

Austria: challenging the powers that be

In a letter to the European Commission, President of Austria's Automatenverband, Helmut Kafka, expresses the views of street gaming operators to the new Austrian gaming law

In the name of a very large majority of the members of the Austrian Automatenverband.at, registered as an interest representative with the European Commission in Brussels, we want to forward the following comment. Our association does have members from other EU member countries and members with business interest and connections within the European Union.

This new gambling law again shows numerous discrepancies with and violations of the European Union Treaty, Regulations and, even the latest, judgements of the ECJ.

That some details also violate and ignore the Austrian Constitution is a national problem.

Except for the details explained in the following pages, which show only a part of the unfair competition against consumers, existing companies and applicants for licenses from other EU countries, specifically created by this law, we also point out the widespread lack of conditions, which would allow a purely national regulation of the gambling market in Austria.

Furthermore this new law, in the present text, does not specify at all the very important necessary technical details for the future online connections of the gambling machines, which are however expressly made mandatory. This means, that very important parts of this new law,

which are already referred to in the text, are completely missing!

The new law does also not regulate, which details of data, however already required to properly comply with this law, have to be forwarded to the government digitally. It also ignores therefore the important subject of the EU Data Protection Directive (95/46/EC) and the fundamental freedoms of privacy of personal data, especially important after the Lisbon Treaty was signed.

It must be suspected, that this will be regulated by a simple bureaucratic procedure, as an individual issue of conditions, outside of this notification, thereby undermining the normal democratic procedure with the Austrian parliament and most probably of the Directive 98/34/EC.

We therefore politely request that the Commission questions any "replies" from the Austrian Government in reference to their conformity to reality to avoid possible "misunderstandings" like for instance in the last notification 2008/522/A.

Of course we are ready to help with further details and information, as well as with proof of the details mentioned in the comment and ask to be kept informed as far as possible.

*Helmut Kafka, President,
Automatenverband.at*



"This new gambling law again shows numerous discrepancies with and violations of the European Union Treaty, Regulations and, even the latest, judgements of the ECJ."
Helmut Kafka,
President,
Automatenverband.

A NEW AUSTRIAN GAMING LAW

Already a first glance at the proposed Austrian Gaming Act (TRIS, 2010/228/A) reveals it to be in fierce contradiction not only to current EU law but, more even more so, with the ECJs case-law in the field of gambling. The newly introduced competence of the provinces to grant the right to stage "games of chance using a gaming machine" (§ 5 Gaming Act) by issuing only up to 3 licences per province, as well as the way of "selecting" private federal licensees for "Casinos" (§ 21 Gaming Act) and Lotteries with its constantly growing and improving product range, constitute restrictions on the freedom to provide services and the freedom of establishment, as laid down in Articles 56 and 49 of the Treaty on the Functioning of the European Union.

The Austrian Regulations in the new Gaming Law, taking account of the

detailed rules for their application, as well as the respective factual situation, do not constitute a consistent and justified system of limiting gaming activities at all!

The proposed reduction of the number of gambling machines will be made ineffective in the new law by introducing an explicitly unspecified number of server based gambling machines called video lottery terminals (VLTs) through a federal license for the whole gambling market of Austria.

Also three more new full casino licenses will be issued, which will increase the number of casinos, with live games and gambling machines without any limits, from already 12 to 15!

Possibly in expectation of the 'result' of the 'transparent search for applicants' and in knowledge of the repeated avoidance

of any correct public tender within the European Union by the ministry of finance of such concessions, "decrees" and licenses in the past, the private company Osterreichische Lotterien is already improving the attractiveness of their product range from the Sept. 8, 2010.

This private company is operating with a simple decree, issued without public tender in 1997 by the minister of finance, which will expire in 2012, unless the issue of this decree might soon be declared unlawful by the ECJ in the "Engelmann" case C-64/08.

In order to improve the profits, players will be artificially attracted to play more with a constantly high jackpot. Lotto 6 of 45 will, from September 2010, guarantee a minimum of € 1.000.000.- for the correct 6 numbers.

In the light of the ECJ's case law, national restrictions on gaming activities may be justified by imperative requirements in the general interest, such as the preservation of public order, consumer protection, the prevention of fraud and crime, as well as for moral, cultural or religious reasons. Restrictions based on such grounds, however, must be suitable for achieving those objectives, inasmuch as they must serve to limit gambling activities in a clearly consistent and systematic manner.

