

Swiss seek to remove online gambling ban with draft law

The Swiss Federal Council published a draft of its revised gambling law on 30 April. The draft law aims to remove the current complete ban on online gambling in Switzerland and allow for operators with existing territorial casino licences to apply for a licence extension to offer online gambling. Dr. Andreas Glarner and Dr. Luka Mueller of MME Partners analyse the draft law.

On 30 April 2014, the Swiss Federal Council released its draft of a revised gambling law for consultation¹. The main reasons that led to the Swiss Government proposing a revised regulatory regime were the concerns expressed by Switzerland's casino industry. After the Swiss gambling prohibition was lifted in 2000, Switzerland's land-based casino industry started to flourish. However, once internet gambling and other remote gambling applications began to rise in popularity, the industry started to face competition from foreign remote gambling operators providing their services into Switzerland. As Switzerland's regulatory regime fully bans the organisation or operation of online casino games for money², the Swiss casino industry could not match the competitive challenge. In addition, Swiss gamblers may legally access online gaming services provided from abroad.

The current regime thus leaves the Swiss online gambling market in the hands of non-Swiss providers. Consequently, the success of online gambling in Switzerland goes hand-in-hand with substantial gambling revenues leaving the country. Since 2007, the industry suffered a 27% decline in

revenues and even a 34% decline in license payments³; the Swiss Casino Federation has identified foreign online gambling as one of the main reasons that has led to this⁴.

The expectations for the long awaited draft - the release of a new law was originally announced for mid-2013 - were high. Many local and international market participants anticipated that Switzerland would implement a legal framework designed to make Switzerland an attractive domicile for international online gambling operators. Though the Swiss gaming market is limited in size, Switzerland would offer an optimal infrastructural platform for online gambling operators.

Now the curtain has been lifted, this spirit of optimism has been replaced by sobering conclusions that - at least according to the Swiss Federal Council - Switzerland is not on the fast lane to become the next gambling hotspot. However, it is definitely too early to strike the flag: there is still a long way to go before a new law will eventually enter into force.

To a large extent, the proposed law does not change the current control and enforcement practices. From a formal point of view, it does, however, bring one substantial change: Currently, the Swiss regulatory framework distinguishes between two kinds of gaming, i.e. casino games and bets/lotteries. Casinos (terrestrial and online) as well as cash games of chance are governed by the 1998 Federal Gaming Act ('FGA'). Any other games - such as lotteries, bets and bingo - are governed by the Swiss Lottery Act ('SLA'). Skill games and prize competitions (as far as they do not fall under the SLA because participation is combined with a purchase obligation) do not fall under these federal laws but are regulated by cantonal law. Principally, skill

games and such prize competitions may freely be organised subject to certain cantonal restrictions. The proposed bill refers those two decrees into a single federal law aiming to guarantee a coherent gambling regulation in Switzerland.

However, this change is not matched with a new organisation on an institutional level: Casinos still require a concession from, and are supervised by, the federal government. The lotteries, sports betting and skill games will also require a cantonal authorisation and are under the supervision of the cantons. In order to support and improve the cooperation between the authorities of the Federal Government and the cantons on an institutional level, the draft legislation proposes the creation of a coordinating body.

Apart from this, the major features of the draft are:

Online gambling ban removed

Under the current regulation, organising online real money casino games is illegal⁵. The same applies to internet-based lottery or betting services⁶. However, while no licences for online casino games are available, the cantons may grant licences for online lottery or betting services. As of today, only Swisslos and Loterie Romande have obtained the necessary permissions and allow players to take part in online games. As a result, both of them have made use of their permissions by developing a wide range of online lottery and sports betting services.

