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Statement regarding the Draft Act on the Pursuit of the Business of Betting Operators in the Province of Salzburg (Salzburg Betting Operator Act)

Dear Sir or Madam,

The "Österreichische Vereinigung für Wetten und Glücksspiel" ("**OVWG**", "**We**"), with its seat in Bankgasse 8, 1010 Vienna, is a voluntary association of enterprises operating in the fields of online gambling and online sports betting. It was created in 2016 and registered in the Austrian Central Register for Associations¹ under the number 695024560. Its primary task is to ensure a higher standard of legal security and an EU-compliant re-regulation in the fields of online gambling and online sports betting in Austria. This shall be achieved by developing feasible and viable solutions for the sake of all stakeholders: for the State, its consumers and of enterprises operating in these fields.

With regard to the recent amendments to the Salzburg Betting Operator Act ("**S.WuG**") (notified to the European Commission under TRIS number 2016/523/A), the OVWG has prepared the following **statement**. The goal of this statement is to justly **balance the interests** of betting operators and their customers, as well as to reach an appropriate and adequate level of **player protection standards**. Some provisions of the S.WuG raise concerns among numerous operators that exercise their activity in the field of online betting and online gambling. It should be noted that the S.WuG has been notified for the second time as certain modifications have been introduced.

¹ Available at <http://zvr.bmi.gv.at/Start>.

I. Regional licensing requirements regarding the location of IT servers

Section 4 ("licensing requirement") para 1 of the S.WuG states: "*The commercial pursuit of the business of a bookmaker, totalisator or betting broker at one or more business premises in the Province of Salzburg requires a permit from the Provincial Government.*" Concerning this provision, the explanatory notes on the draft to the S.WuG explain: "*The prerequisite [...] should not be understood to mean that the betting operator's registered office or head office [...] must be located in the province of Salzburg. Rather, in order for a licensing requirement to arise, it is sufficient that a betting operator – wherever the registered office is – operates a betting terminal in the province of Salzburg or, in the case of internet betting, provides the data from a location situated in the province of Salzburg.*"

With this provision the legislator **obliges any betting operator offering online services** and placing a server (as it provides data) in Salzburg in order **to obtain a license in the Province**. IT servers are considered "business premises" for this matter and therefore equated to, for instance, the statutory headquarter of a betting company.

Such restriction may cause an **unjustified increase of licensing costs** for those betting operators **already holding a license** in (an)other Province(s) of Austria and/or those operators offering online services throughout Europe. At the same time, there is **no public objective** making a regime as provided for by the draft of the S.WuG necessary. In case other Austrian Provinces implement similar provisions, betting operators would be forced to refrain from establishing a business in Austria due to excessive costs. This would be a limitation lacking any logical and plausible basis.

Furthermore, the mere obligation of having compulsory IT servers in Austria, namely in the province of Salzburg, which are seen as (compulsory) "business premises" is a blatant violation of the freedoms of establishment and to provide services throughout Europe.

II. Partial prohibition of live betting

Section 15 ("prohibited betting") of the S.WuG states: "*Betting enterprises shall not offer, place, or broker the following bets: [...]*".

Point 9: "*Bets on the occurrence of a particular circumstance in connection with an event which is already taking place at the time of making the bet ("live bets", straight forecasts or negative bets), except:*

- *bets on the (numerical) interim result or an event deriving therefrom of a (game) section of an ongoing event included in the rules for the sport concerned or established for the particular sporting event;*
- *bets on the (numerical) final result of an ongoing event or an event deriving therefrom; and*

- *bets on which team will shoot the next goal in a football match.*"

The OVWG welcomes the approach of the legislator – if necessary – to modify the **regulatory framework** for sports betting and appropriately **protect betting clients**. The amendments which have been made to the first draft of the S.WuG – following its prior notification on 1 April 2016 – and the **effected modification** to the prohibition of live betting by implementing certain **exceptions** are appreciated for transparency as well as player protection reasons. Contrary to the de facto ban on live betting provided for in the first draft, betting companies now have **clear guidelines** for dealing with live betting offers. Besides creating legal certainty, such alteration is also in line with the position of the European Commission which at least considered a total ban on live betting as disproportionate regarding the notification of the betting law in the Austrian province of Vorarlberg and thus called for the implementation of less restrictive measures.

