

Gaming 2020

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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2018

Third edition

ISBN 978-1-83862-343-2

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Gaming

2020

Contributing editor**Behnam Dayanim**

Paul Hastings LLP

Lexology Getting The Deal Through is delighted to publish the third edition of *Gaming*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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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.

Lexology 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 the contributing editor, Behnam Dayanim of Paul Hastings LLP, for his continued assistance with this volume.



London

May 2020

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This article was first published in June 2020

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Germany

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GENERAL LEGAL FRAMEWORK

Legal definition of 'gambling'

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

The German State Treaty on Gambling (GlueStV) defines gambling or a game of chance as a game where the player is required to pay a stake in order to receive a chance of winning, and the outcome is determined entirely or predominantly by chance.

Bets on the occurrence or outcome of a future event, such as sports bets or horse bets, are considered to be games of chance if they are placed in exchange for a stake – in this case the element of chance is irrelevant.

If one of the elements is missing, the service is generally not gambling and therefore does not need a gambling licence. Because of this, free games (where the player is not required to pay a stake) or games where nothing of value is awarded (such as virtual prizes or 'additional play' that cannot be exchanged into other valuables) are not considered to be gambling.

Skill games where the outcome depends on the physical or intellectual capabilities of the players, and not on chance or luck, are also not considered to be gambling. Where both skill and luck influence the outcome, an overall view is applied to assess which element predominates (ie, amounts to more than 50 per cent). The basis for this assessment is the results of an average player and not a professional player.

Remote activity

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

The German gambling regulation applies to the organisation, execution and brokerage of public gambling. In order to regulate remote or cross-border activity, the GlueStV stipulates that the organisation or brokerage of gambling takes place where the player has the opportunity to participate. If the player is able to participate from the territory of Germany, the German gambling regulation applies. Strong indicators for an opportunity to participate from Germany on a website are:

- offering registration for German residents;
- German language;
- German terms and conditions;
- the use of the German flag; and
- advertising targeted at a German audience.

If, on the other hand, German participants are excluded (eg, by geo-blocking), the German gambling regulation does not apply.

Age restrictions

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

The minimum age for participating in lawful gambling in Germany is 18, which is the country's age of majority. Minors (under the age of 18) are not allowed to participate in gambling. In some land-based casinos the minimum age for participating is 21.

Penalties

4 | What are the penalties for offering unlawful gambling?

Offering unlawful gambling is a criminal offence that may be punished with a fine or imprisonment of up to five years. In addition, unlawful gambling may be prohibited by the gambling authorities and competitors may send cease-and-desist letters to operators of unlawful gambling.

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

Yes, participating in unlawful gambling is a criminal offence that may be punished with a fine or imprisonment of up to six months. In addition, the state may claim any profits from the player.

Social and non-profit gambling

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

The German gambling regulation applies to public gambling. Private gambling is not subject to the gambling regulation. However, the distinction between public and private gambling is fluid. In Hamburg, for example, a soccer betting pool in a prison among the prison inmates and the prison guards has been prosecuted as unlawful public gambling.

Charitable or non-profit gambling is also subject to the German gambling regulation. There are special licences available for this type of gambling.

Regulatory authorities

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

Land-based and remote gambling are regulated by the competent authorities in the 16 German federal states. The authorities' powers are divided by states and by the type of gambling. For example, the state lotteries are supervised by the respective state's gambling authority. Sports betting licensing, on the other hand, is centrally supervised by the gambling authority of Hesse.

The gambling authorities have far-reaching powers. They are able to grant or deny gambling licences and impose additional requirements

on licensed gambling operators (eg, duties to report). They may also prohibit unlawful gambling by sending prohibition orders or withdraw gambling licences. In administrative offence proceedings the gambling authorities have police powers (eg, to search the premises of gambling operators).

Anti-money-laundering regulations

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?

Gambling licensees are not generally considered financial institutions, but if they offer financial services they have to comply with financial services regulation.

In terms of anti-money laundering (AML) providers of gambling services are regulated specifically. A new AML Act transposing the Fourth EU AML Directive entered into force in June 2017, which principally applies to all providers of gambling services in Germany irrespective of their licensing status.