According to the proposed Money Gaming Act⁷, the provision of online gambling services within Switzerland based on a concession is allowed. However, the draft does not break new grounds here either, instead attuning the online casino market to the existing legal framework for lottery and sports

betting services: Only a holder of a licence for a terrestrial casino shall qualify to apply for an online licence. Accordingly - and contrary to the draft of the Dutch Remote Gambling Act published around the same time - the draft does not contain the possibility for foreign operators to join the party without partnering with a local terrestrial licence holder. As only a limited number of terrestrial licences may be granted, foreign operators are well advised to enter into early strategic alliances with the Swiss bricks and mortar casino industry to secure their share of the cake.

In its commentarial report the Swiss Federal Council states that other licence schemes have been discussed. The chosen solution was favoured because it corresponds to the existing regulation for online lottery and sports betting and because it ensures that the Swiss casino industry does not have a disadvantage when compared to foreign providers offering their services into Switzerland, who have obtained market know-how.

In order to be able to extend an existing concession with the right to provide online gaming services, the applicant will have to provide proof that he meets the requested concession standards also with regard to its online business. One of the preconditions is a profitability calculation of the intended services. The Swiss Federal Council believes that - because the Swiss market is rather small - only a few platforms for online games will be profitable. Accordingly, it seems likely that the extension of a concession will be dismissed if the commercial viability is not demonstrated.

Blocking of foreign operators

The draft does not aim to prohibit the use of foreign online gambling services in Switzerland. Thus, players will not in the future have

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to fear sanctions - that is if they manage to access foreign gambling sites. The Federal Council intends to technically block access to foreign online gaming providers if their services have not been licensed in Switzerland.

The Federal Council argues that such measures are required to protect the Swiss players from unregulated foreign offers. The supervising authorities shall blacklist the relevant operators, and internet access providers ('ISPs') shall have the obligation to block the blacklisted websites.

ISP blocking is an extensive measure which may easily be circumvented. Thus, its suitability and proportionality seems at least questionable. Accordingly, there are strong doubts that the proposal will be able to find itself a supporting majority. This in particular as the foreclosure of the Swiss market has the ancillary effect of protecting the economic interests of the Swiss casino industry - which happened to strongly influence the composition of the draft law.

Other changes

The draft bill provides for a tax exemption for all money games and introduces new guidelines for the charitable use of the incomes from lotteries and sports betting services. The revised act also proposes to strengthen player protection and contains a number of provisions to guarantee secure and transparent gaming operations e.g. measures against the manipulation of sport competitions. In addition, the organisers of lotteries, sports betting and skill games shall become subordinated under the Anti Money Laundering Act.

Missed chances

Under the regulations in force, there is much uncertainty as to

what extent Swiss entities may provide services to foreign online gaming operators (e.g. IT services) and if they may invest in such companies. Interpreting the wording extensively, the authorities regularly take the position that each and every activity that supports, funds or simply facilitates online gambling is illegal. The draft regulation clarifies that the advertising of unauthorised gaming operations is prohibited. Other than this, it completely fails to address this question.

Outlook

The revised legislation proposed by the Swiss Federal Council is now in consultation (until August 2014). The purpose of the consultation is to check the acceptance of the planned revision and conduct amendments prior to releasing it to the Parliament for deliberation. Accordingly, it is not clear yet which system Switzerland will finally adopt. It seems unlikely that a revised law will enter into force prior to 2018.

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1. 'Draft Money Gaming Act' ('dMGA'), for the draft bill see http://www.admin.ch/ch/d/gg/pc/documents/2364/V_Entwurf_Geldspielgesetz.pdf and http://www.admin.ch/ch/d/gg/pc/documents/2364/V_Bericht_Geldspielgesetz.pdf for the associated commentarial report of the Swiss Federal Council.
2. Lottery and sports betting may be provided online by the two licensed operators.
3. <http://www.switzerlandcasinos.ch/98.html?&L=%2Fproc%2Fself%2Fenviro>, visited on 14 May 2014.
4. *Ibid.*
5. Article 5 FGA.
6. Article 1, 33 and 38 SLA.
7. Article 9 dMGA.