

POSITION PAPER

OVWVG

Österreichische Vereinigung
für Wetten und Glücksspiel

**Who we are, what we stand
for, what we want to achieve.**

OVERVIEW

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1. WHO WE ARE AND WHAT WE STAND FOR

1.1. The Association

The **Austrian Betting and Gambling Association (OVWG)** represents the interests of online betting and online gambling providers licensed in the EU. All members of the OVWG must fulfil the following requirements and duties at the time of admission and throughout their membership:

- Licence in an EU Member State
- Audit by certified auditors
- Promoting active and systematic player protection
- Systematic prevention of money laundering
- Payment of taxes and duties prescribed in Austria
- Participation in the activities and goals of the OVWG
- Commitment to an open and regulated gambling and betting market in Austria
- Commitment for secure Online Gambling and betting platforms and betting venues
- Commitment to fair working conditions
- Commitment to Austria as a business location

Through their membership in the OVWG, providers show responsibility and transparency.

1.2. The common values

All members of the Association subscribe to the following common values:

- **Corporate Citizenship:** Corporate citizenship includes a commitment to licensing in an EU Member State, adherence to the highest standards of player protection, payment of levies and responsible treatment of employees.
- **Compliance:** Transparent and legally compliant behaviour is very important for the OVWG as an interest group. Its members act in compliance with the law and communicate the association's goals transparently.
- **Innovation:** For entertainment platforms, the members of the OVWG focus on security and innovation. The latest technologies are also used for player protection to ensure efficient monitoring.

- **Social responsibility:** The OVWG and its members are committed to the integration of sport, to effective prevention of gambling addiction, to youth protection and to comprehensive crime prevention and control.

1.3. Value creation potential for Austria

Online gambling and online betting form an important economic factor and do not only serve the recreational pleasure of the players. The technical platforms and computer systems used require the latest technologies, which represent an important sector of the digital economy with high value-added potential.

Our members are also important employers: in this ever-changing industry, only those companies that employ staff with a high level of expertise in internet and security technologies, system architecture and user experience will be successful in the long run. Because OVWG members are always on the cutting edge of technology, they are attractive employers who need qualified professionals to develop and operate their platforms.

2. WHAT WE WANT TO ACHIEVE

The OVWG seeks to **re-regulate the online gambling and betting sector**: The creation of a nationwide legal framework for the online gambling and betting sector on a regulatory and fiscal level that complies with EU law and the market, in which licences are issued without quantitative restrictions, a high level of player protection is ensured and money laundering is actively prevented.

In this new legal framework, providers willing to be regulated should be given fair access to the Austrian online gaming and betting market. In the view of the OVWG, only by creating attractive framework conditions for regulated providers from Austria and abroad can the channelling effect desired by the legislator be achieved and the drift of customers into the unregulated black market, which is difficult to control, be prevented. The Austrian gambling monopoly of the federal government - which in the view of the members of the OVWG is contrary to EU law - does not fulfil this purpose; nine different provincial laws in the betting sector also prevent channelling at the sub-national level.

3. STATUS QUO AND (NECESSARY) REORGANISATION THROUGH DIGITALISATION

3.1. Changing market conditions due to digitalisation

Games, gambling and betting are growing in popularity, especially in the online sector. Traditional casinos and betting venues are being supplemented by online gaming options and mobile solutions, whereby the online market is increasingly gaining market share. For example, in its ongoing surveys on gambling and sports betting in Austria, BRANCHENRADAR finds that gross gaming revenues in online gambling have increased by around 40% since 2014 and continue to grow.

However, the effects of digitalisation do not only affect the turnover figures and the providers, but also the players: Due to the easy availability of games of chance and betting on the internet via computer, smartphone and tablet for an unlimited period of time, a high level of protection for consumers is indispensable - a fact to which the OVWG unconditionally subscribes. Its members have recognised the importance of the online market and the changed market conditions due to digitalisation. There is also an **urgent need for action by the legislator**.