However, we consider these exemptions still too narrow as a prohibition of live betting is in our experience in total **not suitable to reach** the intended **objectives** or may even **run counter** to them. For a comprehensive assessment of this matter we will elucidate national as well as Europe-wide findings.

The explanatory notes set forth the following: "*The prohibition in point 9 includes bets on subordinate events (from the viewpoint of the final result) which are regularly offered in the form of 'live bets' under this designation, but also as bets on occurrences or 'negative bets'.*" This restriction shall serve to protect betting clients from respectively prevent (i) the development of **gambling addiction** and its negative impact as well as (ii) betting-related **manipulation**.

1. Ad (i) gambling addiction

With regard to gambling addiction the explanatory notes relating to the draft of the S.WuG further state: "*Live bets' offer special potential to foster addiction. Concerning addiction potential (from games of chance as well as betting) it applies quite generally that the rapid sequence of individual games necessitating fast decisions on winning and losing carries increased potential for developing a gambling addiction.*" As the **significant period of time between placing a bet and the decision on winning or losing is crucially shorter** compared to traditional betting, the attraction for players as well as the **potential for developing gambling addiction is considered increasingly high** by the legislator due to the rapid sequence of betting opportunities and the supposedly improved ability to assess the outcome.

However, the refusal of the legislator to allow such rapid sequence of betting opportunities is hardly understandable as it is **yet necessary to provide** empirical **evidence** of an increased addiction potential of live betting in this context. According to a survey by the prestigious Division on Addictions of Harvard

Medical School², there is **no indication for live betting bearing the potential of being more dangerous** in contrast to other types of bets. On the contrary, the study pointed out that typical betting clients generally – without distinction between live bets and traditional bets – showcase more moderate gaming behavior compared to other sorts of gambling spending rather low amounts of money per week (averagely less than EUR 5). An increased danger of live bets as well as a higher potential of addiction as follows the opinion of the legislator can therefore not be detected. In point of fact, land-based slot machines being frequently identified as issue by problem gamblers and statistically bearing the greatest addiction risks are comparatively treated with a liberal approach.

Furthermore, proof for such increased danger of live bets could neither be found in the – so far – only **prevalence surveys carried out in Austria**³, conducted in 2011 as well as 2015, nor in the 2014 annual report of the largest counselling and treatment provider for problem gamblers in Austria "Spielsuchthilfe"⁴. In fact, both studies did not consider it necessary to differ between live bets and traditional bets being placed before the game starts in order to **assess gambling addiction risks**.

By allowing live bets on a game result it is obvious that the legislator also contradicts his/her own statements as there is no difference in the rapid sequence of betting opportunities compared to other (prohibited) live bets. The distinction solely refers to the content of the bet, while the explanatory notes do not state in any means that the content of a bet directly relates to its addictive potential.

2. Ad (ii) betting-related manipulation

As live betting "*regularly concerns subordinate situations within an overall event, whose creation does not necessarily require the interaction of several persons, it may also facilitate the manipulation of matches and therefore betting fraud*" according to the explanatory notes. The public opinion shows a tendency to regard betting as particularly prone to manipulation, which actually does not correspond to the facts. This is especially meaningful with regard to bets being influenceable by a single player (yellow card, corner kick, etc).

