

Art. 1 BGS (Federal Act on Gambling): Subject Matter and Exclusions from the Scope of Application

Function of the Provision and Constitutional Basis

Art. 1(1) BGS sets out what the Act governs: whether money games are permissible, how they are conducted, and how gaming revenue is used. Paragraphs 2 and 3 exclude certain situations from the Act's scope. The provision is the entry point to the Act. Whether an offering needs a licence or concession, is subject to criminal sanctions and can be blocked is first decided under Art. 1 read together with the definition of money games in Art. 3(a) BGS.

The Act is based on Art. 106 of the Federal Constitution (BV)

BBi 2017 6245. Under that provision:

- the Confederation legislates on money games and takes account of the cantons' interests (para. 1);
- the cantons license and supervise large-scale lotteries, sports betting and games of skill (para. 3);
- the Confederation and the cantons ensure adequate protection against the dangers of money games (para. 5);
- the net proceeds of lotteries and sports betting must be used entirely for public-benefit purposes (para. 6) **Art. 106 Cst.**

The Federal Council's Dispatch (Botschaft) describes the federal power as a comprehensive concurrent legislative competence **BBi 2015 8387**. The earmarking rule in Art. 106(6) BV shaped the debate on media prize games in particular, because paid media games could circumvent it **AB 2016 S 376**.

Art. 1 BGS has not been amended since it was enacted. The German text now in force is identical to the text adopted on 29 September 2017 **BBi 2017 6245**. The French version of lit. e carries a footnote stating that the Federal Assembly's Drafting Committee rectified it (Art. 58(1) ParIA). In the Federal Council's draft the exclusions were arranged differently: draft lit. d covered sales-promotion games with free participation, and draft lit. e covered the boundary with the financial-services sector **BBi 2015 8387**. References to the Dispatch must take this renumbering into account. Parliament's reworking of lit. d and e is discussed below under Sales promotion.

The Concept of a Money Game as the Threshold for Application

Cumulative Elements and a Broad Scope

Art. 1(1) BGS is built on the concept of a money game. Money games are games in which a monetary prize or other pecuniary advantage is in prospect in return for a stake of monetary value or the conclusion of a legal transaction **Art. 3 BGS**. The Federal Supreme Court requires both elements cumulatively, and both must consist of money or a money substitute **BGE 148 II 392**.

The legislature intended the concept to be read broadly, so that in principle every game with these elements is covered. The Court also infers this breadth from the FINMA exclusion in Art. 1(2)(f) BGS: that exclusion was needed only because many financial services would otherwise fall within the definition **BGE 148 II 392**. Conversely, according to the Dispatch there is no money game if either the stake

or the prize is missing **BBi 2015 8387**.

Case law clarifies the concept in several respects that go beyond the wording:

- Chance or skill does not matter for coverage. The Federal Supreme Court held: "Ob das Spiel bzw. die Gewinnmöglichkeit geschicklichkeits- oder zufallsbestimmt ist, spielt - entgegen den Einwänden der Beschwerdeführerin - keine Rolle, da der Geldspielbegriff nicht hierauf abstellt." ("Whether the game or the chance of winning is determined by skill or by chance is - contrary to the appellant's objections - irrelevant, since the concept of a money game does not turn on this.") **BGE 148 II 392** The distinction matters only for classification under Art. 3(b)-(g) BGS and for the exclusion in Art. 1(2)(b) BGS.
- The stake need not be lost. The fact that the purchase price of a virtual item can be recovered does not remove the gaming character **BGE 148 II 392**. In a case on a platform with NFT trading cards, the Court treated the purchase of cards on the marketplace as concluding a legal transaction in order to take part in the game, even though the cards could keep their value **2C_62/2025**.
- Digital items and platforms. The digital nature of an item does not rule out a money game. "Conducting" a game also covers running a platform on which players compete against each other, even where the prize results from trading among participants **BGE 148 II 392**.
- Hidden stakes. A stake may be hidden in another payment, and a few centimes are enough **6B_489/2024**. In a case involving supposedly "free games" on a terminal, which required buying overpriced services of little use, the Court regarded those services as mere pretexts **6B_995/2021**. That judgment was later partly modified in the cantonal proceedings, but the more recent judgment 6B_489/2024 repeats the same formula on stakes **6B_489/2024**.
- Free-entry option. The possibility of taking part for free does not prevent a game from being a money game. The Court stated that this possibility is "lediglich im Rahmen der Ausnahmebestimmung von Art. 1 Abs. 2 lit. e BGS betreffend die Medienunternehmen von Relevanz" ("relevant only within the exception in Art. 1(2)(e) BGS concerning media companies") **2C_62/2025**. This statement governs how lit. d and e are read (below).