3.2. Legal provisions on the gambling monopoly

In Austria, the **conduct of games of chance is** reserved to the federal government; there is a gambling monopoly (§ 3 GSpG). The Federal Minister of Finance (BMF) can also transfer the right to conduct games of chance to others by granting licences. The freehand awarding of licences, which had been practised until 2010, was declared inadmissible by the ECJ ruling in the *Engelmann* case (C-64/08): as a result, the BMF had to put its gambling licences out to tender Europe-wide, publicly and transparently for the first time.

The stationary casino licences were awarded in two packages of six licences each - so far all in the hands of CASAG. In addition, three further individual licences were put out to tender for the first time in 2013, the award of which was prevented by legal disputes and which were also not put out to tender again. The only lottery licence which also authorises the offering of internet casino games (so-called "electronic lotteries") was (most recently in 2011) awarded to Österreichische Lotterien Gesellschaft m.b.H. (ÖLG).

The tender conditions for the lottery licence were tailored to the monopolist, especially since proof of at least five years of experience in offering lottery products, among other things, was also required. Through these

combined specification of offline and online requirements, it was de facto impossible for a provider that makes its casino services available exclusively via the internet to obtain this licence. Moreover, there has been no justification so far as to why, in a rapidly growing market, only one licence is required in order to "steer the gambling instinct into orderly channels". This is tantamount to a monopoly. All in all, this raises serious doubts about the conformity of the award of the lottery licence with EU law.

The members of the OVWG offer their services completely legally in Austria on the basis of their licences from other EU Member States. However, due to the lack of possibility to obtain Austrian licences and the illegality of the Austrian gambling monopoly under EU law, there is a need for legal action. The providers are willing to apply for Austrian licences at any time and already comply with high player protection standards. Despite the lack of legal certainty, these providers have been paying a gambling levy amounting to 40% of the gross annual gambling revenues for years.

In contrast to online casinos, the authorisation to **offer sports betting in Austria** is not subject to any numerical restrictions. The individual provinces are responsible for regulation, supervision and the granting of licences. This means that within the federal territory nine different legal norms have to be followed. Online betting is not regulated in all federal provinces, and even where it is regulated, the needs of the online market are not addressed in detail. Some federal states do not (yet) take into account the steadily increasing importance of this new form of gambling. Taxation is set at 2% of the betting stakes. In addition, the question in which federal states **social betting (i.e.: betting on events other than sporting events)** is permissible is not conclusively regulated, which also leads to considerable legal uncertainty here.

3.3. Market power in the online sector & ECJ case law

The Austrian gaming market is characterised by the dominant position of Casinos Austria AG (CASAG) and Österreichische Lotterien (ÖLG); both companies are majority-owned by the Czech ALLWYN Group (formerly: Sazka). The CASAG group of companies has twelve stationary casinos in Austria, while ÖLG holds the only lottery licence in the Republic, which entitles it, among other things, to offer so-called "electronic lotteries" (i.e.: online gambling). Due to this monopoly, it is not possible for other providers to offer online gambling with an Austrian licence.

In its recent case law, the European Court of Justice (ECJ) assumes that the restriction of the freedom to provide services - such as the introduction of a monopoly - is only permissible if there is a corresponding justification. Justifications include consumer protection, combating fraud and player protection.¹ The ECJ also notes that it is not the objective of the national regulation that is decisive, but its actual effect² ; it is therefore not sufficient to merely state these objectives programmatically. According to the case law of the ECJ, a restriction of the freedom to provide services based on the justification of "player protection" and "crime prevention" is in any case contrary to EU law if it does not really pursue the goal of player protection or crime prevention. Furthermore, the restriction must correspond to the concern to reduce gambling opportunities or to combat the crime associated with these games in a coherent and systematic manner.³

