

# Gaming

*Contributing editor*  
**Behnam Dayanim**



**2018**

GETTING THE  
DEAL THROUGH

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# Gaming 2018

*Contributing editor*  
**Behnam Dayanim**  
**Paul Hastings LLP**

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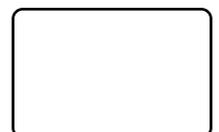


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# Preface

## Gaming 2018

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Gaming*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Behnam Dayanim of Paul Hastings LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE   
DEAL THROUGH 

London  
June 2018

# Switzerland

Andreas Glarner, Thomas Linder, Alexandra Körner and Sophie Schmid

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## Introduction

### 1 What are the legal elements required for an activity to be regarded as gambling?

In Switzerland, the two specific gambling sectors (the casino sector, and the lottery and betting sector) are defined in separate legislation (the Federal Act on Games of Chance and Casinos (FGA) and the Swiss Lottery Act (SLA)).

Games of chance are defined as games that cannot be influenced by skill, such as slot machines, roulette, blackjack, baccarat and poker (article 3 FGA). According to article 3 paragraph 1 FGA, a game of luck must meet the following criteria:

- participants pay a stake or entry fee;
- the outcome of the game is mainly influenced by chance; and
- the player may win a prize.

Games of skill are defined as games where the outcome depends to a certain extent on the player's skill.

Games that are dependent on money or other financial benefits are usually a mixture of both luck and skill, and it is not always obvious which of the two factors is dominant.

### 2 With respect to remote or other cross-border activity, where is the wager deemed to take place?

Remote gambling and online casinos are prohibited in Switzerland. Depending on the specific circumstances of the individual case, the following activities have been prosecuted or are deemed illegal by the Swiss Federal Gaming Board (SFGB), if conducted in Switzerland:

- operating a gaming server;
- processing certain financial transactions in connection with online gambling;
- advertising or marketing for online games (also hypertext linking); and
- management or financing of online gambling.

Thereby, the wager is deemed to take place at the location of the operator. This means that both operators and suppliers can be prosecuted.

### 3 What is the minimum age for participating in lawful gambling?

The participants must be of legal age, which means 18 under Swiss law.

### 4 What are the penalties for offering unlawful gambling?

Land-based casinos are not prohibited. However, a licence is required for the operation of a facility (such as a casino). The same applies to the provisions of lottery and betting services. As already mentioned (see question 2), according to article 5 of FGA, the provision of online gambling services (games of chance) is prohibited. The same applies to online lotteries and sports betting.

Offering gambling services without a licence, or services such as online lottery or cash games of chance is punishable by a fine of up to 1 million Swiss francs if the illegal act was performed intentionally, and in more serious cases, imprisonment of up to five years and fine of up to 2 million Swiss francs (article 55 FGA). In addition, the freezing of illegal asset allocation and the seizure of any materials and documents involved can also be carried out by the police.

Illegal betting activities can be punished with a monetary penalty of up to a daily rate of 90 Swiss francs or a fine up to 10,000 Swiss francs. All assets to the criminal activity can be confiscated.

### 5 Does the law penalise the gambler directly for participating in unlawful gambling?

Using the services of online gambling operators is not illegal; that is, Swiss players accessing foreign online casinos do not risk any criminal sanctions. However, their stakes and winnings could be confiscated by the FGB. The same applies to other unlawful gambling activities.

### 6 Are there exceptions for social gambling, or charitable or non-profit gambling?

Yes. According to article 3 SLA, lotteries for public benefit or charitable purposes are exempt from the prohibition, insofar as their issue and execution is permitted. Lotteries that serve a non-profit or charitable purpose can be licensed by the competent cantonal authority for the territory of the issuing canton.

The private organisation of poker tournaments is permitted if there is no stake or prize. The organisation or commercial operation of poker games and tournaments outside of licensed casinos is prohibited (article 4 paragraph 1 FGA in connection with a decision of the Federal Court of 20 May 2010).

