

# Lootboxes and Skin Gambling in Swiss Gambling Law

Andreas Glarner, Alexandra Körner and Carlo Schmid

*The sale of Lootboxes in video games and the use of virtual currencies and "Skins" for online gambling and betting have increasingly come into the focus of gambling regulators around the world due to their potential gambling nature. This article examines the characteristics of Lootboxes and Skin-Gambling and their classification in the new Swiss gambling law.*

## 1. Introduction

Video games have been very popular for many years, especially among young people. In recent years they have not only been technically improved, but also extended by special features, e.g. by the possibility to obtain certain in-game features such as weapons or skins (see Section 2.2) by purchasing so-called Lootboxes (see Section 2.1). The contents of these Lootboxes or other virtual goods can sometimes also be used outside the game as a stake in online (sports)betting ("Skin Gambling"). A huge market for betting with skins has emerged since then, in which high sums of money are spent. In 2016, around USD 5 billion is said to have been invested in skins on betting sites.<sup>1</sup>

Belgium and the Netherlands have recently qualified certain types of Lootboxes in video games as gambling.<sup>2</sup> As a result, video game manufacturers in those countries are forced to remove these features from their games. Meanwhile, gambling authorities from around the world have signed a joint statement and started to take a closer look at not only Lootboxes, but also other features within video games<sup>3</sup>. In the US, too, it was announced at a Senate hearing on 27 November 2018 that the issue of gambling in games would be investigated.

## 2. Definitions and Characteristics

### 2.1. Skins

Skins are virtual goods (non-physical objects and money) that are used for gameplay in video games. They are mostly cosmetic in nature (weapon or costume designs) and therefore have no direct influence on the performance of a player and the final results of the game. In some video games, skins may also include special character/avatar skills that can be applied by players. In such cases, skins can have an influence on the performance of the players.

Players cannot create skins but can choose and purchase them from various online stores. Each game console has its own online shop, which works similar to an app store and offers skins for a variety of games. The value of each skin is based on its popularity. Skins collected by players over time are stored online in their online game accounts. Skins can be bought with play money or directly with real money. In some cases, skins can also be won in a game after certain requirements have been met or if an opponent has been defeated.

There are numerous official platforms, i.e. platforms operated by the game manufacturers, on which skins can be bought and sold. The best known is the "Steam Community Market", which allows users to exchange their skins from various video games with each other and with the provider (among the best known are Counter Strike: Global Offensive, Dota 2 or Team Fortress 2). On the Steam Community Market, it is not possible to resell skins for real money. On other trading platforms not

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<sup>1</sup> See <https://www.srf.ch/news/schweiz/abstimmungen/abstimmungen/geldspielgesetz/gluecksspiel-jugendliche-verwetten-milliarden-fuer-virtuelle-gegenstaende> , Article by Jürg Tschirren, SRF Digital, 21.09.2017.

<sup>2</sup> See <http://de.krautgaming.com/62523/belgien-und-die-niederlande-erklaeren-lootboxen-zum-gluecksspiel/>, contribution by Dominic Reifschläger of 26.04.2018, last visited on 3 October 2018.

<sup>3</sup> Cf. joint declaration of 16 gaming authorities of 17 September 2018, <https://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>, last visited on 3 October 2018.

operated by the game manufacturers (such as skinsmarket, opskins, gameflip, bitskins, skins.cash, stonefire, Amazon, etc.) it is possible to exchange skins for money or for crypto currencies.

## **2.2. Lootboxes**

A Lootbox is a virtual "box", i.e. a box that can be unlocked, found or bought within a video game to get a random selection of certain objects (skins, avatars, weapons, etc.). Lootboxes can range from simple customization options for a player's avatar or character to improved equipment such as weapons or armour.

Lootboxes can be purchased in various ways. In some cases, they can either be found randomly or won after completing certain tasks in the game. In other cases, they must be bought either with real money (Star Wars Battlefront II, Counter Strike: Global Offensive) or with play money (FIFA, Fortnite). Lootboxes have been criticized for a long time because they can boost pay-to-win systems and turn free-to-play games into paid games.

## **2.3. Skin Gambling**

Skin Gambling refers to the use of skins as a virtual currency to bet on the outcome of (sports)events (e.g. E-sports events) or to use them as a stake for other online games.