The chance for (small) wins will be tripled and the existing five win possibilities will be raised to eight different win possibilities. Also the price for the players will be raised by ten percent from € 1.- to € 1,10. The product range of the Austrian Lotteries company was extended over the years and includes now, besides the classical Lotto 6/45, Toto, Torwette, Euromillionen, Bingo, ToiToiToi, Zahlenlotto 1-90, Joker, Rubbellos, Brieflose, Klassenlotterie, WinWin gambling arcades with gambling machines called VLT with high stakes and prices (€ 25.000.-), tipp3 and win2day.at (online gambling).

Furthermore, the licensing conditions, esp. the condition that a licensee has to be a domiciled, i.e. an established company in Austria, are discriminatory. As a result, no justificatory grounds can be found for those infringements of the fundamental freedoms of the internal market. Certain provisions in the new law, from another member state's point of view, simply lack to follow the principles of basic logic.

VIDEO LOTTERY TERMINALS

While server based, unlimited gambling machines, called VLTs, with a federal license, have no restrictions in numbers, stakes and prices, the number of gambling machines licensed by the provinces, with reduced stakes and prices, is limited to one gambling machine per 1200 inhabitants in 8 provinces with long distances, while in the densely populated city of Vienna, with very short distances, there need to be only 600 inhabitants per one gambling machine, thus ignoring the principle of coherence, strictly and unconditionally required by, even recent, decisions of the ECJ, e.g. Liga Portuguesa, (C 42/07).

The proposed reduction of the number of gambling machines will be made ineffective in the new law by introducing an explicitly unspecified number of server based gambling machines called video lottery terminals (VLTs) through a federal license for the whole gambling market of Austria.

In the light of the ECJ's case law, national restrictions on gaming activities may be justified by imperative requirements in the general interest, such as the preservation of public order, consumer protection, the prevention of fraud and crime, as well as for moral, cultural or religious reasons. Restrictions based on such grounds, however, must be suitable for achieving those objectives, inasmuch as they must serve to limit gambling activities in a clearly consistent and systematic manner.

Finally, the restrictions also have to satisfy the requirement of non-discrimination.

The Austrian new gambling law, already resolved by the Austrian parliament before the end of the notification process, does not genuinely reflect a realistic concern to attain the proposed targets,

which only would allow such a special national legislation. Details, possibilities and restrictions of the new law do not show a consistent and systematic approach without discrimination. Neither are there any religious or cultural, nor moral reasons (see also joined cases C-447/08 and C-448/08) behind it.

Those necessary, even mandatory requirements, though, are not at all met by the proposed legislation, since consumer protection cannot be seriously invoked, when there are unequal stake limits for different operations of the same type of gambling machines, e.g. no limits at all for casinos, or, in another case, current limits for maximum stake of € 0,50 are raised up 20 times to € 10,- per game.

While the Austrian government claims its aim is the protection of players, it raises the maximum win from € 20.- to € 1.000.- and € 10.000.- in order to improve the attractiveness for the players to spend more money for gambling, thereby improving the income and consequently collect more government taxes from the gambling machines!

The responsible secretary of state welcomed in public (on several occasions) an expected increase of over 50 per cent of gambling taxes, based on this new law! This clearly shows the financial motivation behind this new law, only camouflaged by discriminating and illogic player's protection regulations.

At the same time the new law reduces the possible damages, awarded by courts, for violation of player's protection from an unlimited amount to a maximum of only 36 month of the official existence minimum of € 783.- per month. Regardless of how much more money or hundreds of thousands an identified problem gambler has lost already. This way the government is again drastically reducing the financial risks for the very few new, selected private licensees for ignoring and violating the, obviously only allegedly important, player's protection regulations.

The 36 month limit was only introduced after the highest constitutional court twice declared the limit of damages, to a maximum of 6 month of the existence minimum, a breach of the constitutional rights of players damaged by a lack of player's protection. The first ruling of the constitutional court was ignored by parliament and the limitations to a maximum of 6 month of existence minimum limit for proved violations of the player's protection damages was introduced again by the parliament. This was declared unlawful again by the



constitutional court a second time! The case of the unlawful restriction of limiting damages to the existence minimum, even after proof of lack of player's protection by a court decision, is pending at the constitutional court.