### 7 What entity regulates land-based and remote gambling, and what are the regulator's powers?

As set forth in question 1, Switzerland has two sets of regulations addressing the two respective gambling sectors. While the casino sector is regulated by the FGA, the lottery and betting sector is subject to the SLA. Accordingly, Switzerland has two different supervising authorities for these sectors.

The SFGB supervises cash games of luck (casino games). It acts as an independent public authority board, which is part of the Federal Department of Justice and Police. The SFGB has regulatory oversight over casinos and supervises their compliance with the FGA and other applicable regulations. Furthermore, the SFGB is in charge of deciding whether a game shall qualify as a game of skill or as a game of chance and, thus, shall be subject to the FGA. Casino licences, on the other hand, are issued by the Swiss Federal Council, which also determines the number of licences that may be issued and their period of validity.

Betting and lotteries pursuant to the SLA are under the supervision of the cantons, which for their part assigned this task to the Intercantonal Lottery and Betting Board (Comlot). Comlot was established by the cantons in 2006 and is the global licensing and supervising body for lotteries and betting in Switzerland. Comlot evaluates the licence applications of lottery and betting operators and supervises compliance with laws, regulations and licensing requirements.

### 8 Are gambling licensees considered financial institutions for purposes of anti-money laundering and similar financial services regulatory requirements or are they otherwise subject to such requirements?

According to article 34 FGA, the Federal Act of Combating Money Laundering and Terrorist Financing (AMLA) applies to any gambling operators as well. Furthermore, casinos are considered as financial

intermediaries. Financial intermediaries under the AMLA must comply with different duties of AML due diligence. In addition, casinos must report any suspicion of money laundering immediately and respect the criminal provisions of the AMLA. Lottery companies are not yet considered financial intermediaries.

### Land-based gambling

#### 9 What types of land-based gambling are permitted in your jurisdiction, and is gambling regulated at a national or subnational level?

Land-based casinos can be operated by private corporate actors. Casinos usually offer games such as slot machines, roulette, blackjack and poker. However, a licence is required for the operation of a facility (such as a casino). The casino licence regime is regulated by the FGA. The FGA differentiates between two different types of casinos in terms of the possible types of games of chance to be offered, the winnings and the maximum number of slot machines:

- A-type casinos are casinos with no limits in stakes and may offer 14 different table games, with unlimited stakes, jackpots and maximum winnings at all slot machines. An A-type casino is only allowed in an area with a population of at least 1 million people.
- B-type casinos are usually spa or resort casinos, with a maximum of three kinds of table games and limited stakes, jackpots and maximum winnings at all slot machines. The maximum number of gambling tables operated per casino is three. The number of slot machines is limited to 250. While for the A-type casinos there are no limitations as per the maximum stake, the limit per stake in B-type casinos is 25 Swiss francs and the maximum jackpot offered is 25,000 Swiss francs.

The lottery market is regulated by the Federal Act on Lotteries and Commercial Betting. However, the licence regime is subject to cantonal law. As of today, only the state-owned Swisslos and Loterie Romande have obtained the necessary licences.

#### 10 Please describe the licensing criteria to operate land-based gambling of each type or classification. Does your jurisdiction limit the number of available licences?

##### Casino licence

Licences for land-based gambling can only be granted in the following circumstances.

If issued, either:

- the operator is a legal entity under public law or a joint stock companies organised in accordance with Swiss law, whose share capital is split into registered shares, provided that the members of these companies' administrative boards have their primary residence in Switzerland; or
- the operator is a cooperative organised in accordance with Swiss law, if their members have their primary residence in Switzerland.

The licence applicant and its most important business partners, as well as its beneficial owners and shareholders, must have sufficient capital, have a good reputation and guarantee a proper business.

In addition, operating licences can only be granted if the applicant guarantees the independence of the management and supervision of the gaming operation.