Amusement Machines and Continuity with the Former Law

At the other end of the broad definition is the amusement machine, where any pecuniary advantage is merely incidental. The Federal Supreme Court looks at the ratio between the amount inserted and the value of the entertainment offered **6B_489/2024**. In the case before it, the Court nonetheless classified "photoplay" machines as casino games (Art. 3(g) BGS). It relied on how the machines worked, the games identified by the Federal Gaming Board (ESBK), and the common experience that users were seeking a monetary advantage **6B_489/2024**.

According to the same judgment, case law under the former Casino Act (Spielbankengesetz) remains applicable "mutatis mutandis" in principle, because the former concept of a game of chance and the

new concept of a casino game coincide in substance **6B_489/2024**. For lotteries this continuity is limited. The new definition of a lottery deliberately drops the criterion of systematic planning (Planmässigkeit) under Art. 1 of the former Lottery Act (LG), which had repeatedly caused problems of delimitation **BBI 2015 8387**.

In criminal proceedings, the offender's state of mind is also relevant. Under the Casino Act, the Federal Supreme Court required that the offender knew, or accepted the possibility, that a monetary prize or pecuniary advantage was in prospect. Where that knowledge was lacking, an acquittal was consistent with federal law **6B_1245/2019**. This concerns intent, not whether the game objectively qualifies as a money game. The Court left open whether the same would apply under the BGS **6B_1245/2019**.

Consequences of Coverage and Competent Authorities

If an offering falls under Art. 1(1) BGS and no exclusion applies, the operator needs a licence or concession, which is valid only in Switzerland **Art. 4 BGS**. Classification under the categories of Art. 3 BGS determines the applicable regime and authority. Those categories are lottery, sports bet or game of skill, and large-scale game, small-scale game or casino game **Art. 3 BGS**.

The criminal provisions are tiered:

- Misdemeanour. Anyone who intentionally conducts, organises or makes available casino games or large-scale games without a concession or licence commits a misdemeanour **Art. 130 BGS**.
- Contraventions. Other money games without a licence, and advertising for money games not licensed in Switzerland, are contraventions punishable by a fine of up to CHF 500,000 **Art. 131 BGS**.
- Casino games. The Federal Act on Administrative Criminal Law (VStrR) applies. The ESBK Secretariat prosecutes and the ESBK decides **Art. 134 BGS**.
- Other money games. Offences connected with these games are prosecuted and judged by the cantons. The intercantonal authority has rights of appeal and objection **Art. 135 BGS**.

Access to online money games that are not licensed in Switzerland and are offered by foreign or concealed operators must be blocked. The ESBK and the intercantonal authority each keep a blocking list for their own area of competence **Art. 86 BGS**. The Federal Supreme Court upheld DNS blocking as proportionate in judgment **2C_337/2021 2C_337/2021**. In that judgment the Court:

- accepted possible overblocking;
- assigned the blocking list for large-scale games to the Gespa (intercantonal gaming authority);
- held that Art. 86(2) BGS also covers e-mail traffic linked to the offering.

Blocking proceedings of this kind have also been used to decide whether novel digital offerings are money games **BGE 148 II 392 2C_62/2025**.

The Gespa can also review and challenge cantonal small-scale game licences for compliance with federal law in full. This review is not limited to the boundary between large-scale and small-scale games **BGE 151 II 710 2C_46/2023**.

Transition from the Former Law

Art. 2(2) of the Criminal Code (StGB) governs acts committed before 1 January 2019. The Federal Supreme Court held that the former Casino Act, which provided for a fine for a contravention, is more lenient than Art. 130(1)(a) BGS, which defines a misdemeanour. A monetary penalty is the more severe type of penalty regardless of how it is enforced and how high it is **BGE 147 IV 471**.