PROTECTION-ISM?

The present Austrian Gambling Law explicitly protects only the private licensees of the states gaming monopoly and licensees of the province of Lower Austria against the financial risks of a lack of player's protection with this dramatically reduced damage payments.

All other gambling operators and businesses have to pay in such cases the full, unlimited, damages up to three years, according to the Austrian Civil Code (ABGB) like any other business in Austria.

The new Austrian Gambling Law now reduces this damages for violations of the player's protection to 36 month of existence minimum (max. € 28.188.-) for all the new and therefore unnecessarily privileged, licensees. Possibly also in

The present Austrian Gambling Law explicitly protects only the private licensees of the states gaming monopoly and licensees of the province of Lower Austria against the financial risks of a lack of player's protection with this dramatically reduced damage payments.

violation of the consumer protection within the European Union and of course the Austrian Constitution again.

Already these details show, that player's protection in the new gambling law is mostly a lip service, which should distract from the massive manipulation of the Austrian gambling market.

Furthermore, the following details also explain the extensive discrimination and massive lack of coherence:

Full identification of the player with a card directly at the gambling machine and recording of his playing time, in order to restrict the playing time per player to 3 hrs within 24 hrs in the whole of Austria, is introduced only for those gambling machines, which can be played with the smallest stakes (up to € 1.-) and smaller wins of maximally € 1.000.-.

Neither the more dangerous gambling machines with € 10.- stake per game and maximum wins of € 10.000.-, nor the most dangerous gambling machines at the Casinos without any limits for stakes and

prices at all, are subject to similar strict controls or restrictions by the public authorities. Where there are gambling machines with high or unlimited stakes and wins, only a simple age and identity control of the players at the entry of the premises is required by this new law.

No such control or restrictions of playing time at the gambling machine itself takes place there. The activities of those, also private, gambling operations, where actually even more protection of the players would be necessary, because of the very high or unlimited stakes and wins, are not subject of the same strict regulations and rules by the public authorities.

A COLD SHOULDER

A specially praised player's protection mechanism, a "cool off period" after 2 hrs playing time with the € 10.- stake and € 10.000.- win gambling machines, was unmasked as a matter of seconds only. The most dangerous Gambling machines in Austria with unlimited stake and wins will not even shut off for those few seconds.



"In the area of gaming machines, though, there are no additional revenues to be expected as per the new law, the total number of machines in operation will be significantly reduced."
Dr. Franz Wohlfahrt,
CEO Novomatic AG



Dr. Franz Wohlfahrt,
CEO Novomatic AG

THE NOVOMATIC VIEW

"The recent amendments to the Austrian Gaming Law, passed by the Austrian Parliament and notified by the EU, are an absolutely necessary reform of an outdated law. The draft provides for the strictest protection measures for gaming machines and video lottery terminals (VLTs) in the European Union and places new challenges on the industry as well as its operators.

For us, this law represents the basis for the development of our strictly

regulated home market which will require significant investment - namely in new distribution structures, primarily in electronic casinos that are equipped with access control as well as in their direct linking to the Austrian Federal Computing Centre (Ministry of Finance). In the area of gaming machines, though, there are no additional revenues to be expected as per the new law, the total number of machines in operation will be significantly reduced.

A positive aspect that should be noted is that on the basis of this newly established legal certainty our 2,700 jobs in Austria can be secured on the long term. Finally, the authorities have a sound and efficient hold that allows them to effectively and comprehensively eliminate the scourge of illegal gaming."

In a number of cases, the ECJ, on occasion of hearings, had asked Austrian governmental representatives, whether or not there was publicity for jackpots or lotteries on national channels of TV, which, in the affirmative, disqualifies a plea for consumer protection or restriction of gambling as such.

It is a completely inconsistent and unsystematic policy for this very important segment of the Austrian gambling market.

It is also an extreme case of discrimination and incoherence, which speaks for itself. All these advertisement and practices and more can be found in Austria in an extraordinary vast extent, showing the inadmissibility of the proposed regulation(s) as a matter of protection for the consumers.