Notable exceptions to the application of the AML Act are slot machines in amusement halls and pubs (but not in land-based casinos), horse racing bets by horse racing associations in the form of totalisators (but not bets offered by bookmakers) and social lotteries and licensed state lotteries, including lottery brokerage online and offline.

The obliged gambling service providers (such as operators of sports betting and online casino games) have multiple AML measures to comply with. First and foremost, they have to implement know-your-customer procedures that are based on identification verification. For offline gambling services, this applies from a threshold of €2,000 (winnings or stakes). Online gambling services do not benefit from this privilege, they have to identify their customers from the beginning. Other than that, there are a lot of detailed AML requirements to comply with. Non-compliance can lead to administrative fines of up to €1 million, or even 10 per cent of the turnover of the previous year.

LAND-BASED GAMBLING

Types

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

Gambling in Germany is regulated at the federal and state levels. The main regulation is the GlueStV, which is currently in force in all 16 German states. In addition, there is a state gambling law in each state regulating the local licensing regime and the state's gambling authorities. In some states there is also a casino act. At the federal level, there are, inter alia, the AML Act, the Race Betting and Lotteries Act and the Gambling Regulation.

Land-based gambling is permitted in Germany in the form of casinos, amusement halls, lotteries and betting shops. Casinos are operated by the state or with (very limited) concessions by private entities. Amusement halls are run by individuals or private companies. Lotteries with high jackpots are operated as a state monopoly. Private entities may sell the lottery tickets in lottery shops or as brokers by mail or online. Social or charity lotteries may be organised by private (charity) entities. Betting shops for horse or sports betting may also be licensed for individuals or private companies.

Establishment licensing

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?

The licensing criteria to operate land-based gambling and the number of available licences depend on the kind of gambling and on the regulation of the respective German state. The main licensing criteria are:

- reliability and economic capability of the organiser;
- protection of minors; and
- a sufficient social concept including measures to prevent addiction.

While casino licences are very limited (only a handful in each state), lottery and sports betting shops are limited to several hundred in each state. For amusement halls there are minimum distance regulations that provide an additional limit on the number of venues.

Director, officer and owner licensing

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

Licences are granted for the organisation or brokerage of gambling services. Licence holders may be individuals or legal entities. The individuals or the authorised representatives of the legal entities need to be reliable. This is usually checked in the licensing procedure using certificates of good conduct and the central register of trade and industrial offences. The appointment of a new authorised representative needs to be notified to the licensing authority in order to carry out a new reliability check. The individual directors, officers or owners of licensees need not be licensed.

Location

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

This depends on the kind of gambling and the respective state law. While lottery shops may be part of a supermarket or shopping centre, casinos are usually separate buildings. Sports betting shops are not allowed in buildings with casinos or amusement halls. Amusement halls must not fall short of certain minimum distances to other amusement halls and may not be in spatial proximity to facilities that are mostly visited by minors.

Casino development

13 | What considerations arise in developing a casino resort project that are not typical to other resort development?

There are no (Las Vegas-style) casino resorts in Germany. The main issue in Germany is receiving a casino licence at all and then complying with the requirements of the relevant state's law as well as the licence itself.

Passive/institutional ownership

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

As there is no licensing requirement for the owners of a licensee, there are also no provisions for passive or institutional ownership that allow for exemption or modification of licensing requirements.

Responsible gambling

15 | What responsible gambling obligations apply to licensees?

Responsible gambling obligations to be complied with by licence holders include youth protection and the protection of persons that are at risk of gambling addiction. There are barring systems in place for amusement halls, sports betting and some lotteries.

Taxes

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

For sports betting, a federal sports betting tax is levied at 5 per cent. The taxable base is either the face value of the betting slips or the stake. Recently, some German cities have started collecting an additional sports betting tax, an example amount being 3 per cent.

Lotteries are subject to a tax of 20 per cent of the nominal value of all lottery tickets (excluding the tax).

Taxes for casinos and amusement halls are regulated on a state or even regional level.

REMOTE GAMBLING

Types

17 | Is remote gambling permitted and, if so, what types?

