

Art. 1 BGS: Object and scope exclusions of the Federal Act on Gambling

Function of Art. 1 within the gambling regime

Art. 1 BGS sets out what the Federal Act on Gambling regulates and where it stops. Para. 1 names three objects: whether money games are admissible, how they are operated, and how gaming proceeds are used. Para. 2 excludes six groups of activities. Para. 3 takes snowball, avalanche and pyramid schemes out of the Act and refers them to the UWG **Art. 1 BGS**.

The trigger for the Act is not in Art. 1 but in Art. 3 lit. a BGS. A money game is a game in which, in return for a monetary stake or the conclusion of a legal transaction, a money prize or other pecuniary advantage is in prospect **Art. 3 BGS**. The Federal Supreme Court reads this definition broadly: in principle "alle" games combining the two elements fall within the Act **BGE 148 II 392**. Because the definition is so wide, the exclusions in paras. 2 and 3 are where most disputes about scope are actually decided. The Court has itself used the FINMA exclusion as evidence that the legislature intended a broad concept of money game **BGE 148 II 392**.

The three objects in para. 1 match the purposes in Art. 2 BGS: protecting the population, safe and transparent operation, using the net profits of large-scale games (except skill games) for public-benefit purposes, and directing part of casino revenue to the AHV/IV **Art. 2 BGS**. Two operative rules give effect to these objects:

- Admissibility: anyone who operates money games needs an authorisation or concession, valid only in Switzerland **Art. 4 BGS**.
- Use of proceeds: the net profits of lotteries and sports betting must be used in full for public-benefit purposes. They may not be used to fulfil statutory public-law obligations. Skill-game profits are not earmarked **Art. 125 BGS**.

Applicants for such funds have no legal claim to a contribution. The Bern Administrative Court confirmed that the authority decides at its discretion. A cantonal-connection requirement that excluded an intercantonal sports federation was lawful **100 2023 176**.

Constitutional basis and competence

The Act implements Art. 106 BV. The Confederation legislates on money games. The cantons authorise and supervise large lotteries, sports betting and skill games, and the same allocation applies to games operated by telecommunication **Art. 106 Cst.**. In the Council of States the bill was presented as implementing Art. 106 BV and as merging the Lotteries Act of 1923 and the SBG into a single act **AB 2016 S 376**.

Some exclusions therefore also allocate competence. For skill games that are neither automated, intercantonal nor online, the Confederation does not use its comprehensive legislative competence **BBI 2015 8387**.

Within the Act's scope, cantons keep further room to act:

- they may prohibit, by legislative act, all lotteries, all sports bets or all skill games among large-scale games **Art. 28 BGS**;
- they may tighten the rules on small games or ban them **Art. 41 BGS**.

The Geneva Court of Justice held that this power also covers the tombola privilege in Art. 41 para. 2 BGS. A cantonal ceiling of CHF 10,000 in total stakes therefore applied to a charitable association's tombola of about CHF 40,000 **ATA/806/2026**. These cantonal powers apply inside the Act. They are not exclusions under Art. 1.

Temporal scope

Art. 1 is unchanged between the version in force from 1 January 2021 **BGS (2021-01-01)** and the current version in force from 1 September 2023 **BGS (2023-09-01)**. The French text of lit. e carries a note recording an editorial correction by the Drafting Committee under Art. 58 para. 1 ParlA. That correction is not a substantive amendment **Art. 1 BGS**.

Which law applies depends on when the facts occurred:

- After 1 January 2019: the BGS governs **6B_489/2024**.
- Older case law: decisions under the former Gaming Houses Act remain valid "mutatis mutandis" under the BGS, because the purposes of the two acts are fundamentally the same and the former concept of games of chance overlaps materially with that of casino games **6B_489/2024**.
- Earlier conduct: the former law applies unless the new law is more lenient. The legislature deliberately raised former contraventions to misdemeanours, so the old fine is the more favourable sanction. The Federal Supreme Court therefore remanded for the former law to be applied **6B_995/2021**. The Vaud appellate court then convicted under Art. 56 para. 1 lit. a aLMJ **CAPE pe20-008995-187/2023**. That remand judgment implements the Federal Supreme Court's ruling on the applicable law. It does not displace the Federal Supreme Court's reasoning on the stake element.
- Earlier contrasting cantonal practice: before that clarification, the Basel-Landschaft Cantonal Court had applied Art. 130 para. 1 lit. a BGS as the more lenient law **460 19 227**.