In reality, we are of the opinion that such allegation is to be classified as a **fundamental misunderstanding**; the capabilities set out above usually connected with live betting de facto do not yet constitute any likelihood of fraud. Bets on such events – if offered at all – may only be carried out by placing reasonable amounts of money as betting limits are quite low. Therefore, manipulation is not

² LaBrie, R. A., LaPlante, D. A., Nelson, S. E., Schumann, A., & Shaffer, H. J. (2007). Assessing the playing field: A prospective longitudinal study of Internet sport gambling behavior. *Journal of Gambling Studies*, 23(3), 347-362.

³ Kalke, J., Buth, S., Rosenkranz, M., Schütze, Ch., Oechler, H., & Verthein, U. (2011). Glücksspiel und Spielerschutz in Österreich. Freiburg: Lambertus.

Kalke, J., Wurst, F.M. (2015). Glücksspielverhalten und Glücksspielprobleme in Österreich. Hamburg: Institut für interdisziplinäre Sucht- und Drogenforschung.

⁴ Berger, P., & Horodecki, I. (2015). 2014 Jahresbericht: Tätigkeits- und Forschungsdaten. Wien: Spielsuchthilfe.

worthwhile in this context. In our experience with European bookmakers, it is simply **not profitable** for betting fraudsters to place amounts on events such as throw-ins and yellow or red cards.

There is no practical evidence in any means that live betting may "*facilitate the manipulation of matches and therefore betting fraud*". Such assumptions are moreover not in line with **scientific surveys**. A recent and independent study from 2015 conducted by the ASSER International Sports Law Centre/T.M.C. ASSER Institute⁵ investigated the relationship between cases of betting-related manipulation and certain sports bets on the basis of quantitative empirical evidence, providing the following results:

(i). Betting-related game manipulation is mainly related to the **end result** of a game and, particularly, the **number of goals** scored (**goal difference**). This has been confirmed by the monitoring statistics of the "Fraud Detection System" of the worldwide leading surveillance company in the betting sector "Sportradar" ("**FDS-Monitoring-Statistics**") in investigating different betting markets. The most suspicious betting activities have been discovered in the most common sorts of betting: the win bet (e.g. the traditional 1x2 betting type), the number of goals bet as well as the Asian handicap bet. Manipulating the (minimum) goal difference a team has to reach in result is by far the most frequently observed method of betting-related fraud. It is particularly popular as it allows fraudsters to maximise their profits in forcing teams to lose a game by multiple goals. To reach the objective intended by such manipulation, coordinated actions of participants and/or the referee are required.

However, the legislator **exempts** the **bets being most likely subject to manipulation**, for instance betting on goal difference, even **from the ban on live betting**. "*By referring to the "(numerical) interim result" and/or the "(numerical) final result" in the exemptions in point 9, it is clarified that, for the types of sport in which the interim or final result is specified as a ratio (football, basketball, ice-hockey, tennis), only bets on this ratio are initially excluded from the prohibition in point 9. However, the ban in point 9 also excludes bets on events which can be derived from this ratio, e.g. bets on the goal difference [...]*". In our opinion, such approach constitutes an unjustifiable **evaluative contradiction** with regard to the allegedly pursued objectives of the prohibition of live betting.

(ii). The assertion that **side bets** bear a significant risk of betting-related manipulation lacks any empirical proof. An analysis of the volume of placed bets has shown that the **liquidity** regarding the side betting market is **much lower** compared to the main betting market. European betting operators often choose to offer side bets only in connection with specific events (where it is less likely participants would risk their careers for game manipulation) and, moreover, tend to accept only small amounts of money. Even if operators would accept higher bets, for example on the next player to receive a yellow

⁵ Die Wahrscheinlichkeiten von Spielmanipulation, Fakten & Zahlen zum Integrationsrisiko gewisser Sportwetten, available at <http://www.asser.nl/media/2691/die-wahrscheinlichkeiten-von-spielmanipulation-studie-2015.pdf>.

card, such high stakes would instantly cause **suspicion of game manipulation**. As a result, it seems **not profitable** for fraudsters trying to exploit these types of betting for their own purposes.