Remote gambling is generally not permitted in Germany. At the moment there are only exemptions and licence options for lotteries and sports betting including mobile gambling. Remote gambling in the form of online poker and online casino games is not allowed at the moment (except existing or valid online casino licences in Schleswig-Holstein).

Licensing

18 | What are the criteria for obtaining a licence to operate remote gambling?

The criteria for obtaining a licence to operate remote gambling depend on the kind of gambling and the regulation of the particular German state. The main licensing criteria are reliability and economic capability of the organiser, protection of minors and a sufficient social concept including measures to prevent addiction.

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

The licensing criteria for remote gambling operators differ from those applicable to land-based operators insofar as additional or adapted concepts have to be provided in the licensing process. Operators have to provide adapted social, youth protection, security and payment concepts taking into account the specific requirements of remote gambling.

There is no longer a limit on sports betting licences. Lotteries with high jackpots are operated under a state monopoly, but the licences for private brokerage are unlimited. Licences for social lotteries are also unlimited.

Cross-border gambling

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

No, offering gambling services in Germany without a German gambling licence is technically illegal. The German gambling regulation does

not allow offering gambling services in Germany with just an EU or offshore gambling licence or even without a licence at all.

21 | May operators licensed in your jurisdiction offer internet gambling to consumers in other countries?

Operators licensed in Germany may offer internet gambling to consumers in other countries if the law of the other country allows. The German gambling regulation only applies to gambling in Germany.

Taxes

22 | What tax rate applies to each form of remote gambling?

For remote sports betting, a federal sports betting tax is levied at 5 per cent.

Lotteries sold remotely are subject to a tax at 20 per cent of the nominal value of all lottery tickets (excluding the tax).

German value-added tax applies at a rate of 19 per cent on online casino operations in Germany (with live casino services as an exception).

INTELLECTUAL PROPERTY

Patents

23 | Are gambling games – land-based or remote – patentable in your jurisdiction?

There is no specific regulation on patents for gambling games. Gambling games are patentable if the general requirements for patents are met. Patents may be granted for any invention, in all fields of technology, provided that it is new, involves an inventive step and is susceptible to industrial application. Mere ideas for gambling games are not protectable under copyright or patent law.

Trademarks

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

There is also no specific regulation on trademarks for gambling games. The general trademark laws also apply to gambling. However, the use of brands, logos or other types of marks in promoting gambling games must comply with the advertising restrictions for gambling (see 'Restrictions').

ADVERTISING

Restrictions

25 | What types of restrictions apply to advertising gambling games?

Advertising of gambling services on television and on the internet needs an additional German gambling advertising licence. It is possible for an operator to receive such a licence for television, internet, or both regarding lotteries, sports and horse betting (but not casinos) from the gambling advertising authority in North-Rhine Westphalia. The advertising licence can only be obtained by the gambling operator or broker (and not the television broadcaster or internet service provider who publishes the advertising) after he or she has received the necessary gambling licence.

There is a general prohibition of advertising and promotion of gambling offers using telecommunications (eg, email, SMS, WhatsApp and telephone calls). It is the gambling authorities' view that this ban does not prohibit general information about the company and communication within a customer relationship, as long as no specific gambling product is advertised.

Other advertising channels (eg, letters, magazines, newspapers, flyers and posters) are not generally prohibited, and do not have an additional licensing requirement. However, there are certain rules on what is or is not allowed in all gambling advertising (eg, advertising for unlawful gambling and advertising addressed to or involving minors is not allowed). Advertising for gambling is also not allowed to be misleading or too provocative.

Advertising for sports betting is not allowed on television directly before or during a sports event broadcast if the advertising includes bets on the event that is being broadcast.

In addition, there are obligations to give information about gambling addiction, ways to help gambling addicts and the chances of winning in connection with the advertising.

SUPPLIERS

Licensing

26 | What types of suppliers to gambling operators require licences?

Suppliers of core gambling services (such as the gambling platform used) are checked in the licensing process of the operator. Apart from that, there is no specific gambling licensing requirement for suppliers to gambling operators. Other licensing requirements, such as payment services' or financial institutions' licensing requirements, persist if applicable.

Registration

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

Slot machines need to be technically approved by the Physikalisch-Technische Bundesanstalt. Other than that, there is no registration or other process for suppliers that is specific to German gambling law.