The Swiss Federal Council decides on the number of casino licences available. As of today, there are 21 licensed casinos in Switzerland.

##### Betting and lottery licence

Generally, lotteries and betting are prohibited pursuant to Swiss law. However, by way of exception, cantonal law may allow raffles and lotteries organised for the purpose of public utility, as well as betting on live sport events held within the cantonal territory. For large-scale lottery events, a Comlot licence is required. Even if there is no restriction on the number of lottery licences, only Swisslos and Loterie Romande have obtained lottery and betting licences so far.

#### 11 Must individual directors, officers or owners of licensees also be licensed or reviewed for suitability?

The licence is issued to the casino operator (corporate entity). Individuals such as directors, officers and owners of the corporate

entity must demonstrate their good reputation and proper business conduct, in accordance with article 5 of the Ordinance to the FGA.

#### 12 May a gambling location be part of a resort, restaurant or other multi-purpose location? What limitations apply?

Yes. There are no special regulations.

#### 13 Are there provisions for passive or institutional ownership that allow for exemption or modification of licensing requirements?

No.

#### 14 What responsible gambling obligations apply to licensees?

Each casino must present a social concept (article 14 paragraph 2 FGA).

The following persons are subject to a general ban on land-based gambling, article 21 paragraph 1 FGA:

- persons under 18 years;
- persons who are suspended from casinos;
- board members or members of the SFGB;
- casino employees who are involved in the daily business;
- representatives of companies that manufacture or deal in gaming facilities; and
- representatives of casinos.

Furthermore, players who are insolvent or fail to meet their financial obligations must be blocked from casino gaming operations. The same applies to players who risk wagers that are disproportionate compared with their income or their assets, as well as players who negatively affect the operation of a casino. In its assessment, the casino may rely on the available data and assumptions, but is not allowed to investigate a player's financial circumstances. In addition, the player may also apply for a self-blockage. The casino must register the blocked players and notify all of the other casinos in Switzerland. However, the blockage must be cancelled as soon as the reason for the blockage has ceased to exist. Finally, casinos are not allowed to grant loans or advances to players.

The same applies to the lottery market: in short, the social protection regulations and conditions of accreditation fall into the following categories of effective prevention of problem gambling and gambling addiction:

- information on gambling addiction and responsible gambling;
- early diagnosis of at-risk individuals;
- staff training and awareness-raising (organisers and sales outlets);
- product concepts and designs that mitigate risk;
- restrictions in terms of age, access and stakes;
- imposition of bans; and
- supervision of the implementation and impact of social protection regulations.

#### 15 What type of tax and what tax rate applies to each form of lawful land-based gambling activity?

The tax regimes for the casino sector, and the lottery and betting sector are different.

##### Casino

For the players, casino winnings are free of individual taxes. However, in accordance with the Swiss Constitution, casinos are subject to tax based on their gross revenues. The tax rate can vary from between 40 per cent and 80 per cent of gross revenues, but casinos can request a reduction in the rate in the case of exceptional economic conditions. Generally, casinos pay 40 per cent tax on gross revenues up to 10 million Swiss francs. If gross revenues exceed this sum, the tax rate rises by 0.5 per cent for every million Swiss francs. The federal government can change the current level of taxation rates up to 80 per cent.

##### Lotteries

Lottery and betting winnings are generally considered to be taxable income of the players. Betting and lottery winnings of more than 1,000 Swiss francs are subject to a 35 per cent withholding tax at the federal level if the gambling activity is performed in Switzerland. The withholding tax amount is subtracted automatically when the betting or lottery winnings are paid out. However, it can then be reclaimed by the

### Update and trends

In late September 2017, Switzerland's parliament passed the new Money Gaming Act, which consolidates the country's existing respective laws on casino games, and betting and lotteries into one single law. According to Swiss law, citizens have the opportunity to launch a public referendum to oppose a law. For this, 50,000 eligible voters' signatures must be submitted within 100 days after publication of the law. If this requirement is fulfilled, the electorate will decide on the Act. Opposing parties have been collecting signatures since the Money Gaming Act was published. These signatures are valid, which is why the Swiss electorate will vote on the new law in June 2018.