Arts. 140 to 144 BGS deal with authorisations granted under the old law. Former authorisations for skill-game machines lapse unless new applications are filed in time **Art. 142 BGS**. Cantonal small-game authorisations remained valid for at most two years **Art. 144 BGS**. Since the entry into force, the intercantonal authority supervises skill games operated in automated form, online or intercantationally **Art. 142 BGS**.

Threshold: when is an offer a money game?

Stake or legal transaction

A pecuniary stake and a prospect of gain must both be present. If either is missing, there is no money game **BGE 148 II 392**. The courts read the stake element broadly:

- Small or hidden payments: even a few centimes are a stake, and the stake may be concealed in another payment **6B_489/2024**. Under the former lottery law, the provider share of a premium-rate number fee was a stake. Ordinary postage or telephone charges were not **BGE 125 IV 213**.

- Recoverable stakes: players deposited real money to buy virtual units they hoped to resell at a profit. The possibility of recovering the purchase price did not remove the game character **BGE 148 II 392**.
- Purchases as legal transactions: the purchase of NFT sports cards required to take part in online games counted as the "Abschluss eines Rechtsgeschäfts". It made no difference that the cards kept their value. Participation need only be "lediglich möglich" (merely possible) after the transaction **2C_62/2025**.
- Alibi services: terminal "services" that were expensive and of little use were mere alibis. Once the free tokens were used up, a stake was required. A capped refund option did not change this **6B_995/2021**.
- Club fees: an annual club fee of CHF 35, whose only discernible purpose was to buy the right to play poker, was a stake **SU250016**.

Free participation under the BGS

On free participation the BGS departs from the former lottery law.

Under the old law, a competition that could also be entered without a stake was not a lottery-like enterprise. This required that the announcement presented the competition "unmissverständlich" (unmistakably) as open with or without a stake, with equal chances of winning **BGE 125 IV 213**. The courts applied this strictly:

- TV quiz shows: free internet and WAP routes did not help, because the average viewer could not recognise that they gave the same chances in every phase as the CHF 1.50 premium call **6B_775/2009**.
- Free play on the machine: the Bern Administrative Court held that free play could at most exclude a lottery-like enterprise, not a lottery. A free route that required disclosing personal data and consenting to marketing was not equivalent **100 2012 394**.

Under the BGS, the Federal Supreme Court held that the possibility of free participation does not prevent a money game. It matters "lediglich im Rahmen der Ausnahmebestimmung von Art. 1 Abs. 2 lit. e BGS betreffend die Medienunternehmen" ("only within the exception of Art. 1 para. 2 lit. e BGS concerning media companies") **2C_62/2025**. The remark was made in a case where lit. e was not invoked. It nevertheless matches the legislative history discussed below.

In practice, the former free-route doctrine has moved out of the definition and into lit. e. Purchase-linked promotions now depend on lit. d.

Gain, operator role and skill

A prize need only be "in Aussicht" (in prospect). No additional incentive to buy is required **2C_62/2025**. A slot machine need not pay the gain out itself; payment by staff is enough **6B_489/2024**.

Operating a platform on which players play against each other is itself operating a money game, even where the gains come from trading between participants **BGE 148 II 392**.

Whether skill or chance decides the outcome is irrelevant to the money-game concept itself **BGE 148 II 392**. Skill matters only for the category, for example a skill game in which the gain depends "ganz oder überwiegend" (wholly or mainly) on skill **Art. 3 BGS**.

For machines, the courts compare the amount inserted with the entertainment value offered. A great disproportion indicates a money game; spending several francs per minute merely for entertainment was found implausible **6B_489/2024**.