(iii). Furthermore, there is also no basis for assuming that live bets represent a specific respectively higher risk of game manipulation than traditional pre-match bets. One of the main points emerging from the FDS-Monitoring-Statistics is that fraudsters usually choose to take advantage of **pre-match as well as live betting** options with respect to the common sorts of betting (win, number of goals, Asian handicap). This method is selected in order to reduce the hazard of getting caught and to minimise the loss of profits. Two thirds of the probably manipulated games showed both pre-match and live betting patterns occurring in combination. Although live betting offers certain advantages to ensure higher profits (higher betting limits, variations of odds may be exploited) and the period of time available to detect betting-related manipulation is shorter, FDS-Monitoring-Statistics still indicate that **insider information** is **normally used in connection with pre-match betting**.

The survey explicitly proves that the (partial) ban on live betting as foreseen in the draft of the S.WuG is **no suitable measure to fight fraud and betting-related manipulation**. On the contrary, technical systems make it possible to effectively combat betting-related fraud which has been successfully practiced by leading betting operators for years and was also highlighted in the conclusions of the expert workshop of the European Commission regarding the Green Paper on problem gambling.⁶

3. Black market

If the law prohibits the provision of live betting, there will exist the **additional risk** that betting clients may turn towards **unregulated** and thus **illegal** online betting operators. This is generally **contrary to the intention of the legislation** regarding betting and gambling as the purpose should be to channel players away from the black market.

Limiting certain kinds of bets obviously runs counter to this intention since betting clients may not want to accept and try to bypass such restrictions. However, as unlicensed betting operators are **not bound to the player protection standards** foreseen by the legislator, betting clients will have to face the risk of falling victim to fraud and the lack of adequate measurements that help to prevent the development of gambling addiction. **National regulatory authorities** are naturally **not able to oversee** such **betting markets** and have no access to important data on its functioning being necessary to detect fraudulent activities. Moreover, such illegal betting operators do not pay any taxes, resulting in a loss for the state budget, or financially support any player protection

⁶ Conclusions, Workshop on Online Gambling: Detection and Prevention of Problem Gambling and Gambling Addiction, S 2; available at http://ec.europa.eu/internal_market/gambling/docs/workshops/workshop-ii-conclusions_en.pdf.

institutions. This **financial loss** yet does not only affect the state budget but also the licensed betting operators, which is detrimental to intended competition.

For this reason, it is essential to allow betting operators to offer a **wide range of products** in order to maintain a **viable betting market**.

4. Violation of the freedom to provide services according to Art 56 TFEU

In addition to the previously mentioned arguments, the planned prohibition of live betting is, in our opinion, also violating the freedom to provide services pursuant to Article 56 of the Treaty on the Functioning of the European Union ("TFEU"). According to the jurisdiction of the European Court of Justice ("CJEU"), such restrictions can only be justified under certain conditions. The CJEU developed a **testing scheme** establishing certain requirements which need to be fulfilled **simultaneously**; if this is not the case, an interference with the fundamental freedoms is not permitted and therefore contravenes EU law. Any restrictive measure must **(i)** be justified by **overriding public interests** and **(ii)** comply with the **principles of non-discrimination and proportionality**. The CJEU has already acknowledged the combat against criminal activities and gambling addiction as overriding reasons of public interest. However, a restrictive measure – such as the prohibition of live betting – is not permitted if the legislation "[...] *does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner.*"⁷. The burden of proof that a measure is suitable to pursue the specified public interests as well as that the restrictive measure can be justified lies with the respective Member State.

As we have already outlined above, the ban on live betting is neither suitable to fight gambling addiction nor to prevent game manipulation and thus **cannot be justified** by overriding public interests. A **comparison of international** respectively national **legal provisions** regarding live betting clearly showcases that the legislator can set high standards in terms of player protection and measures to prevent betting-related fraud **without establishing a ban on live betting**. Such restrictive measure is simply **not necessary and suitable** to achieve the intended objective and, as a consequence, does not comply with the fundamental freedoms of the European Union.