LABOUR AND EMPLOYMENT

Wage and hour rules

28 | Are there particular rules governing hours and wage treatment for casino employees?

There are general laws such as the Working Hours Act and the Minimum Wage Act that basically apply to all employees in Germany, including casino employees. Beyond that, many casino employees are governed by collective agreements that were agreed with the local works council or the respective union (eg, ver.di). The content of the collective agreements vary significantly from casino to casino because they are often negotiated on a local level; however, most casinos have, for example, comprehensive rules agreed for overtime work.

The treatment of the *tronc* (tips for casino employees) is usually regulated in the respective state's Casino Act or in 'house-tariff agreements' negotiated with the applicable union.

Collective labour

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

There is no obligation for casino employees to be members of labour unions or similar organisations; however, a significant number of employees are a member of a labour union (mostly ver.di).

ACQUISITIONS AND CHANGES OF CONTROL

Change of control

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

The shareholders and distribution of ownership of a legal entity applying for a gambling licence are checked during the licensing procedure (usually with a threshold of 5 per cent of the shares or voting rights). Gambling licences are usually non-transferable in Germany. Because of this, changes in the ownership structure of a licence holder after the licence has been granted have to be reported to the gambling licensing authority in order to allow additional background checks of the licence holder.

Bankruptcy

31 | How are gambling licences treated in bankruptcy?

Dealing with bankruptcy is generally regulated in the Insolvency Act without specific rules for gambling. Since gambling licences are generally non-transferable in Germany, creditors may not obtain a licence by way of an asset deal in an insolvency proceeding, but a new licensing procedure is usually required for the potential new owner. Bankruptcy of a licence holder may also lead to a revocation of the licence if the gambling authority deems that licensing requirements, such as the reliability or the economic capability of the organiser, are missing.

QUASI-GAMBLING

Regulation

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

See 'Legal definition of "gambling"' with regard to the definition of gambling. If one of those elements is not fulfilled, the service is not considered to be gambling. There is no specific regulation on quasi-gambling, such as social gaming, daily fantasy sports or skill gaming. But there are some rules on competitions and prize draws on television and websites. General regulation regarding youth protection, consumer protection and data protection, as well as advertising, also applies to quasi-gambling.

Licensing

33 | Does your jurisdiction license quasi-gambling operators?

There is no general licensing requirement for quasi-gambling operators in Germany. Operating a skill-based game commercially (especially if it is not free to participate and if there is a possibility to win a prize) might need a business licence according to the German Industrial Code.

Other restrictions

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?

The regulation of competitions and prize draws on television and on websites is very specific with regard to age limits, advertising restrictions and content of terms and conditions. Other than that, there are no specific restrictions on the conduct of quasi-gambling activity.

LITIGATION

Recent cases

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

In recent years, litigation at the German administrative courts, the Federal Constitutional Court and at the European Court of Justice (ECJ) has been a major drive towards changes to the German gambling regulation.

In 2013 and 2014, the Federal Administrative Court clarified the difference between stakes that lead to gambling regulation and mere participation fees in three judgments. If there is no direct connection between the payment and the chance of winning, the service is not considered to be gambling. This leads to options to shape services in a way that they are not gambling that needs a licence.

The most dynamic sector in the German jurisdiction has been sports betting. After the ECJ basically held the sports betting monopoly to be incoherent with EU law, the German states opened the market for 20 private sports betting operators. But the licensing process has been stopped by administrative courts because of more violations of EU law (eg, non-transparent procedure). After that the ECJ ruled that EU law may preclude the imposition of penalties in respect of the unauthorised cross-border intermediation of sporting bets carried out in Germany. Several administrative courts subsequently ruled that offering sports betting in Germany without a German gambling licence cannot be prohibited if the operator has a valid EU licence and complies with material gambling regulation (such as youth protection) and has applied for a German sports betting licence.

In October 2017, the Federal Administrative Court confirmed the internet ban of three types of gambling, and ruled that, even after the partial opening of the internet distribution channel for sports betting and lotteries, the ban on organising or brokering casino, lottery scratch tickets and poker games on the internet is compatible with constitutional and European law. The Federal Administrative Court decided that it is also compatible with constitutional and European law to take into account the lack of the necessary permission against the provider of online sports betting in the prohibition procedure. A constitutional complaint against the decision has been filed with the Federal Constitutional Court.