In **6B_548/2021** the Court therefore set aside a Geneva judgment that had applied Art. 130 BGS as the more lenient law (lex mitior) **6B_548/2021**. On remand, the Geneva court imposed a fine under the former law **AARP/375/2022**.

In 2020 the Cantonal Court of Basel-Landschaft had still applied the new law as more lenient. It reasoned that in the individual case a fine had to be compared with a suspended monetary penalty **460 19 227**. That approach cannot be reconciled with **BGE 147 IV 471**, which expressly rejects such a case-by-case comparison for this relationship **BGE 147 IV 471**.

The Exclusions in Paragraph 2: Interpretation and Limits

The exclusions presuppose that a money game exists in the first place; they take it out of the Act. The Dispatch, for instance, justified excluding sports competitions precisely because they could otherwise fall within the definition of a money game **BBI 2015 8387**.

Private Circle (lit. a)

The Federal Council has defined this concept in Art. 1 of the Gambling Ordinance (VGS). A money game in a private circle exists only if all of the following are met **Art. 1 VGS**:

- (a) the game is not played commercially or on the basis of a public announcement;
- (b) the number of players is small, and very small if they have no family, professional or other tie outside the game;
- (c) no costs or fees of any kind are charged beyond the stake;
- (d) the total prize is low and equals the sum of all stakes.

The last criterion rules out any skimming of stakes in favour of an organiser. The Dispatch calls for a restrictive interpretation and gives families and shared offices as examples **BBI 2015 8387**. A private circle can never exist where the game is run commercially or on the basis of a public announcement. Nor does one exist where players compete against each other on a commercially operated platform **BBI 2015 8387**. The National Council rejected a proposal to exclude all non-commercial games with stakes of up to CHF 100 **AB 2017 N 100**.

Bern poker club decision (old law). Under the Casino Act, the Bern High Court required an especially close tie, going beyond a shared interest in gaming, for the exception covering friends and family **SK 2017 36**.

- It endorsed the lower court's reasoning, which it reported as: "Der Ausnahmekreis müsse somit so eng definiert werden, dass die Schutzmechanismen des Spielbankengesetzes nicht mehr nötig seien (pag. 08 341)." ("The excepted circle must therefore be defined so narrowly that the protective mechanisms of the Casino Act are no longer needed.") It held that this restrictive reading could not be faulted **SK 2017 36**.
- The facts concerned a poker club with up to 130 members. Most knew each other only by sight or by first name, and they played tournaments regularly, at least every other Thursday. The court treated the club not as a circle of friends but as a "reine Interessen- bzw. Zweckgemeinschaft" ("a mere community of interest or purpose") **SK 2017 36**.

The decision adds substance to the criteria of a tie outside the game and a small number of players under Art. 1(b) VGS **Art. 1 VGS**. Because it was decided under the former law, it applies to lit. a only by analogy.

Physical seclusion is not enough. The Cantonal Court of Basel-Landschaft convicted the president of an association under Art. 130(1)(a) BGS **460 19 227**. Two gambling machines in a side room of the club premises were accessible to club members and were played in the hope of winning. The claim that the room was an office that was always locked was held not to be proven. The court did not expressly examine the exclusion. The outcome is nonetheless consistent with Art. 1 VGS, because a machine that skims stakes will generally fail the criterion that the total prize equals the total stakes **Art. 1 VGS**. Under the former law, the Federal Supreme Court likewise did not regard the fact that a machine stood in an attic room outside the premises as a bar, especially since there were indications of use by

outsiders and of disguising the room as a private flat **8G.67/2003**. That decision, too, applies to lit. a only by analogy.

Suspected games in a back room. Such a suspicion must be investigated with the tools of gambling and criminal law, not with administrative measures that serve unrelated purposes. The Administrative Court of Vaud set aside a municipal order restricting a grocery shop's opening hours **ge-2011-0132**. The order followed a police report about a suspected illegal gaming room in the shop's back room: card games with chips and two touchscreens thought to be games of chance. The court gave two reasons **ge-2011-0132**:

- without an express statutory basis, the municipality could not restrict opening hours as a punishment;
- the measure was not suitable for preventing money games in the back room, because the facts found were no more closely connected with the shop than with any other private space.