The Money Gaming Act intends to replace the currently existing online gambling ban with a system that allows online gambling based on a licence. However, only a holder of a licence for a land-based casino qualifies to apply for an online licence and can therefore extend its existing land-based services to online services too. The Act does not contain the possibility for foreign operators to enter into the Swiss market independently. However, foreign online gaming providers can get access to the Swiss market by entering into a partnership with a local terrestrial licence holder. The foreign operator must prove that it has 'a

good reputation' to be approved by the Swiss authorities. The threshold to be met is currently unclear.

The revised law does not introduce a prohibition for the use of foreign online gambling services in Switzerland. However, the Money Gaming Act intends to reduce illegal (not licensed) offering of online gambling services more effectively by means of technical and non-financial measures. In particular, the Money Gaming Act provides that blacklists of non-licensed providers of casino game websites are kept and that the access of the listed websites has to be blocked by internet access providers. Only websites by operators that are domiciled abroad or disguise their domicile are blacklisted. Exact details of the technical blocking process are yet to be established and will be legislated in an ordinance.

According to the Money Gaming Act it will be possible to organise small poker tournaments outside casinos under tight conditions and subject to a licence. The licence requirements include that the number of the participants as well as the buy-in must be limited. Further, the tournament must be held in a public location.

player if the winnings are declared as taxable income on their individual tax return. The winnings are subject to individual tax on both the federal and cantonal level. For federal tax, there is a tax-free amount of 1,000 Swiss francs. In addition, 5 per cent of winnings (up to a maximum of 5,000 Swiss francs) can be deducted as lump-sum stake cost. Depending on the canton, different tax-free amounts and deductions may apply. Applicable tax rates vary substantially depending on total income and residence.

In addition, the organisers of grand lotteries must pay a duty of 0.5 per cent of their gross revenues to the cantons for the prevention of and fight against gambling addiction (article 19 Intercantonal Agreement on Supervision and Licensing in 2005).

### Remote gambling

#### 16 Is remote gambling permitted and, if so, what types?

Remote gambling and remote lotteries and betting are illegal in Switzerland. This also applies to mobile gambling.

#### 17 What are the criteria for obtaining a licence to operate remote gambling?

Not applicable (see question 16).

#### 18 How do the licensing criteria for remote gambling operators differ from those applicable to land-based operators?

Not applicable (see question 16).

#### 19 May operators located in other countries offer internet gambling to consumers in your jurisdiction without obtaining a licence there?

According to the prevailing opinion of doctrine and case law, the criminal provisions prohibiting online gambling do not apply extraterritorially, but only to operators with a physical presence in Switzerland or to persons that conduct activities on Swiss territory. Consequently, based on this view, the Swiss regulations may not prevent foreign operators providing their services in Switzerland from abroad. Switzerland is currently revising its gambling regulation (see 'Update and trends').

#### 20 May operators licensed in your jurisdiction offer internet gambling to consumers in other countries?

As set forth above, there is no licence regime for online gambling operators in Switzerland. However, to the extent a Swiss operator blocks access to Swiss players, the offering of internet gambling to consumers in other jurisdictions is, subject to a variety of additional conditions, possible without a Swiss licence.

#### 21 What tax rate applies to each form of remote gambling?

Not applicable (see question 16).

### Intellectual property

#### 22 Are gambling games – land-based or remote – patentable in your jurisdiction?

Principally yes, if the respective game qualifies as a technical innovation that is novel, can be applied commercially and is not obvious to a person skilled in the art.

#### 23 Are there limitations on how brands, logos or other types of marks may be used in promoting gambling games?

No, as long as the advertising is not in an intrusive or misleading manner. Furthermore, the advertising may not be directed at minors or blocked persons.