With regard to advertising by a monopolist, the ECJ goes on to hold that advertising carried out by the holder of a monopoly must remain moderate and narrowly limited to what is necessary to direct consumers to the controlled gaming networks. On the other hand, such advertising must not aim to promote the natural gambling instinct of consumers by encouraging them to actively participate in gambling. This is the case, for example, if the game is trivialised, if it is given a positive image because the revenue is used for activities in the general interest, or if its appeal is increased by advertising messages that temptingly hold out the prospect of significant winnings.⁴ According to media reports, ÖLG, which belongs to the CASAG group, spends more than 50 million euros annually on advertising, making it one of the largest advertising investors in Austria. This advertising does not pursue gambler protection, but rather the purpose of "encouraging in particular those persons to actively participate in gambling who have not hitherto been willing to gamble without further ado".⁵

Against the background of the aforementioned case law, the OVWG assumes that the Austrian gambling monopoly already does not serve the protection of players due to the intensive advertising policy of the monopolists and is therefore contrary to Union law. The Austrian provisions contradicting Union law may therefore not be applied (primacy of application of Union law). Consequently, **providers without a national licence may also legally offer services in Austria on the basis of the freedom to provide services.**

¹ ECJ of 06.11.2003, Case C-243/01, *Gambelli*, para 65 ff; 08.09.2010, Case C-46/08, *Carmen Media*, para 55.

² idS esp. ECJ 15.09.2011, Rs C-347/09, *Dickinger/Ömer*, para 65.

³ ECJ 30.04.2014, Case C-390/12, *Pfleger*, para 56.

⁴ e.g. ECJ 08.09.2010, Rs C-316/07 et al, *Stoß*, para 103.

⁵ e.g. OGH 30.03.2016, 4 Ob 31/16m.

3.4. Lack of an independent authority

Since the end of 2017, the authority responsible for gambling and the awarding of licences in Austria has been the Tax Office for Fees, Transfer Taxes and Gambling, which is subordinate to the Federal Ministry of Finance. The supervisory authority is the Federal Minister of Finance - previously also responsible for awarding licences. The state's 33.24% stake in CASAG is also located in the BMF - via the holding company ÖBAG. The BMF thus assumes a triple role, which must be critically questioned: on the one hand, the BMF administers the shares in the monopolist and has legitimate financial interests, on the other hand, the BMF holds the role of supervisory authority. This constellation entails a clear conflict of interests. **Austria still does not have a dedicated regulatory authority for gambling that is independent of instructions and that should also be responsible, above all, for granting licences to online providers.**

4. BEST PRACTICE EXAMPLES

4.1. Denmark and Great Britain

In most EU countries there is already a balanced and clear legal framework that can serve as a point of reference for regulation in Austria. **Denmark and Great Britain are** to be cited here as positive examples and their practicable regulatory models are to be used as a model for a solution that is valid throughout Austria and complies with EU law:

- **Denmark:** In Denmark there is a licensing system for online gambling and online sports betting without a numerical limitation of licences. The competent gambling commission follows an open and cooperative approach. The authority publishes compliance guidelines and recommendations. The licensing process is designed to be transparent: The competent authority conducts a company check and a technical or organisational audit. In addition, high player protection standards must be met. The taxation is product-dependent and amounts to 28% of the gross profit.
- **Great Britain:** The UK also has a licensing system for online gambling and online sports betting without numerical restrictions. The authority offers applicants and active providers regular consultations on regulatory topics and publishes compliance guidelines and recommendations.

The authority in GB is obliged to grant a gaming licence as long as there are no reasons against licensing. The gaming operators are obliged to submit the relevant data for reporting. The taxation depends on the product and amounts to about 21% of the gross profit. The treatment of bonuses etc. also depends on the product.

4.2. Findings for Austria

Protectionism and bans lead to a massive increase in the black market rate. Experiences of other European countries show that the regulatory concept is to successfully channel internationally existing gaming offers in the national licensing system, whereby the best possible security and highest player protection can be achieved. If, on the other hand, an online licence is granted exclusively to the existing monopolists in a protectionist manner, consumers will find ways and means to continue to use the offers of their preferred international providers.

