Unlike many jurisdictions, gambling and betting is subject to two very different layers of legislative competence in Austria. While games of chance are regulated by the Federal Gambling Act (Glücksspielgesetz, ‘GSpG’), betting is not covered within the scope of the GSpG and is regulated at the level of the nine Austrian federal provinces, the Bundesländer. These betting laws allow operators fulfilling certain requirements to obtain licences valid for the respective territory. While there are exceptions, the majority of betting laws regulate retail betting only. Two out of the nine Bundesländer laws include an online betting licence requirement for operators that maintain servers or have a physical establishment in the respective jurisdiction. However, all the betting laws in Austria lack specific rules applicable to foreign betting operators.

On the contrary, gambling activities are subject to a de facto monopoly: The single lottery licence covers the operation of lottery products as well as all forms of online gambling and the operation of VLTs. The licence is held by Österreichische Lotterien GmbH, the only company ever to be licensed for providing online lotteries and online gambling in Austria. The Ministry of Finance as the Austrian gambling regulator may issue up to 15 licences for land-based casinos. Casinos Austria AG holds all twelve licences currently granted.

The legal regime governing the operation of betting and gaming in Austria is, on the one hand, shaped by the diverse legislators and regulators and, on the other hand, by the inconsistent approach towards how to regulate gaming and betting. In particular, the restrictive system of a de facto monopoly has led to numerous challenges based on EU law before local courts and authorities as well as before the CJEU. Over time, a number of Austrian cases have been referred to the CJEU, including most prominently the Engelmann, Dickinger and Omer and Pfeifer cases, with the main question being whether the Austrian de facto gambling monopoly is in compliance with EU law, in particular with the freedom to provide services and the freedom of establishment. The CJEU has found that the monopoly “seems to be disproportionate” and has highlighted doubts in regards to the consistency of Austrian legislation.

In March 2016, the Austrian Supreme Court (Oberster Gerichtshof), in an unfair competition case, asked the Austrian Constitutional Court (Verfassungsgerichtshof) to clarify whether the Austrian gambling monopoly is compliant with the Austrian Constitution. In its request, the Supreme Court argued that Austrian gambling law does not comply with the principles set by CJEU case law, in particular when it comes to the CJEU’s consistency test (often dubbed the ‘hypocrisy test’). The Supreme Court found that the advertising policy applied by the Austrian de facto monopolists violates the criteria set by the CJEU in the Markus Stoß case and runs contrary to the public interest objective of protecting players and restricting the gambling offer, mainly as their advertising activities aim to attract new customers by stimulating their active participation, such as by trivialising gambling and giving gambling a positive image. Leaving the monopoly provisions unapplied in cross-border cases subject to EU law (i.e. towards foreigners but not towards Austrians) would have constituted discrimination of nationals, which is contrary to the Austrian Constitution. However, the Constitutional Court rejected the Supreme Court’s referral on formal grounds. On the same day of this rejection, the Constitutional Court...
While there are legislative changes in regards to betting and gambling legislation, the de facto monopoly currently still stands.

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rulled on several complaints filed by slot machine operators, which were based on the same arguments as the Supreme Court’s referral. In this decision, the Constitutional Court found no breach of EU law or the Austrian Constitution. In taking this decision, the Constitutional Court followed a tendency initially started by the Supreme Administrative Court (Verwaltungsgerichtshof), which had already found the GSpG to be unproblematic in relation to EU law.

Although the Supreme Court had first argued that the GSpG infringes EU law principles (and its request to the Constitutional Court had actually gone as far as seeking the latter to repeal certain parts of the GSpG and, in eventu, the entire law), the Supreme Court’s Fourth Chamber, which had referred the request to the Constitutional Court, now consistently states that the questions regarding the monopoly’s compliance with EU law and constitutional law have been sufficiently clarified. However, ever since the Constitutional Court ruling in October 2016, the Supreme Court has refrained from making any further statements regarding the compliance of the GSpG with EU law. Other chambers of the Supreme Court may or may not follow suit.

Although there are now decisions of all three high courts considering that the GSpG is in compliance with EU law, the Regional Administrative Court of Upper Austria (Landesverwaltungsgericht Oberösterreich) has been active in issuing decisions to the contrary, holding that the monopoly is inconsistent and thus infringes EU law. Moreover, this Court has submitted two new requests for preliminary ruling on the compatibility of the Austrian gambling regime to the CJEU: Filippi, C-589/16 and Gmalieva, C-79/17. Besides shedding light on further angles of the overarching question of whether the GSpG takes a consistent approach to gambling legislation, the CJEU has been asked to clarify whether a court having found the national legislation to be in violation of EU law is obliged to revoke sanctions that had already been imposed for breaches of such legislation.

The CJEU has also recently opined on cases referred from Austria and added further clarity to its case law on gambling. In mid-2016, in Admiral, the CJEU ruled that national legislation “must meet the concern to reduce opportunities for gambling or to fight gambling-related crime not only at the time of its adoption, but also thereafter.“ Therefore, the approach taken by a national court or authority assessing the consistency of legislation must be dynamic rather than static and consider how circumstances have developed following the adoption of legislation. On 14 June 2017, the CJEU clarified in Online Games that Member States are obliged to provide evidence whether a restriction of EU law is justified, including in court proceedings.

Besides this, legislative amendments have mainly taken place at the Bundesländer level as several have recently replaced outdated betting acts. In May 2016, Vienna passed a new law, which introduced a highly questionable licensing system with only one licence having been awarded so far, in mid-2017. Although the law stipulates a liberal licensing system, applicants are facing serious issues in the process. This is quite different from the situation in Salzburg, where a new betting act entered into force on 1 June 2017 (Salzburger Wettunternehmengesetz), being the second betting act (next to Vorarlberg) also regulating online betting. Styria has recently notified a new betting act (Steiermärkisches Wettengesetz) to the European Commission. The draft regulates retail betting only and is scheduled to enter into force at the end of 2017. Furthermore, the Bundesländer are currently implementing the Fourth Anti-Money Laundering Directive into local legislation with extended due diligence obligations applying to locally licensed companies. The lottery and casino licensees are subject to enhanced AML obligations under the new Capital Markets Anti-Money Laundering Act (Finanzmarkt-Geldwäschegesetz) that entered into force on 1 January 2017.

While there are legislative changes in regards to betting and gambling legislation, the de facto monopoly currently still stands. Despite the high courts having found the GSpG to be compliant with EU law, Austrian case law remains inconsistent when it comes to answering this question. The cases pending before the CJEU are likely to add more substance to the arguments voiced by the critics of Austrian gambling law.

1. Supreme Court 30 March 2016, 4 Ob 31/16m.
4. Supreme Court 22 November 2016, 4 Ob 31/16m, 24 January 2017, 4 Ob 268/16i; 3 May 2017, 4 Ob 7/17w.
5. Regional Administrative Court of Upper Austria 22 December 2016, LVwG-411653/5/Gf/Mu, 28 December 2016, LVwG-411664/6/Gf.
6. CJEU 30 June 2016, C-464/15, Admiral, para 34.
7. CJEU 30 June 2016, C-464/15, Admiral, para 36.
8. CJEU 14 June 2016, C-685/15, Online Games, para 66.