

Gaming

Contributing editor
Behnam Dayanim



2018

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Gaming 2018

Contributing editor
Behnam Dayanim
Paul Hastings LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

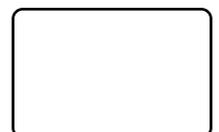


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2018
First edition
ISBN 978-1-78915-118-3

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	5	Mexico	37
Behnam Dayanim Paul Hastings LLP		Carlos F Portilla Robertson and Iván Guerrero Sánchez Portilla Ruy-Díaz y Aguilar SC	
Australia	6	Nigeria	43
Jamie Nettleton, Karina Chong and Mia Corbett Addisons		Yahaya Maikori, Nnedi Mgbemena and Osayamen Ojo Law Allianz	
Brazil	11	Poland	47
Lucas Tavares Bueno, Rafael Gagliardi and Gabriel da Câmara de Queiroz Demarest Advogados		Piotr Dynowski and Michał Sałajczyk Bird & Bird Szepietowski i wspólnicy sp k	
Czech Republic	16	Spain	53
Vojtěch Chloupek Bird & Bird sro advokátní kancelář		David López Velázquez Uría Menéndez	
Germany	21	Switzerland	58
Michael Stulz-Herrnstadt and Christoph Engelmann DLA Piper		Andreas Glarner, Thomas Linder, Alexandra Körner and Sophie Schmid MME Legal Tax Compliance	
Macao	25	United Kingdom	62
Carlos Eduardo Coelho MdME		Melanie Ellis Harris Hagan	
Malta	30	United States	69
Malcolm Falzon and Terence Cassar Camilleri Preziosi		Behnam Dayanim, Reade Jacob and Edward J George Paul Hastings LLP	

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.

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.

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

Germany

Michael Stulz-Herrnstadt and Christoph Engelmann

DLA Piper

Introduction

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

The German State Treaty on Gambling (GlueStV) basically 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.

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 intermediation of public gambling. In order to regulate remote or cross-border activity, the GlueStV stipulates that the organisation or intermediation of gambling takes place where the player has the ability to participate. If the player is able to participate from Germany, the German gambling regulation applies. Strong indicators for an ability to participate from Germany on a website are: German language, German terms and conditions, the use of the German flag, advertising targeted at a German audience and, of course, the actual possibility of participation for German residents. If, on the other hand, German participants are excluded, for example by geo-blocking, the German gambling regulation does not apply.

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 age of majority in Germany. 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.

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 interdicted 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.

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 borderline 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 kind of gambling.

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 states. The authorities’ powers are divided by states and by the kind of gambling. For example, the state lotteries are supervised by the respective state’s gambling authority. Sports betting, 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 interdict unlawful gambling or withdraw gambling licences. In administrative offences proceedings the gambling authorities have police powers (eg, to search the premises of gambling operators).

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 Anti-Money Laundering Act transposing the 4th European AML Directive entered into force in June 2017. It basically applies to all providers of gambling services in Germany irrespective of their licensing status.

Notable exceptions to the application of the new 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 intermediaries online and offline.

The obliged gambling service providers (such as operators of sports betting and online casino games) face a multitude of AML measures to comply with. First and foremost, they have to implement know-your-customer procedures that are based on ID 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

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. On 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 intermediaries 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.

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 plan 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.

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

Licences are granted for the organisation or intermediation 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 do not need to be licensed.

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.

13 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.

14 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.

15 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 in the amount of 5 per cent. Taxable base is either the face value of the betting slips or the stake. Recently, some German cities have started to collect an additional sports betting tax, an example amount being 3 per cent.

Lotteries are subject to a tax in the amount 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

16 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.

17 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 plan including measures to prevent addiction.

18 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.

At the moment, the number of licences for sports betting operators is limited to 20. Lotteries with high jackpots are operated under a state monopoly, but the licences for private intermediaries are unlimited. Licences for social lotteries are also unlimited.

19 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 even offshore gambling licence. As an exception, at least the 35 sports betting operators that have been found to fulfil the requirements to receive a German sports betting concession are tolerated to operate in Germany as long as the licensing procedure is on hold and as long as they comply with the licensing requirements.

20 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.

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

For remote sports betting a federal sports betting tax is levied in the amount of 5 per cent.

Lotteries sold remotely are subject to a tax in the amount of 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

22 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.

23 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 question 24).

Advertising

24 What types of restrictions apply to advertising gambling games?

Advertising of gambling services on TV and the internet needs an additional German advertising licence. It is possible for an operator to receive such a licence for TV, internet, or TV and internet advertising regarding lotteries, sports and horse betting (but not casinos) from the gambling advertising authority. The advertising licence can only be obtained by the gambling operator or intermediary (and not the TV broadcaster or internet service provider who publishes the advertising) after he or she has 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, 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. For example, 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 TV 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

25 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.

26 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.

Update and trends

The prime ministers of the 16 German states agreed on an amendment to the German gambling regulation in response to the ECJ's criticism. Sports betting concessions were not to be issued on a quantitative but on a qualitative basis, which included lifting the limit of 20 sports betting concessions and even issuing preliminary concessions for the 35 operators that have been found to meet the requirements for a concession and are listed in the draft law. The new law was planned to enter into force on 1 January 2018 if it had been ratified by all 16 German states before then.

However, this did not happen. After the elections and a change of government in Schleswig-Holstein, the parliament of Schleswig-Holstein decided not to adopt the amendments. The new Schleswig-Holstein government stands for a regulation that offers licences for sports betting and also for online casino games as the 2012 Gambling Law of Schleswig-Holstein did. Following this, the government of North Rhine-Westphalia also decided not to adopt the amendments. The 16 states are currently discussing how to proceed in this situation; a majority in favour of introducing online casino licences has not yet been found.

Casino development

27 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.

Labour and employment

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 as 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 so-called *house-tariff* agreements negotiated with the applicable union.

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

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 in 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.

31 How are gambling licences treated in bankruptcy?

How to deal 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

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

See question 1 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 TV and websites. General regulation regarding youth protection, consumer protection and data protection, as well as advertising, also applies to quasi-gambling.

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.

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 TV 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

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 followed up and ruled that offering sports betting in Germany without a German gambling licence cannot be interdicted 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 European and constitutional 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.



Michael Stulz-Herrnstadt
Christoph Engelmann

michael.stulz-herrnstadt@dlapiper.com
christoph.engelmann@dlapiper.com

Jungfernstieg 7
20354 Hamburg
Germany

Tel: +49 40 188 88 0
Fax: +49 40 188 88 111
www.dlapiper.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com