There are numerous platforms that allow skin owners to use skins as a stake on E-sports events and tournaments as well as bets on a football, basketball, baseball or hockey game. In addition, there is a number of websites where traditional online casino games can be played using skins (such as skins.casino, gamdom.com, csgoempire.com, csgofast123.com, etc.). In such cases, players will transfer their skins from their player account to the respective gambling website. If the player wins, the winnings are paid out in the form of additional skins, which the player can then "withdraw" and convert into money or re-use in a video game. The gambling websites are not operated by the videogame manufacturer, but by third parties. However, they are connected to the video games via an interface.

## **3. Legal Framework for Gambling Law in Switzerland since 1 January 2019**

### **3.1. The new Swiss Money Gaming Act**

On 1 January 2019, the new Federal Act on Money Games (Money Gaming Act, MGA), which was adopted by the Swiss electorate in the referendum of 10 June 2018, entered into force. It consolidates the former laws on casino games, betting and lotteries into a single law.

With the introduction of the MGA, the online gambling ban in place until the end of 2018 was replaced by a system that allows online cash games to be conducted on the basis of a license. However, only holders of a Swiss land-based casino licence may extend their licence to an online licence. As of 1 July 2019, Swiss players' access to websites of foreign gambling and betting providers can be blocked by the Swiss authorities (IP blocking) and the provider can be placed on a public blacklist.

### **3.2. Definition of Money Games**

According to Art. 3 lit. a MGA, "money games" are games in which a monetary gain or other monetary advantage is expected in return for the payment of a pecuniary stake or the conclusion of a legal transaction. Both elements, the payment of a stake and the promised profit, must be cumulative and consist of money or a monetary surrogate (investment and other advantages with monetary value).<sup>4</sup>

The wording of Art. 3 lit. a MGA, in contrast to the regulation in force until the end of 2018, no longer includes an element of chance or luck that turns a game into a money game for which a licence is needed. The reason for the withdrawal of the luck element cannot be found in the materials for the MGA. However, the message on the MGA makes it clear that at least the distinction between casino games (Art. 3 lit. g MGA) and games of skill (Art. 3 lit. d MGA), which are subcategories of money games, still results from the element of luck or skill.<sup>5</sup>

<sup>4</sup> Message on the Money Gaming Act (BBI) 2015, p. 8435.

<sup>5</sup> Message on the Money Gaming Act (BBI) 2015, p. 8438.

The word "game" is not defined in the MGA. According to the interpretation of the MGA represented here, the legislator did not wish to extend the scope of the Money Gaming Act compared to the old regulations and accordingly maintained the fundamental distinction between games of chance and games of skill. Accordingly, a game only qualifies as a game in the sense of the MGA if it contains either a luck or a skill element. This understanding is also consistent with the subcategories of money games in the MGA: As under the legislation in force until the end of 2018, the MGA distinguishes between casino games and skill games (in addition to lotteries and (sports)betting).

### **3.2.1. Definition of Lotteries and Sports Bets**

Lotteries as defined by the MGA are money games that can be played by an unlimited or at least a large number of persons and in which the result is determined by a random drawing or similar procedure (Art. 3 lit. b MGA).

Sports bets are defined as money games in which the winnings depend on the correct prediction of the course or result of a sports event (Art. 3 lit. c MGA). The term "sports event" must be understood narrowly. Only events that are directly part of a (legal) sports competition are considered as such.<sup>6</sup>

### **3.2.2. Definition of Skill Games**

Skill games are defined in the MGA as money games in which the winnings depend entirely or predominantly on the skill of the player (Art. 3 lit. d MGA). Skill games that are automated, intercantonal or carried out online now belong to the category of "large games" (Art. 3 lit. e MGA). The organisation of large games requires a licence (Art. 21 and 24 MGA).

The only games excluded from the scope of application of the MGA are games of skill for sales promotion, from which there is no danger of excessive gambling and in which participation takes place solely through the purchase of goods or services at market prices (Art. 2 para. 2 lit. d and e MGA). In addition, games of skill which are neither automated nor carried out intercantonally or online do not fall under the MGA (Art. 2 para. 2 lit. b MGA).

### **3.2.3. Definition of Casino Games**

According to Art. 3 lit. g MGA, casino games are those money games which are open to a limited number of persons, with the exception of sports betting, games of skill and small games. Article 3 of the Money Game Ordinance specifies that a maximum of 1000 players may participate in the same casino game at a time (this does not apply to jackpots). This does not mean that all participants play at the same time but refers to the number of players who participate in a game unit, i.e. for whom the decision is made at the same time.<sup>7</sup>

## **4. Legal Analysis**

### **4.1. Lootboxes**

#### **4.1.1. Stake**

Whether a Lootbox is considered a money game and thus falls under the gaming regulation in force since January 2019 depends crucially on its design and the form in which it is purchased.