The court did not decide whether a money game had taken place or whether the players formed a private circle; it left this to the competent authorities **ge-2011-0132**. The decision concerns only municipal law from before the BGS. It shows, however, that the lit. a question arises in proceedings before the competent gambling and criminal authorities (see Consequences of Coverage above).

Small-Scale Games of Skill (lit. b) and Cantonal Law

Games of skill are money games in which winning depends entirely or predominantly on skill **Art. 3 BGS**. They are excluded only if they are, cumulatively, neither automated, nor intercantonal, nor conducted online **BBI 2015 8387**. If any one of these features is present, the game is a large-scale game **Art. 3 BGS**. An online game with a stake and prize of monetary value therefore falls under the Act whatever its skill component **BGE 148 II 392**.

For small-scale games, Art. 3(f) BGS lists only lotteries, sports bets and poker tournaments, not games of skill **Art. 3 BGS**. A small, non-digital, local game of skill is therefore not a small-scale game. It lies outside the BGS altogether and remains within cantonal competence under Art. 106(3)(c) BV **Art. 106 Cst.**

Skill or chance. Under the former law, the Federal Supreme Court required an overall assessment to distinguish skill from chance. Relying on an earlier judgment ("StarBall"), it stated that the money prize must depend "in unverkennbarer Weise" ("unmistakably") on the player's own skill **2A.206/2005**. It nonetheless accepted the "Hot Time" machine as a skill-game machine despite random allocation of symbols. The player could influence the game through speed, time bonuses and extra lives, and the share of games won by playing blind was vanishingly small **2A.206/2005**. The continuity statement in 6B_489/2024 supports applying this standard under the BGS as well **6B_489/2024**.

Cantonal powers within the BGS. The cantons may, by legislative act, prohibit all large-scale games of skill **Art. 28 BGS**. For small-scale games, they may adopt stricter rules or prohibit them entirely **Art. 41 BGS**. Ticino has banned the operation of large-scale games of skill. The Federal Supreme Court declined to hear an abstract review of that ban because the applicants had asked only for the court to amend it rather than to annul it. It therefore did not rule on whether the ban was lawful **2C_251/2023**.

Sports Competitions (lit. c)

The exclusion covers the competition itself, even where entry fees and prize money change hands. According to the Dispatch, active participants do not enter into a sports bet, whereas a bet on the course or outcome of a sporting event remains covered by the Act **BBI 2015 8387 Art. 3 BGS**. Anyone betting on the competition therefore falls under the Act.

BGE 151 II 710 illustrates this. A local sports bet on a pig race had been licensed as a small-scale game, and the Gespa challenged the licence on the ground that a pig race could not be licensed as a sports bet. The Federal Supreme Court decided only whether the Gespa had

standing to appeal, not whether there was a sporting event **BGE 151 II 710**.

Sales Promotion (lit. d) and Media Companies (lit. e)

Legislative history.

- Federal Council draft. The Federal Council had proposed a single exclusion for sales-promotion games with equivalent, clearly communicated free participation **BBI 2015 8387**.
- Council of States, first round. It initially sought to liberalise retail promotions without any free-entry requirement **AB 2016 S 376**.
- Council of States, Dittli proposal. For the media, it later added three criteria: a sales-promotion purpose, no risk of excessive gambling, and "gleich gute Zugangs- und Teilnahmebedingungen" ("equally good conditions of access and participation"). The aim was in particular to prevent online media games that can be played in rapid succession **AB 2017 S 322**.
- National Council. It drafted today's lit. d, which requires that participation be possible solely by buying goods or services at prices no higher than market prices. This was meant to put a stop to the hidden stakes then in use ("den heute vorkommenden verkappten Einsätzen ein Riegel vorgeschoben") **AB 2017 N 1266**.
- Final agreement. The Council of States concurred. It was recorded for the legislative materials that lit. d is not a "Lex Detailhandel" (a law for retailers only) but also applies to trades, car dealerships and mountain railways **AB 2017 S 626**.