BGE 136 II 291 reserved public or commercial Texas Hold'em tournaments to casinos **BGE 136 II 291**. Art. 3 lit. f BGS now recognises small poker tournaments as small games **Art. 3 BGS**, so that outcome no longer transposes directly.

The leading BGS decisions confirm that the digital character of the object does not matter **BGE 148 II 392 2C_62/2025**. Loot boxes remain unresolved:

- The ESBK considers general statements difficult and leaves qualification to ESBK and Gespa case by case. Where a loot box qualifies, it may not be offered to minors and needs authorisations **ESBK Tätigkeitsbericht 2022**
- The Federal Council described the gambling-law treatment of loot boxes as "bisher nicht abschliessend geklärt" ("not yet conclusively settled"), with youth-protection rules applying where the BGS does not **BBI 2020 8203**.

Both statements are non-binding.

Private circle (para. 2 lit. a)

Statutory criteria

Art. 1 VGS defines the exclusion. All four of the following conditions must be met:

- (a) the game is neither run commercially nor based on a public announcement;
- (b) the number of players is small, and it must be very small if the players have no tie outside the game, in particular a family or professional tie;
- (c) players bear no costs or fees beyond their stake;
- (d) the total winnings are low and equal the total stakes

Art. 1 VGS

The dispatch says the circle must be narrowly limited ("eng beschränkt"), giving families and office groups as examples. It adds that players competing against each other on a commercially operated platform are not a private circle **BBI 2015 8387**.

In the National Council, a proposal to exclude non-commercial games with stakes up to CHF 100 was rejected **AB 2017 N 100**. Parliament therefore chose not to replace the relational test with a monetary threshold.

Judicial interpretation

None of the retrieved decisions construes Art. 1 para. 2 lit. a BGS or Art. 1 VGS by their wording. The case law instead builds on the former concept of the family and friendship circle.

Starting point. The Federal Supreme Court held that non-public Texas Hold'em tournaments for money in a circle of friends or family are permissible, while commercial or public poker belongs in casinos **BGE 136 II 291**.

Narrow reading. The Bern High Court reads the exclusion very narrowly. It applies only where the bonds of friendship between the players themselves neutralise the social risks the Act targets. In the case decided, a poker club had about 120 to 130 members. They mostly knew each other only by sight or first name and met at least every second Thursday. The court treated this as a mere community of interest, not a circle of friends **SK 2017 36**.

Factors that defeat the exclusion. Several decisions show which features take a game outside the private circle:

- Organisation and regularity in a private home. Weekly gambling at fixed dates in a private flat was a gambling house, even without public access or a profit motive **BGE 83 IV 203**.
- Members-only access. Restricting access to members did not create a private circle **SU250016**. A side room labelled "Privat" that club members could still use did not either **460 19 227**.
- Invitations and income. Chat invitations stating jackpots and buy-ins, dealers, and income from the games for the venue defeated a defence of "Spielabende unter Freunden" (games nights among friends) **SST.2022.233**.

Interaction with the statutory criteria

These factors correspond to criteria (a) to (d) of Art. 1 VGS: commerciality, public announcement, fees beyond the stake, and the size of the group and the ties within it. No retrieved decision links the

two expressly.

Criterion (c) carries particular weight in practice. A membership fee that serves only to buy the right to play is already a stake (see "Club fees" under the threshold section) **SU250016**. It is also a cost or fee beyond the stake under Art. 1 VGS, so the exclusion fails as well **Art. 1 VGS**.

Skill games that are not automated, intercantonal or online (para. 2 lit. b)

Scope of the exclusion

The three negative conditions are cumulative **BBI 2015 8387**. This mirrors Art. 3 lit. e BGS, under which a skill game becomes a large-scale game as soon as it is automated, intercantonal or online **Art. 3 BGS**.

What falls outside the BGS is therefore only a narrow category: the locally organised, non-automated skill game with a stake and a prize. For that category the Confederation leaves the field to the cantons **BBI 2015 8387**.