Lootboxes, which are obtained free of charge by performance (e.g. by completing certain missions in a video game) or by chance do not require a stake. They are therefore not subject to gambling legislation.

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<sup>6</sup> BBI 2015, P. 8437.

<sup>7</sup> Explanations of 22 October 2018 on the Ordinances of the Money Gaming Act, [https://www.bj.admin.ch/dam/data/bj/wirtschaft/legislation/laws\\_on\\_games\\_of\\_money/erlaueterungen-vo-d.pdf](https://www.bj.admin.ch/dam/data/bj/wirtschaft/legislation/laws_on_games_of_money/erlaueterungen-vo-d.pdf).

If, on the other hand, Lootboxes are purchased for real money, the criterion of stake is fulfilled. The use of virtual money/play money to purchase a Lootbox can also be qualified as a stake according to the practice of the Swiss Federal Gaming Board (SFGB). This applies at least in those cases in which the play money was acquired with real money.

In Switzerland - in contrast to the German gambling law - the amount of the stake does not play a role in determining whether or not there is a stake. Even if a Lootbox only costs CHF 1, there is a stake.

#### 4.1.2. Element of Luck

To be considered a money game in the sense of the MGA, the Lootbox must be a game: According to the view taken here, the content of the box must therefore be determined either by luck or chance or by skill. Players usually have no influence on the content of a Lootbox, the content is determined by chance. The element of luck is therefore generally given. The skill element would be fulfilled if a more skilled player could obtain a Lootbox with more "valuable" content than a less skilled player.

#### 4.1.3. Prize or Monetary Advantage

In order to qualify as a cash game, the player must have the opportunity to win a prize equal to a cash prize or other financial advantage (Art. 3 lit. a MGA). The terms "prize" and "monetary advantage" are not defined in the MGA. According to general understanding, a prize is the positive difference between the winnings and the stake. A monetary advantage is the fact that the player can gain a certain "advantage", i.e. more than he has used to play the game.

The question arises as to whether the skins, weapons or avatars obtained from Lootboxes qualify as prize or other monetary advantage within the meaning of Art. 3 lit. a MGA.

When assessing whether a prize or monetary advantage is obtained through the Lootboxes, it is important to distinguish between whether the contents of the Lootboxes have a value exclusively within the game or whether this value can also be used outside the game. If the content can only be used within the game, the following applies:

- **Content that cannot be purchased in the game:** If the Lootbox content can only be used in the game (e.g. for better chances of winning or to improve one's own playing strength), and if the content cannot be purchased elsewhere in the game, in our opinion, there is no prize or monetary advantage in the sense of the MGA.
- **Content for sale in the game:** If the content of the Lootbox correspond to the value of the purchase price, there is no prize or monetary advantage due to a lack of a monetary advantage. This would be the case, for example, if a Lootbox was bought for CHF 5 and the weapons or skins contained in it could be bought for the same price in the store for the game. If, however, the player had the chance to acquire content at preferential conditions with the purchase of a Lootbox, the criterion of the monetary advantage would be fulfilled.

There could also be a prize or monetary advantage if Lootbox contents give rise to a claim for real money. An exchange possibility, e.g. if the game offers the possibility to sell the contents of Lootboxes to other players for money could also be qualified as remuneration. In this case, however, the profit or monetary advantage is not directly the result of buying a Lootbox. There is no direct causal link between the stake and the prize. However, this causal relationship between stakes and prizes is, under Swiss law (old and current), not necessary for a game to qualify as a money game. However, it would usefully limit the scope of the gambling legislation. In the present case, it would exclude the possibility that Lootboxes whose contents only lead to monetary advantages in a second step could be qualified as money games.

So far, external trading platforms (such as skinsmarket, opskins, gameflip, bitskins, skins.cash, stonefire, Amazon etc., see above), i.e. not operated by the game manufacturers, have made it possible to trade skins and other contents of Lootboxes directly for real money. Through the interfaces to these websites, however, the game manufacturers enable their players to outsource their skins to these external trading platforms. According to the case law of the Swiss Federal Court, the actions of third parties are only attributed to the operator of a game if the latter knew or should have known that

winnings would be paid out by the third parties or other monetary advantage are promised.<sup>8</sup> Providing interfaces could qualify as help to illegal conduct, even if game manufacturers prohibit the sale of virtual game items on third party platforms in their general terms and conditions.

If Lootboxes contain virtual currencies, for example, with which additional Lootboxes or skins can be purchased, SFGB considers that there is a monetary advantage, as the player does not have to buy additional Lootboxes for money.

