end isn't such a conservative regulatory regime leading to a general constriction of the market, one wonders?

In addition, the Romanian gambling advertising market now prouids itself with a newly published code of ethics on responsible communication in the field of gambling ("Ethics Code") recently issued (on February 14, 2018) by the Romanian Office for Gambling. Between the draft bill which sits with the Romanian Parliament for more than 2 years now on the TV gambling add total ban and the decision issued in December 2017 by the National Audiovisual Council according to which it may be deemed that gambling ads can be aired on the Romanian TV stations only after 11 PM, it seems that the Romanian Gambling Office had now decided to take attitude. This looks like the first of a series of efforts designed to assess whether gambling advertising can be disciplined and managed through industry self-regulation before or instead legislation being required.

The Ethics Code is not a legally binding document, but a guideline, which seems to be still subject to improvements, as immediately after publication the regulator called on the market for comments and discussion on the text. However, once posted publicly on NOG's website, it is clearly endorsed by them, hence it may probably serve as basis to evaluate future advertising and apply sanctions. While no transitory period has been mentioned so far, we can only assume that this code will not serve as a stick from day one. In the end, the intent is to set some background rules to ensure the health and stability of the market, viable from a commercial point of view but in the same

time ensuring the protection of customers.

There are however some rules in the Ethics Code that, in our view, could lead to some major restrictions in what concerns the advertising of gambling products/services. For example, we point out the provision in the Ethics Code which commands that for the advertising to be made in the audiovisual media, regardless of the channel used, the ad must be aired, through the operators' diligence, "during hourly intervals for which, in the case of that particular channel, assurances can be given that at least 90% of the audience is over 18 years of age or that the channel is intended exclusively for this age group". In this case, we are to see what channels are the ones corresponding to promoting the gambling services/products within these boundaries, where in what

concerns the digital media there are websites that are available for minors as well (for example Facebook) and, in what concerns the audiovisual code, 18+ programs can only be aired on coded non-Romanian channels.

It remains to be seen how the industry will be responding to the compliance requirements newly established as well as what would the consequences be if they choose not to adhere to such rules. It seems unlikely though to believe that operators will remain idle to see how things shake out. In our expectation the industry will respond to the regulator's invite to comment and propose amendments to the Ethics Code while auditing and adjusting their promotions at the same time.

To conclude: there are ups and downs to every market, and whereas industry-

wide regulation and standards are pivotal to safeguard everyone, it is beyond doubt that, in order for any market to mature and develop, it needs to be afforded certain degree of freedom. However, greater freedom brings with it greater and direct responsibilities, where the key to getting the balance right in this affiliates' story is, in our view, self-regulation. A proactive self-regulation that has anticipated potential pitfalls, that has social responsibility, consumer protection and advertising compliance at its heart and that builds the right synergy in aligning to all the market requirements so that the ultimate goal is achieved: adapting regulation so that it becomes cost-effective for all businesses (operators and affiliates alike) and protects customers at the same time.

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Cosmina Simion co-heads the Gaming and Consumer Protection & Advertising practices of NNDKP, a preeminent business law firm in Romania. In addition to the gambling industry, her practice focuses on IP/IT, media & entertainment and online industries, having acquired a strong expertise in these fields in her over 19 years of professional activity.

In the gaming field, her experience encompasses the full range of regulatory and operational gaming aspects, assisting betting and gaming operators, software & platform suppliers, financial services providers, auditors & certifiers, industry relevant associations or marketing affiliates. Cosmina has also been actively involved in the review and drafting of the Romanian primary and secondary gaming legislation.

Previous coordination roles include heading the IP, media and technology practice of a Tier 1 global law firm, and acting as an in-house counsel at a US media group.

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Alina is a passionate Romanian law qualified lawyer currently focusing her practice on gambling law. Thus, during the past years, she has assisted several gambling operators in obtaining their first online licenses in Romania, and provided day-to-day advice on various regulatory issues related to the organization and operation of their gambling activity. On the supply end, Alina has assisted various gambling suppliers to the B2C operators to include software and platform suppliers, payment processor, marketing affiliates as well as testing laboratories in the process of obtaining their first Class 2 licenses in Romania.

Alina also provides assistance in relation to intellectual property law, advising clients in various industries on trademark and design rights, copyright and related rights matters, as well as consumer protection aspects.

She is a member of the Bucharest Bar.