Skill games within the Act

Skill games that are automated, intercantonal or online stay within the Act as large-scale games. They need Gespa authorisation, and their profits are not earmarked **Art. 125 BGS**. A canton may ban them entirely **Art. 28 BGS**. Ticino did so: Art. 4 of its implementing act prohibits large-scale skill games.

The Federal Supreme Court declared the challenge to the Ticino ban inadmissible. The appellants had requested only a reformatory remedy, namely a transitional provision, and in abstract review of cantonal norms only cassatory conclusions are admissible. The Court did not decide whether the ban is lawful **2C_251/2023**.

Practical limit: the threshold question comes first

A game qualifies for lit. b only if it really is a skill game, meaning the gain depends wholly or mainly on skill **Art. 3 BGS**. Operators regularly fail at this threshold. The Vaud court found a terminal game that "ne laisse aucune place à l'adresse ou à la dextérité du joueur" (leaves no room for the player's skill or dexterity) to be a casino game **CAPE pe20-008995-168/2021**.

No retrieved decision applies lit. b to a game accepted as a skill game.

Sports competitions (para. 2 lit. c)

Purpose of the exclusion

The exclusion exists because sports competitions could otherwise meet the definition in Art. 3 lit. a BGS. The dispatch's example is tennis tournaments with an entry fee and prize money **BBI 2015 8387**.

Where the line runs

The decisive distinction is between taking part in the competition and betting on it:

- The competition itself is outside the Act.
- A money bet on its course or outcome is a sports bet under Art. 3 lit. c BGS **Art. 3 BGS**. The dispatch adds that "Sportereignis" is to be read narrowly **BBI 2015 8387**.

Whether an event counts as sport is a federal-law question that Gespa can bring before the courts. In **2C_46/2023** a canton had authorised a local sports bet on a pig race. The Federal Supreme Court affirmed Gespa's standing to challenge that authorisation, because Gespa must review cantonal small-game permits

comprehensively for compliance with federal law. The Court did not define "sports event" or "sports competition" **2C_46/2023**.

Open questions

The retrieved sources do not address esports, fantasy sports or tipping games under lit. c. **BGE 148 II 392** indicates that platform-organised player-versus-player online formats with a stake and a prize are money games whatever their skill content **BGE 148 II 392**. That suggests lit. c should not be stretched to cover such formats. No court has yet decided the point.

Promotional games (para. 2 lit. d and e)

Legislative history

The Federal Council's draft contained one exclusion for promotional lotteries and skill games. It applied only if free participation was possible on the same conditions as paid participation and was communicated clearly and unambiguously **BBI 2015 8387**.

Parliament replaced this with two separate regimes:

- Council of States (Dittli compromise). The chamber adopted a media-company provision that restored the sales-promotion purpose, added the condition of no risk of excessive gambling, and required "gleich guten Zugangs- und Teilnahmebedingungen" (equally good access and participation conditions) for free entry. Its stated aim was to prevent online games on media websites that can be played repeatedly in quick succession **AB 2017 S 322**.
- National Council. The National Council then adopted the version that now forms lit. d and e. In this version, "zu höchstens marktkonformen Preisen" (at prices no higher than market prices) is intended to prevent disguised stakes **AB 2017 N 1266**.
- Final agreement. The Council of States agreed. Speaking for the record, a member said lit. d is not a "Lex Detailhandel" (a retail-only law) and also benefits service businesses, garages and mountain railways **AB 2017 S 626**.

The dispatch's single free-entry test therefore no longer describes lit. d. It survives only in lit. e.

Lit. d: purchase-linked promotions

All of the following conditions must be met:

- a lottery or skill game;
- run for a short period;
- for the purpose of sales promotion;
- with no risk of excessive gambling;
- participation exclusively through the purchase of goods or services;
- at prices no higher than market prices **Art. 1 BGS**.

The exclusion is not limited to retailers **AB 2017 S 626**. Because buying a product to take part counts as concluding a legal transaction under Art. 3 lit. a BGS **2C_62/2025**, lit. d is the only route by which a purchase-linked game can escape the Act.

