

Austrian Online Gaming

Status quo and outlook

by Dr. Christian Rapani and Mag. Julia Kotanko

Since the 2010 amendment of the Austrian Gaming Act, the terrestrial as well as online gaming industry in Austria has been facing inconsistencies in enforcement and judicial decisions. By the end of 2016 all three Austrian supreme courts formed a unified line of judgments confirming the legality of the Austrian monopoly on games of chance. Even so, the existing regulatory framework in Austria, especially affecting online games of chance and online betting, still raises questions under EU law and continues to be challenging for various reasons. Recent developments indicate that upcoming changes are probable and have the Austrian (online) gaming industry expectantly looking into the future.

Introduction to Austrian Online Gaming Law

Austrian gaming law distinguishes between games of chance and betting. The former is regulated under a national monopoly while the latter falls into the competence of the nine Austrian states, which therefore each have their individual betting laws.

Online Games of Chance

According to the Austrian Gaming Act [*Glücksspielgesetz; GSpG*], a game of chance is defined as a game in which the decision on the outcome exclusively or predominantly depends on chance. Online games of chance fall under the definition of the so-called “*electronic lotteries*” and, as such, are also subject to regulation under the national monopoly on games of chance.

Under the national monopoly on games of chance the Federal Ministry of Finance may transfer the right to operate games of chance by granting licenses. The only license for offering electronic lotteries has been granted with a term until 30 September 2027. While this license is valid, no new license for offering electronic lotteries may be issued.

Choosing to regulate (online) games of chance by maintaining a national monopoly has generated much public and



legal debate, especially regarding the conformity of the monopoly on games of chance with EU law. Only a monopoly which is in conformity with EU law may legitimately infringe upon the principle of the freedom to provide services as guaranteed by EU law. Positions became so entrenched that first instance courts and even the three Austrian supreme courts (Supreme Administrative Court, Supreme Constitutional Court, Supreme [Civil and Criminal] Court) amongst each other could not agree on the question of conformity of the monopoly with EU law.

Ultimately however, by the end of 2016, all three Austrian supreme courts formed a unified line of decisions declaring the national monopoly on games of chance to be in conformity with EU law and subsequent decisions of all instances have since followed this assessment.

Nonetheless, in accordance with rulings from the European Court of Justice (ECJ), the question of whether a law is in conformity with EU law may always be posed to the courts and the way in which circumstances have developed after the regulation was adopted must be reviewed and considered anew in every case. With the progression of time new facts may therefore arise that would require each of the Austrian supreme courts to reevaluate their assessment of the conformity with EU law.

New legal circumstances of relevance in this context might be derived from ECJ judgments, such as the Sporting Odds Ltd. judgment of 28 February 2018, Case C-3/17, which

concerned the Hungarian gaming regulations, and one Austrian request for preliminary ruling from the ECJ, which is still pending. Furthermore, recent studies and legal publications provide for new findings and additional facts, which might require courts to (re-)consider and rule anew on the conformity of the national monopoly on games of chance with EU law.

Online Betting

As already outlined, Austria does not have a nationwide betting law. Betting is regulated at a state level and Austria therefore has nine separate betting laws.

The term “*betting*” is divided into “*sports betting*” (betting on sporting events) and “*social betting*” (e.g. betting on the result of presidential elections). “*Live bets*,” also referred to as “*in-play betting*,” present a subcategory of sports bets. The ambit of the state betting laws do not all include regulations on social betting and/or live betting, which is why the following only pertains to sports betting in the narrow sense.

All states regulate sports betting by issuing licenses, which are not limited in number, and may be granted to anyone who fulfils the necessary conditions as per the relevant state laws.

Of the nine state laws, only two, namely the laws in Vorarlberg and Salzburg, explicitly regulate online sports betting. The Explanatory Notes of these two state laws provide that only sports betting operators, who have their servers within the respective states’ territory, fall within the scope of the state betting law.

This under- and/or non-regulation of nationwide cross-border online sports betting offerings leads to a fragmentation of the legislative framework and does not provide satisfactory legal certainty to national and international online sports betting operators in the Austrian market.

Overview of Recent Developments Impacting on the Status Quo

There have recently been a few developments, which might turn out to have great importance for the Austrian online gaming industry.

Ministerial Draft

A Ministerial Draft amending the Austrian Gaming Act, which also regulates the national monopoly on games of chance, was published in February 2018.

According to the Explanatory Notes, the goal of the Ministry of Finance, which published the draft, was to crack down on unlicensed – meaning non-Austrian licensed – operators of online games of chance. The amendments would have provided the responsible authority with increased enforcement powers, e.g. by allowing them to resort to IP-blocking measures to combat illegal online games of chance offerings. Furthermore, another section would have stated that contracts regarding illegal games of chance are null and void. The consequence would be the unravelling of the contract. The introduction of such an explicit qualification in the Gaming Act would have significantly facilitated the pursuit of legal claims by players. In Austria the statute of limitation for these civil claims is 30 years.

Consequently, the proposed amendments would have had a serious impact on all online operations of games of chance.

The Ministerial Draft was, however, withdrawn within a few days after its release due to alleged “*technical difficulties*”, which gives hope for the matter potentially being reconsidered. At the time of writing, it remained unclear if, when and, if so, with what content the withdrawn Ministerial Draft or a new amendment might be (re-)published. The gaming industry therefore will have to await new developments in this respect.

Supreme Court Decision

Regardless of the possible adoption of the nullity of illegal games of chance contracts into the law, the Austrian Supreme Court has already ruled upon the online games of chance offering from one Maltese licensed operator in 2017.

In its judgment the Austrian Supreme Court stated that payments made by a player on grounds of an illegal and therefore void gaming contract are reclaimable.

Continued on page 27



Dr. Christian Rapani



Mag. Julia Kotanko

Dr. Christian Rapani is founding partner of his law firm located in Graz, Austria. The key areas of his practice are business and corporate law and Dr. Christian Rapani is the author of various publications in his fields of activity. He has extensive experience in advising domestic and international clients on all aspects of gaming law, with a special focus on B2B and B2C online gaming offerings. He has provided guidance in various licensing proceedings and advises clients on national regulatory requirements and developments affecting their business.

Mag. Julia Kotanko is a senior legal associate specializing in gaming law. She is continuing her academic career by writing her doctoral thesis in the field of online sports betting. Dr. Christian Rapani can be reached at office@rapani.at.