

# Switzerland:

## A controversial draft gaming act

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**T**he Swiss government has recently published a draft for the country's new gaming act. Inter alia, the revised gaming act will bring a regulated online gaming market. Only the national lottery and betting providers seem to be happy with the draft. Online operators and casinos are demanding significant amendments to the draft. This article outlines suggested changes in the draft, its controversial elements, and the road ahead.

### **The current gaming landscape in Switzerland**

At present, Switzerland does not have a regulated online gaming market. Only "Swisslos" and "Loterie Romande", the two public lottery and betting operators, can legally offer a portfolio of online games. For all other games, operators cannot apply for licences. By contrast, Switzerland has a high number of licensed casinos; in fact, it features one of the highest densities of casinos per capita in the world.

Gaming legislation currently consists of two main acts. One act regulates the lottery and betting sector for which the Cantons (regions) are competent ("Bundesgesetz betreffend die Lotterien und die gewerbsmässigen Wetten"). The other act regulates all other forms of games, which can only be legally played within the premises of licensed casinos ("Bundesgesetz über Glücksspiele und Spielbanken"). Both sectors have their own supervisory bodies ("Comlot" and Federal Gaming Board respectively).

### **Major changes put forward in the current draft law**

The new gaming act, which will replace the currently applicable two acts, will bring a couple of significant changes to the current regulatory regime. The major change certainly consists in the introduction

of a regulated online gaming market. Under the impression of losing out on online gambling revenues, the Federal Gaming Board recommended to the Swiss government to legalise the online sector. In the present draft law, only the existing casinos would be able to apply for an extension of their licence to include remote channels, too.

Another important change regards the permission of "money tournaments" outside of casinos. As elsewhere, poker games have become hugely popular in Switzerland, in particular Texas Hold'em. Poker has gone through a meandering regulatory history. After the Federal Gaming Board held in December 2007 that Texas Hold'em tournaments did not constitute games of chance (but games of skill), poker clubs popped up throughout the country. These business operations came to an abrupt end by a contrary judgment from the Federal Supreme Court in May 2010. The present draft law foresees that "money tournaments" will be permissible under certain conditions outside casinos.

### **Controversial elements...**

Long before the actual publication of the draft law on 30 April 2014, it became more and more clear that the public lottery and betting stakeholders would manage to see most of their interests reflected in the draft law. The situation is quite different for the casinos and the online operators who have expressed their frustration about the draft law during the consultation phase that ended on 20 August 2014.

### **... from the casinos' perspective...**

There is a central element that the existing casinos in Switzerland are happy with: the ring fencing of the online gaming market. According to the draft, only casinos licensed in Switzerland would be able to legally offer games of chance via remote channels.

Apart from that aspect, the casinos state frustration about the draft and are majorly concerned about their competitiveness.

As a matter of fact, while the revenues in the Swiss casino sector increased until 2007, they have significantly decreased ever since. There are a couple of reasons for this. First, the general smoking bans seem to have affected the number of casino visitors. Second, casinos in Switzerland are subject to much stricter responsible gambling rules than in most other countries. Casinos are even required to check the financial background of their visitors when there is suspicion of problem gambling – quite a requirement in the Alpine country that highly values data protection and bank secrecy. If the suspicion cannot be lifted, the person must be blacklisted – or the casino may face substantial penalties as illustrated in a recent judgment of the Swiss Supreme Court. The casinos suspect that blacklisted persons continue to gamble mostly in nearby foreign casinos but also in illegal gaming venues or online. It is indeed surprising that in a country where public authorities allocate a significant amount of earmarked money to problem gambling research, this question has never been studied.

Third, the casinos are not particularly happy about the perspective of games of chance legally taking place outside of casinos. According to the draft, however, players would only gamble with small stakes and exclusively against each other with the tournament organiser not being involved in the game. Finally, the casinos face certification requirements for gaming machines and table games that are not particularly innovation-friendly. Internationally certified gaming machines must comply with specific Swiss rules and pass a time-consuming additional certification process. Major manufacturers wonder whether it is worth to adjust their new products for a rather small casino market.

#### **... and from the online operators' perspective**

The frustration of the online operators about the present draft is obvious: the ring fencing of the Swiss online gaming market would exclude all online operators from a commercially interesting market. Contrary to the current situation where numerous Swiss residents choose to gamble with foreign online operators, the draft law foresees that consumers could only gamble online with land-based Swiss casinos. The draft mentions black listing and blocking measures against foreign operators. The effectiveness of these measures is doubtful: blocking measures can be fairly easily circumvented as the government concedes in its report.

If the Swiss legislator chooses to adjust the present draft and to allow for a licensing procedure open to foreign operators too, such licenses would nevertheless not cover sports betting and lottery games. According to an amendment of the Swiss constitution in 2012 (article 106), these games fall within the exclusive competence of the cantons. The same goes for games of skill.

Finally, foreign online operators do not enjoy the same rights in Swiss courts as they do within the EU's Single Market. While Switzerland is a member of the European Free Trade Association (EFTA), it is neither part of the European Union (EU) nor of the European Economic Area (EEA). In spite of the close economic ties between Switzerland and the EU through numerous bilateral agreements, the voluminous gaming case law of the Court of Justice of the EU and the EFTA Court is not directly applicable for the Swiss gaming market. In other words, a liberalisation of the national gaming market cannot be enforced through court proceedings before the Court of Justice of the EU or the EFTA Court.

#### **Consumer interests and the road ahead**

While some stakeholders such as cantonal and federal authorities had great impact

on the wording of the draft, others did not. In particular, it is questionable that the draft serves consumer interests - with regard to both the land-based and online gaming market. Consumers have an interest in an attractive range of games, which they can choose from an attractive range of operators. They want to choose from internationally competitive operators who compete in providing attractive and innovative games. And of course, they have an interest in duly regulated, fair and safe venues as well as remote channels.

The Federal Office of Justice is now called to draft a report, based on which the government will submit the bill along with an accompanying message to the parliament. In 2015, the bill will undergo critical scrutiny in the parliamentary committees for legal affairs and subsequently in the plenary sessions. Significant amendments should be expected.

Switzerland is globally known for an economic policy that favours liberal and open markets, welcomes innovation, and trusts in the consumers' ability to make sound individual choices. In that sense, Switzerland has a much more liberal Anglo-Saxon rather than a protectionist, paternalistic tradition. The current draft for a new gaming act does not seem to live up to this standard.

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