Far-reaching publicity for lotto jackpots on both national TV-channels, online casino-gambling, for new gambling offers, scratch cards etc., advertised just before the early evening news, live drawings every Sunday and Wednesday on TV, are common practice to attract new players in a clearly excessive and aggressive manner.

The Lotteries are also advertising the nearly regular extensions of their manifold online gambling offers of their online gambling website There are widespread and constant advertisements

in the largest newspapers and magazines, special casino vouchers are offered at supermarkets and many more temptations are provided. The third largest advertisement budget in Austria is used to aggressively and constantly propose all forms of gambling, offered by the government's private licensees, to the public.

It shows, that there is no responsible government policy of a proportionate, controlled expansion in the gambling sector, which could be consistent with the objective of drawing players away from excessive gambling or from clandestine gambling, to activities, which are taxed, authorised and regulated.

Licensing conditions for applicants from another member state are rendered unfairly difficult, since the proposed legislation simply ignores, even most recent, yet unpublished, decisions by the ECJ, when seemingly unfair conditions are set up, e.g. companies of a certain nature or structure, have to be domiciled in Austria (C 62/83 and C 63/81, Seco).

In the light of the soon expected preliminary ruling of the ECJ in the Austrian “Engelmann” case (C- 64/08, probably Sept. 9th) and the already known opinion of the General Advocate, it is expected, that the past renewal in secrecy of the Austrian monopoly gambling concessions and decrees, for very few selected private companies, could be declared unlawful.

(Three more cases of preliminary questions from Austrian courts are pending at the ECJ. The new law does not seriously improve the uncovered legal discrepancies!) Between 1997, 1998 and 2001 all the concessions for casinos and many decrees for the lottery and its extensions, were prolonged without public tender, unnoticed by the public and any possible competitor within the EU.

This would explain, why this law was now pushed through parliament with particularly noticeable haste and certain peculiarities already on 16th of June 2010. Even avoiding to wait for any possible changes, which might be required by the notification process, which ends on 16th of July.

Also, the enacted period of validity for licenses/concessions for fifteen years, in practice means, that the Austrian gambling market will be closed and thus inaccessible for any operators from other EU member states during this time. This, in itself, is highly discriminatory, let alone that there is no sufficiently transparent regulation of a system of public tender for such licenses in the new law, that could stand scrutiny by the competent national authority or even the ECJ. (see C-203/08),

Instead the new law requires only a “transparent search for applicants”, leaving the issue of any federal gambling licenses to selected private companies up to the political discretion of the Minister of Finance. The need for EU wide public tenders as required by EU Regulation, is explicitly and strictly avoided in the new gambling law, under the pretension, that all the required conditions for a strictly national “adjustment or manipulation” of the market for a few new licensees are of course fulfilled.

CLOSING THE DOOR ON STREET GAMING

An exclusive selection process behind closed doors must be expected. The same applies to the only one or maybe three provincial licenses, which can be issued by each of the nine provincial governments.

The Austrian Government cannot prove, that there are overriding reasons of general interest to restrict the



fundamental freedoms of the Union. The extreme derogation from the fundamental freedoms of the Treaty by the Austrian Government is neither accompanied by an analyses of the appropriateness and proportionality of the restrictive measures adopted nor by statistical and/or other precise evidence enabling the necessity for the outstanding unilateral measures adopted to be evaluated. The new law is neither based on actual facts, verifiable scientific research, nor necessary data about gambling and gambling addiction in Austria.

Also there is not even a sufficient number of cases of criminality in gambling - constantly less than 19 convictions for illegal gambling (§168 StGB) per year in the last years - but a hype about an allegedly illegal gambling problem was

artificially created in public. Strikingly soon after the opinion of the Advocate General in the “Engelmann” (C-64/08) case was published, it became a more important matter of public attention.

The present gambling law and criminal law already allows, that any illegal gambling machine or device can be immediately confiscated by the mere assumption, simple appearance or an only possible suspicion of any illegal gambling activity.

The head of the Anti-Money-Laundering-Group at the Federal Criminal Office confirmed at a gambling conference less than 3 weeks ago in Vienna, that there are actually no problems with and no convictions for money laundering in the Austrian gambling sector at all.

The extreme derogation from the fundamental freedoms of the Treaty by the Austrian Government is neither accompanied by an analyses of the appropriateness and proportionality of the restrictive measures adopted nor by statistical and/or other precise evidence.