### Advertising

#### 24 What types of restrictions apply to advertising gambling games?

Promotion of legal gambling activities (for or from operators holding a Swiss licence) is not illegal.

Advertising or marketing for online games (also hypertext linking) is considered an unlawful measure (article 5 FGA). However, all forms of marketing and communications measures conducted from outside Switzerland, even if addressed to Swiss players, face little risk of being held contrary to Swiss law. On the other hand, marketing measures that take place on Swiss territory (eg, sponsorship of a Swiss sports team, advertising in Swiss TV) could potentially qualify as an organisational measure that supports or facilitates online cash games of luck for Swiss residents.

### Suppliers

#### 25 What types of suppliers to gambling operators require licences?

Swiss law distinguishes between two kinds of casino licence:

- Licences for the casino location: licences for casino locations may only be granted if the appropriate canton and local community support the application, and if the applicant provided evidence for the economic benefit of the planned casino for the region (article 13 paragraph 1 FGA).
- Operation licences: operation licences may only be granted if the applicant: (i) guarantees the independence of the management and supervision of the gaming operation; (ii) presents a security and social security (player protection) concept; and (iii) presents a business continuity plan. Casinos can be operated only after the licence has been granted by the federal government and issued by the SFGB (article 13 paragraph 2 FGA).

The holder of the casino location licence and the holder of the operation licence do not necessarily need to be the same legal entity or person.

**26 If licensing is not required, is there a registration or other process suppliers are subject to, and what triggers that process?**

In Switzerland, a licence is required (see question 25).

**Casino development****27 What considerations arise in developing a casino resort project that are not typical to other resort development?**

No, there are no special zones for casinos.

**Labour and employment****28 Are there particular rules governing hours and wage treatment for casino employees?**

Employees of casinos are generally subject to the Labour Code and the Swiss Civil Code. It regulates regulations regarding overtime, weekend work, etc.

**29 Must casino employees be members of labour unions or similar organisations?**

No.

**Acquisitions and changes of control****30 How are licensee changes of control, and substantial changes in shareholdings of licensees, addressed?**

The licence is issued on the basis of the information provided to the Federal Gaming Board by the licensee. Depending on the importance of the participation, a change must be reported or approved in advance.

**31 How are gambling licences treated in bankruptcy?**

Swiss bankruptcy law is applicable.

**Quasi-gambling****32 How are forms of 'quasi-gambling' regulated? Are any treated as 'gambling', and what triggers such treatment?**

Switzerland does not have a special regulatory regime for 'quasi-gambling' such as social gambling. Instead, a case-by-case approach is used to decide whether a specific service qualifies as a lottery, bet or casino game under the FGA or the Federal Act on Lotteries and Commercial Betting.

**33 Does your jurisdiction license quasi-gambling operators?**

Provided that a social game is free or there is no monetary advantage to be won, it will not require a licence. The general gambling licence rules apply.

**34 Does your jurisdiction impose other restrictions on the conduct of quasi-gambling activity, including restrictions on advertising, age of participation, limitations on prizes, etc?**

There are no specific regulations for quasi-gambling (see question 32).

**Litigation****35 What, if any, significant litigation involving the gambling or quasi-gambling sectors has your jurisdiction seen in recent years?**

Most of the litigation involving the gambling sector regards the qualification of games as games of chance or games of skill. In a famous decision dated 20 May 2010, the Federal Court decided that poker is always a game of chance and not a game of skill (judgment 2C\_694/2009).

Recently, with judgment 2C\_1086/2013, the Federal Court removed the existing ambiguities regarding Comlot's supervisory powers. It has comprehensive supervisory competence in the Swiss lottery and betting market and can carry out subordination and qualification procedures. The complaint of a company offering services in connection with the 'Euro Millions' lottery was rejected. The complainant had unsuccessfully asserted that Comlot had regulatory competence only with regard to the holders of licences to conduct intercantonal lotteries.

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