No retrieved decision interprets "kurzzeitig" (short period), the excessive-gambling condition or the market-price condition. The terminal case law gives a guide by analogy for the price condition. Where "services" were priced out of proportion to their usefulness, the courts treated them as alibis disguising a stake **6B_995/2021**. An offer of that kind would not satisfy the market-price condition. The courts in that case decided on the stake element, not on lit. d.

Lit. e: media-company promotions with free entry

Lit. e requires all of the following:

- the game is run by a media company;
- it is short-term and for sales promotion;

- there is no risk of excessive gambling;
- free participation is available on equally good access and participation conditions as paid participation **Art. 1 BGS**.

This is the only place where the BGS still lets free participation matter **2C_62/2025**. The strict former case law on equivalence and on presenting the free route to the average participant can serve as guidance, provided its different statutory setting is kept in mind **6B_775/2009 BGE 125 IV 213**. The "gleich guten" wording, adopted to secure genuine equivalence **AB 2017 S 322**, points towards keeping that strict standard. No retrieved decision applies lit. e.

Tax consequence

Excluded promotional games still have tax consequences under separate rules. Thurgau tax practice restates lit. d and e. It treats single winnings above CHF 1,000 (direct federal tax: CHF 1,100 from 2024) from Swiss promotional games as fully taxable, and treats winnings from foreign promotional games as always taxable **Thurgauer Steuerpraxis, StP 25 Nr. 6 (2026-09)**.

Activities supervised by FINMA (para. 2 lit. f)

Purpose of the exclusion

The Federal Supreme Court explains that lit. f was enacted because numerous financial services, such as exchange-traded structured products, would otherwise fall under Art. 3 lit. a BGS, "was verhindert werden soll" (which is to be prevented) **BGE 148 II 392**.

Limits

The wording ties the exclusion to activities that are subject to FINMA supervision under the FINMASA **Art. 1 BGS**. Labelling a product as trading or investment is not enough. In **BGE 148 II 392** the Court qualified a virtual-unit trading game as a money game despite the operator's argument that it was a financial-market activity **BGE 148 II 392**.

Under the former law, the Federal Supreme Court assessed a structured note with a football-result bonus as a whole, because note and bonus could not be acquired separately. Because the bonus depended on match results, the Court qualified the product as a prohibited professional bet **BGE 133 II 68**.

FINMA treats bet-like binary options as a question of financial-market law and intervenes against unauthorised providers

FINMA: Client protection - How investors can protect themselves against unauthorised financial market providers
 . No retrieved decision applies lit. f to exclude an activity from the BGS.

Snowball, avalanche and pyramid schemes (para. 3)

Legal basis

Para. 3 sends these schemes exclusively to the UWG. According to the dispatch, this reflects the legal position before the BGS **BBI 2015 8387**. The National Council majority wanted to bring them under the BGS. The Federal Council version prevailed by 107 votes to 78 **AB 2017 N 1266**. In the Council of States the reason given was that the existing allocation of competence should be kept **AB 2017 S 322**.

Art. 3 para. 1 lit. r UWG defines the conduct: promising benefits whose advantage for the recipient lies mainly in recruiting further persons rather than in selling or consuming goods or services **Art. 3 UCA**.

Criminal liability

Criminal liability requires intent and a criminal complaint **Art. 23 UCA**. In **6B_538/2022** the acquittal was upheld because the accused

believed the business model was lawful and therefore lacked intent. The Court left open whether the objective elements were met **6B_538/2022**.

Civil consequences

The St. Gallen court held contracts based on such a system void under Art. 20 para. 1 OR. Payments could be recovered under Art. 62 ff. OR after deduction of commissions received **BE.2019.51**.

Older facts

The dispatch's claim of continuity needs qualification. Before para. 3, the courts also treated such schemes under lottery law. The Federal Supreme Court classified a gift circle (Schenkkreis) as a lottery-like enterprise. Founding or running it was punishable; merely paying the entry stake was not **BGE 132 IV 76**. For a contract concluded in March 2012, the Zurich courts still relied on Art. 43 no. 1 aLV and refused enforcement because the contract was void **RT150182**.