Contrary to the reality of the gambling market in Austria, a never before seen and heard amount of false propaganda about alleged problems and solutions, supported by a suddenly appearing, highly equivocal, market research with stunning interpretations of numbers and details, was presented to the public.

For instance: the new law is praised for finally eliminating the illegal “parallel games” in the gambling machines. This is not only presented as an important achievement by the secretary of state in several press conferences, but it is also repeated by other politicians, in the media and by allegedly competent researchers - however, as the real technical court experts and the producers involved very well know and can of course prove - such “parallel games” never ever existed

Contrary to the reality of the gambling market in Austria, a never before seen and heard amount of false propaganda about alleged problems and solutions, supported by a suddenly appearing, highly equivocal, market research with stunning interpretations of numbers and details, was presented to the public.

in those Austrian gambling machines.

The new gambling law however, does eliminate, after a reduced and unequal transition period, over 1300 flourishing small and medium companies from the market, which employ well over 10.000 people, in favour of less than 30 new privileged private companies, without a correct public tender process!

This way the healthy competition between many hundreds of small and medium companies, the best protection against the exploitation of the consumers, is explicitly avoided and the present choice for the consumers, to play where they get the best value for their money, is artificially nearly completely reduced to a few new and privileged licensees.

As it is known by the local Austrian politicians/officials involved, that the Commission is neither enforcing the treaty and regulations very intensively in reference to gambling, nor that many infringement proceedings in gambling matters have much effect immediately, EU Law requirements are consequently widely ignored, circumvented and ECJ decisions are artfully interpreted. (See for instance the Greek case or the new Belgian Law).

THE PRIVILEGED FEW

It was reported, that when a reference was made about relevant judgements of the ECJ, which should be considered now, a smashing reply from a government official was: “... if, in a few years, there is a judgment by the ECJ against this law, we will just change a part of the law then”.

(At which time the Austrian gambling market will be already in the hands of a very few new privileged private companies for 15 years, without public tender.)

After a wave of protests from the existing private gambling businesses, licensed by the provinces to operate gambling machines with very small stakes and prices, (some of them in possession of licenses for ten years and a considerable number even with licenses without time restrictions) reached the public attention - a promise of “evaluation” of the effects of the new gambling law within a few years was made.

However destroyed small and medium companies and lost jobs cannot be restored as quickly or at all, as quickly as they can be destroyed!

Already the failed attempt to introduce the 2008 Gambling Law (TRIS 2008/522/A) by surprise (immediately

after national elections and before the new government was sworn in, Oct./Nov. 2008) destroyed dozens of millions of Euro of the market value of the private companies effected. A completely unnecessary, destructive step, which started in secrecy.

It seems, therefore, imperative that the European Commission looks into the matter more profoundly and requires the Austrian Government to adjust this new gambling law to current EU law, the treaty and regulations in time and not after promised “evaluations” in a few years.

The ruling in the ECJ’s “Engelmann” case (C-64/08) is expected to be published in the second week of September and a possible result could very well be, that the Austrian Government has to revoke all existing gambling monopoly concessions, licenses and informal decrees, issued to private companies, with immediate effect.

It is necessary to avoid that this possible situation is being misused to issue the new concessions/licenses without a correct public tender process, declaring its avoidance maybe wrongfully by being in accordance with the only exception in the C-203/08 case or as a necessity because of “a case of emergency”. A possible precaution could be to prolong the notification period for another three month or more until the legal requirements of European Union, the consequences and the detailed conditions of the ECJ decisions, including the judgement of the national court involved, are correctly concluded/fulfilled.

Only this way any possible misuse of the new law to manipulate the gambling market to the disadvantage of the consumers and existing companies can be avoided and the Austrian Government has then enough time to adjust possible national peculiarities, apparent mistakes and also those (accidental) misinterpretations of the EU Law, Treaty and regulations. (see also Art. 56 AEUV; the state monopoly and the provinces will issue concessions/licenses for the Austrian gambling market to private companies only, not to state owned, controlled or state governed companies)

It would also avoid a number of infringement cases, many complaints to the commission and the ECJ, which would inevitably follow from various member countries, because of excluded competitors from other EU countries and the consequent claims for damages of those, who participate or have interests across EU borders in the Austrian gambling market.