Although sports betting in Austria is regulated by the Provinces, a European assessment of provisions affecting the fundamental freedoms makes it necessary to consider the **Austrian gambling market as a whole**. The CJEU has already stated that "[...] *whilst EU law does not preclude an internal allocation of competences whereby certain games of chance are a matter for the Länder and others for the federal authority, the fact remains that, in such a case, the authorities of the*

⁷ CJEU 30 April 2014, C-390/12, *Pfleger et alia*, Para 56.

Land concerned and the federal authorities are jointly required [...] not to infringe Article 49 EC [now Article 56 TFEU]. [...] in the full measure to which compliance with that obligation requires it, those various authorities are bound, for that purpose, to coordinate the exercise of their respective competences."⁸ To be in line with European legislation, a restrictive measure must not only fulfil the requirements set out above, but also generally be **conducted in a coherent and systematic manner**.

In contrast to the planned amendment of the S.WuG in Salzburg, live betting is allowed in several other Austrian Provinces. An example would be the Upper Austrian Betting Act⁹, which came into effect recently and is considered a betting law strongly focused on player protection as well as the fight against betting-related fraud. Nevertheless, section 9 of this act referring to prohibited types of bets does not even mention live betting at all.

A ban on live betting in Salzburg would hence contradict the policy of the vast majority of the other Provinces (e.g. the adjacent Upper Austria) as they are **all pursuing the same objectives**. Since a European assessment is based on a holistic approach (i.e. the whole of Austria), the planned introduction of the prohibition of live betting is not coherent and thus cannot be justified under EU law.

5. International comparison

A glance at the legislation of other countries proves that the mentioned objectives **can be reached much more appropriately**:

The German Province of Schleswig-Holstein introduced a well-functioning and EU-compliant regulation for the gambling industry three years ago. The licences issued within this regulatory system only provide for restrictive measures regarding betting on sporting events in the youth and amateur sector. This approach is not only **supported** by decision-makers in organised sport, but also betting operators. Experience in recent years has shown that no problems in terms of game manipulation were encountered in Schleswig-Holstein and that the regulations are perceived as being **exemplary and expedient**.

Other regulated markets in Europe (e.g. UK and Denmark) are permitting live betting to be conducted offline as well as online for several years. However, they are statistically among those

⁸ CJEU 8 September 2010, C-46/08, *Carmen Media Group*, Para 70.

⁹ Landesgesetz über den Abschluss von Wetten und das Vermitteln von Wetten und Wettkunden, ver LGBl No 72/2015, available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrOO&Gesetzesnummer=20000830>.

markets showing the lowest rates in terms of betting-related problems in Europe.¹⁰ Markets such as Denmark, Spain and the UK chose to implement a transparent and robust regulatory framework in order to realise an open and flexible betting market. To prevent betting fraud these markets, for instance, **(i)** oblige betting operators to **report** any **suspicious activity**, **(ii)** establish an **information channel and clear guidelines** within and outside the regulated national gambling sector and **(iii)** entrust the regulator with the **power of prosecution**. To establish a gambling market with functioning protection mechanisms it is doubtlessly necessary to **determine requirements and sanctions**, however, a ban on live betting is certainly no convenient solution.

We would kindly ask you to take our considerations into account.

Best regards,

Claus Retschitzegger

OVWG-President

¹⁰ United Kingdom: 0.5%; *Wardle, H., Seabury, C., Ahmed, H., Payne, C., Byron, Ch., Corbett, J., & Sutton, R.* (2014). Gambling behavior in England and Scotland. Report prepared for the Gambling Commission. London: NatCen.
Denmark: 0.4%; *Bonke, J., & Borregaard, K.* (2009). The prevalence of problematic gambling behaviour: A Scandinavian comparison. *Scandinavian Journal of Public Health*, No 37, page 654-660.