In summary, it can be stated that it depends on the design of the Lootbox if there is a prize or monetary advantage in the sense of the MGA.

## **4.2. Skin Gambling**

### **4.2.1. Stake**

In Skin Gambling, online casino games are played or bets are placed, whereby skins are used as stake (see above).

If a player uses skins for online casino games or bets which he has won or earned in a video game without the use of real money or play money, the skins do in our opinion not represent a monetary stake in the sense of the MGA. However, skins that are purchased for money in a game and then used (inside or outside the game) as a stake for sports betting or online casino games may be qualified as stake.

### **4.2.2. Casino Game or a (Sports)Bet**

Depending on the design of the game in which a player participates by using a skin, it qualifies as a casino game, a lottery, a skill game or a (sports)bet. With regard to sports betting, the question arises whether E-sports events fall under the term "sports event" within the meaning of Art. 3 lit. c MGA. This is likely to be confirmed.

All these games have in common that their provision requires a license according to the MGA and that they may not be offered to minors.

### **4.2.3. Organization of Online Casino Games and (Sports)Bets**

Whether skins or real money are used as stakes for casino games or betting is irrelevant for the definition of casino games and online betting (cf. Art. 3 lit. c and g MGA). The implementation or organization of online sports betting or casino games requires a license. Swiss providers of online sports betting or online casino games without a licence can be prosecuted in Switzerland. From 1 July 2019, Swiss authorities will be able to have the websites of foreign providers blocked for Swiss players in accordance with Art. 86 MGA and to place the providers on a public blacklist (Art. 87 MGA). However, the participation in such games remains legal for the player.

## **5. Conclusion**

**Lootboxes** have similarities to a traditional game of chance or a game of skill, depending on the type of purchase and their design. Decisive for the question of whether offering Lootboxes falls under the Money Gaming Act is the way the Lootbox is obtained and whether the content of a Lootbox represents a prize or a monetary advantage. The possibility of exchanging the content of Lootboxes for real money or other monetary advantages is also relevant for its qualification.

To the extent that Lootboxes qualify as cash games, they may only be offered by Swiss casinos with an online licence. The Lootbox function of foreign game manufacturers would have to be blocked for players resident in Switzerland. However, it is unclear how such blocking can be technically implemented, as Lootboxes are a "game inside the game" and cannot be easily removed or switched off. Some game manufacturers have already responded to investigations by foreign authorities (see

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<sup>8</sup> BGer 6B\_466/2011 of 16 March 2012, E. 4.3.1.

introduction) by adapting the mechanics of Lootboxes: In the game "Dota 2" by Valve, the chances of getting a box (in Dota 2 so-called "drop") with a higher rarity are displayed before the player can buy the drop.

**Skin Gambling using** skins purchased with real money or play money is likely to qualify as gambling within the meaning of the Money Game Regulation. Skins are used for casino games, lotteries, skill games or (sports) betting within the meaning of the regulation. Offering online betting and gambling was prohibited in Switzerland until the end of 2018. Since January 2019 and the entry into force of the MGA, it can be offered by licensed Swiss providers, but the offer may still not be directed at minors.

Skin Gambling and Lootboxes are criticized in (foreign) politics especially because many young people and minors play video games and the addiction potential is particularly high at that age. The addiction potential of Lootboxes has already been investigated and affirmed in a study by the Australian Senate Environment and Communications Reference Committee<sup>9</sup>. It is therefore to be expected that the gaming authorities of the various countries will try to find solutions for the regulation of Lootboxes with the manufacturers of video games or prohibit Lootboxes. In Switzerland, websites of unlicensed providers of online sports betting and online casino games that can be played with the use of skins may be blocked by the authorities in the future.

The use of Lootboxes and skin gambling varies from game provider to game provider. For a final assessment of their legality under Swiss law, their specific characteristics in each case must be examined individually.

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Dr. Andreas Glarner, LL.M., Legal Partner at MME, advises internationally oriented technology and industrial companies as well as Internet and blockchain companies and, among other things, has broad experience in entertainment and gaming law.

Dr. Alexandra Körner, Senior Legal Associate at MME, advises domestic and foreign clients on corporate and commercial law issues. In addition, she has particular expertise in compliance issues relating to gambling and entertainment law.

Carlo Schmid has been a trainee at MME since March 2018. During his time as a trainee, he has dealt intensively and on several occasions with current issues of casino law.

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<sup>9</sup> Vgl. "Gaming micro-transactions for chance-based items" vom "Senate Environment and Communications References Committee", 26. Juli 2018.