The decisions of the Federal Administrative Court strengthened the gambling authorities and in 2018 they focused on targeting advertising for gambling that is not licensed in Germany, especially secondary lotteries and online casino games (including free games, which in their opinion should be considered as indirect advertising for the unlicensed gambling services). In many cases they did not approach the international operators of the gambling services, but the (more easily accessible) media partners in Germany, such as television broadcasters and website operators. This continued in 2019 and litigation also started to focus on payment service providers – especially refund claims from players but also the first payment blocking order in summer 2019.

UPDATE AND TRENDS

Key developments of the past year

36 | Highlight any noteworthy developments or trends in the gambling or quasi-gambling sectors (legal or business) and their potential implications.

On 1 January 2020, the third amendment of the German State Treaty on Gambling (GlueStV) entered into force. This interim amendment allows issuing new (online and offline) sports betting licences and it removes market entry barriers for sports betting operators that want



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to be licensed in Germany and provides clarity – not only for sports betting operators but also for third parties involved, including payment service providers, the media and sports clubs. The licensing procedure has already started, but there is no deadline to apply for a licence and the number of licences is not limited – this enables new operators to apply for a licence at any time.

However, the administrative court of Darmstadt (VG Darmstadt) ruled on 1 April 2020 in a summary proceeding that the licensing authority is temporarily prohibited to issue any sports betting licences until a transparent and non-discriminatory licensing procedure has been made up for. The court ruled that the current sports betting licensing procedure does – for different and independent reasons – not comply with the requirement that sports betting licences are issued following a call for applications and the implementation of a transparent and non-discriminatory procedure. One of the arguments of VG Darmstadt is that the licensing proceeding is non-transparent because of the way of involvement of the gambling committee (Glücksspielkollegium), which consisted of 16 members delegated by the federal states and who take the substantive decision by which the licensing authority is bound. With this decision, the issuing of sports betting licences in Germany is once again stopped by a court. If this decision is confirmed by the higher administrative court of Kassel (VGH Kassel) in the appeal, it will lead to another lengthy period where no licence is issued. But VG Darmstadt also pointed out that sports betting operators that are currently active on the German market were sufficiently protected by the fact that, according to the licensing authority, they were treated as if they were legally active on the German market during the ongoing licensing proceeding. For those who have so far refrained from entering the market and filing an application, the court suggests that this decision should be reconsidered. In other words, in the opinion of the court, applying for a German sports betting licence would potentially legalize the German sports betting operation of the applicant. As there are no deadlines or limits to apply for a licence, new licensing applications could be filed at any time.

Moreover, the legislator is already working on a new gambling regulation for 2021. Following an industry association hearing in February 2020, the heads of the 16 German federal states adopted a draft State Treaty on the New Regulation of Gambling in Germany (Gluecksspielstaatsvertrag 2021 – GlueStV 2021) at their conference on 12 March 2020. The new law will bring substantial changes to the German gambling regulation in 2021, including:

- new licensing options for online poker, virtual slots and online casino (table) games;
- an extension of current licensing options (eg, for sports betting and for lottery brokerage);
- removal of the requirement of an internet and TV advertising licence;
- detailed player protection and advertising requirements;
- a new central gambling supervisory authority in the state of Saxony-Anhalt;
- a safe-server system to ensure the supervision of gambling;
- strengthened enforcement against illegal gambling; and
- a catalogue of 58 administrative offences with fines of up to €500,000.

The state of North Rhine-Westphalia is authorised to make editorial and necessary legal changes in agreement with Berlin by the time the new State Treaty is signed. The new State Treaty also needs to be notified to the EU Commission in the meantime. It is possible that the above-mentioned VG Darmstadt decision as well as criticism of the current draft by data protection authorities will require further changes on the new law.

It is intended that the new State Treaty will be signed by the heads of the federal states in the summer of 2020. Afterwards, it has to be ratified in at least 13 federal states in order to enter into force on 1 July 2021 as scheduled.

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