The Thurgau High Court held that payments into a gift circle are not barred from recovery by Art. 66 OR **RBOG 2012 Nr. 02**. That civil-law reasoning does not depend on lottery law. The lottery-law distinction between punishable organisers and non-punishable participants, however, has no direct counterpart in the retrieved UWG case law.

Who decides whether a game falls within the Act

Administrative qualification

The Act gives no general authority to declare a game excluded under Art. 1. Qualification follows the authorities' fields of competence:

- Gespa decides on the qualification of large-scale games. Before deciding, it must consult the ESBK (Art. 27 para. 1 BGS). If the two disagree, they exchange views and, failing agreement, refer the case to the coordination body. Gespa breached the guarantee of a decision without undue delay (Art. 29 para. 1 BV) when it suspended its qualification proceedings to wait for the ESBK **2C_908/2020**.
- The ESBK qualifies casino games **2C_908/2020**. The ESBK's administrative criminal proceedings need not be suspended while a Gespa qualification is pending **BV.2021.24**.
- Investigative powers in the excluded areas. Gespa may require information and documents "in den Bereichen nach Artikel 1 Absätze 2 und 3" (in the areas covered by Art. 1 paras. 2 and 3) to clarify whether a large-scale game exists. It may also order interim and restorative measures **Art. 108 BGS**.

The former Comlot could only conduct a subordination or qualification procedure establishing whether an activity fell under the lottery ban. Retrospective sanctions belonged to criminal proceedings **BGE 141 II 262**.

Qualification in criminal proceedings

On this point former and current law differ.

- Former SBG. A conviction required a prior, final ESBK qualification decision. Without one, the criminal judge could not decide the qualification as a preliminary question **6B_30/2021**.
- BGS. The Vaud appellate court relied on the legislative intent that the trial authority may qualify the games itself "pour autant qu'aucune autorité administrative n'ait encore pris de décision exécutoire" (provided no administrative authority has yet taken an enforceable decision), and refused to suspend the case **CAPE pe20-008995-168/2021**. The Federal Criminal Court cited the same passage **BV.2021.24**.

No retrieved Federal Supreme Court decision confirms the new position under the BGS. It is consistent with the materials as cited in these decisions.

Consequences of misjudging scope

An operator who wrongly relies on an exclusion faces the following:

- criminal liability for operating casino games or large-scale games without authorisation: up to three years, or up to five years if committed commercially or as part of a gang **Art. 130 BGS**;
- contraventions for other unauthorised games and for advertising games not authorised in Switzerland **Art. 131 BGS**;
- for casino-game offences, the VStrR applies, and the ESBK prosecutes and adjudicates **Art. 134 BGS**;
- for online offers by operators based abroad, access blocking **Art. 86 BGS**.

The blocking regime has been upheld for novel formats **BGE 148 II 392 2C_62/2025**. The blocking measure is subject to review by the Intercantonal Gambling Court and then the Federal Supreme Court. An operator that introduces effective geoblocking can apply to be removed from the blocklist **BGE 148 II 392**.

Practical implications

For organisers and their advisers, the sequence of questions follows from the analysis above:

1. Is there a money game at all? Check both elements. Free tokens, retained asset value, membership fees or "services" do not eliminate a stake **2C_62/2025 6B_995/2021**.
2. Does an exclusion apply? Check whether every condition of the relevant letter is met, and record the facts that support it. For example:
 - for lit. a: group size, the ties between players, the absence of fees and the absence of advertising **Art. 1 VGS**;
 - for lit. d: market-conform pricing and the duration of the promotion;
 - for lit. e: equivalent free access.
3. Which authority? For doubtful cases, seek clarification from Gespa or the ESBK in their fields of competence **2C_908/2020**. A criminal court may otherwise qualify the game itself **CAPE pe20-008995-168/2021**.
4. Cantonal law may be stricter for large-scale and small games, even where the federal Act would allow the game **Art. 28 BGS Art. 41 BGS**.
5. Pyramid-type schemes: assess them under the UWG. For participants, consider restitution under Art. 62 ff. OR **BE.2019.51**.