Serious European gambling operators must therefore also be given the opportunity to obtain a licence. Empirical data from important European markets show that prohibition and protectionist models have much higher black market shares than liberal licensing and channelling models: In France, where online casinos are banned, the black market share of the total gambling market is at least 40%. Denmark, on the other hand, regulates online gambling products in a licensing system while maintaining the state lottery monopoly. In its supervisory report, the Danish Gambling Authority concludes that illegal gambling has a maximum market share of 5%⁶.

Only by creating attractive framework conditions for regulated providers from home and abroad can the desired channelling effect be achieved and customers be prevented from slipping into the unregulated black market. Player protection, crime prevention and the prevention of money laundering must be the most important goals of the new framework.

⁶ <https://spillemyndigheden.dk/en/news/data-gambling-market-4-q-2012>

5. REGULATION IN AUSTRIA

5.1. Advantages of a new regulation for the state

The OVWG advocates the creation of a transparent and market-conform regulatory system in order to achieve the highest possible channelling effect: Providers willing to be regulated, whether online or offline, should be given fair access to the Austrian betting and gaming market. New regulation will increase the channelling of players in favour of licensed providers, which will result in increased player protection and more security.

The **advantages of** a realignment are:

- High level of player protection
- Maximum control over licensees by the federal government through licensing under a regulatory regime
- Ensure a regular flow of taxes into the treasury

5.2. Socio-political advantages

From a socio-political perspective, regulation and a fair tax system result in the following advantages:

- **Consumers** are better protected by a regulated gaming market because they can primarily use secure platforms from licensed providers. Thus, players are channelled towards regulated companies, which drastically reduces the risk of manipulation, money laundering or betting fraud.
- The **state** benefits when providers make their fiscal contribution under clear framework conditions and are subject to state control.
- **Providers** benefit when they find a secure legal basis on the Austrian market. This increases the ability to plan and creates the basis for continuing to develop innovative and safe offers for online gamblers, thus strengthening Austria as a business location.

6. CONCRETE DEMANDS ON THE LEGISLATOR

The OVWG seeks the following legislative changes in the Austrian market:

- **New regulation of the online sector:** Creation of a nationwide legal framework for the online gambling and betting sector that conforms to EU law and the market on a regulatory and fiscal level. In this new legal framework, licences are to be issued without quantitative restrictions, a high level of player protection is to be ensured and money laundering is to be actively prevented. All serious providers who are willing to be regulated and who meet these requirements are to be given access to the Austrian gambling and betting market.
- **Fair tax model based on gross gaming revenue:** The taxation of licensees should be uniformly based on gross gaming revenue for all products and should not exceed a level of 20%. Experience from other countries shows that a taxation of up to 20% creates an incentive for licensed providers compared to non-licensed games and betting. Above this percentage, this positive channelling effect is lost because providers increasingly withdraw from the market and this in turn leads to customers playing in the unregulated market.
- **High player protection standards:** Gambling and betting are forms of entertainment that can have downsides. Irrespective of legal requirements, the protection and safety of persons (especially young people) are among the most important goals of OVWG members. The commitment to high player protection and safety standards is an indispensable prerequisite for OVWG membership. Technological innovations in combination with human sensitivity (social control) are crucial for the efficient enforcement of player protection. The OVWG is convinced that with sensible regulation, the majority of players will use the licensed platforms and not switch to the offerings of unlicensed providers. Regulation thus has the effect of better channelling players towards licensed gambling and betting providers.
- **Independent regulatory authority:** Gambling and sports betting providers are to be supervised in future by an independent authority with nationwide jurisdiction; the (quantitatively not limited) licences for online gambling are also to be issued by this authority.

The OVWG is convinced that Austria can also serve as a positive example for a functioning channelling of the online sector in the future.

The OVWG is happy to support the legislator in the implementation of this project with legal know-how, innovative ideas and many years of experience.