The Dispatch's explanations of its draft lit. d therefore remain useful only for free participation under today's lit. e.

Lit. d. The following requirements apply cumulatively:

- the game runs for a short period;
- it serves to promote sales;
- it poses no risk of excessive gambling;
- participation is possible solely by buying goods or services at prices no higher than market prices.

In that case the purchase price is precisely not a hidden stake. Free participation is not required. Conversely, offering it does not save a game that fails the requirements, because according to the Federal Supreme Court free participation is relevant only under lit. e **2C_62/2025**.

Unfair competition law continues to apply. Under the Unfair Competition Act (UWG), it is unfair to promise a prize in a competition or prize draw where claiming the prize is tied to buying goods or services, calling a premium-rate number or paying an expense fee **Art. 3 UCA**. This rule targets so-called bait offers **AB 2010 S 939**. The UWG rule concerns claiming the prize, whereas lit. d concerns access to the game. A game excluded from the BGS under lit. d may therefore still be unlawful under unfair competition law if the prize is paid out only after a further purchase.

Lit. e. For media companies, a purchase at market prices is not enough. Free participation must be available on equally good conditions of access and participation as paid participation. In addition, the game must run for a short period, serve to promote sales and pose no risk of excessive gambling.

Case law under the former lottery law offers a workable standard for this equivalence, because the legislature intended to build on existing practice **BBI 2015 8387**. Under that case law, the competition had to appear unambiguously, as announced, as an event in which people could take part with or without a stake and with the same chances of winning **6B_775/2009**. The decisions show how the standard works in practice:

- Standard met. In BGE 125 IV 213, a crossword puzzle with entry via a 156 premium-rate number or by postcard met the standard **BGE 125 IV 213**.
- Standard not met. In 6B_775/2009, TV prize games used a premium-rate number and displayed internet and WAP

addresses. The average viewer could not tell "dass diese Gratisteilnahmemöglichkeiten in jeder Phase des Spiels die gleichen Gewinnchancen boten" ("that these free participation options offered the same chances of winning at every stage of the game") as calling the premium-rate number **6B_775/2009**. The viewer was bound to gain the impression that the paid number gave better prospects.

- Standard met (cantonal). The Cantonal Court of Valais found no lottery where free participation by e-mail was clearly labelled, because the free option and the equal chances were unambiguously recognisable to an average audience **P3 13 95**.

What matters, therefore, is how the average audience perceives the design and running of the game, not merely whether a free route exists. According to the debate, the words "gleich gute" ("equally good") in the current text were meant to secure this equivalence **AB 2017 S 322**. Applying the lottery-law standard to lit. e is an inference drawn from the legislative materials, not a holding of these judgments on the BGS. They do not address the concept of a media company.

Financial Market Supervision (lit. f)

According to the Dispatch, this exclusion (lit. e in the draft) is meant to mark the boundary with the financial-services sector. It gives exchange-traded structured products as an example **BBI 2015 8387**. On what this exclusion shows about the breadth of the money-game concept, see above **BGE 148 II 392**.

The exclusion covers activities subject to FINMA supervision. It depends on being subject to that supervision, not on merely resembling a financial product. In the "x Game" case, the argument that the game worked like a financial product was irrelevant, because the features of a money game were present **BGE 148 II 392**.

Under the former law, the Federal Supreme Court assessed a structured note inseparably linked to a bonus coupon on the football World Cup as a whole, and classified it as a prohibited bet. The reason for buying the product was no longer economic: "elle n'est plus de nature économique, mais de nature principalement ludique" ("it is no longer economic in nature, but principally playful in nature") **BGE 133 II 68**. The decision shows the risk that coupling a financial product with a gaming element can make the whole product a money game. Having been decided under the former law, it does not answer whether lit. f would today cover such a combined product from a FINMA-supervised issuer.

Snowball, Avalanche and Pyramid Systems (Paragraph 3)

Paragraph 3 refers these systems to the UWG. The Federal Council had proposed this as a continuation of the existing legal position **BBI 2015 8387**. The National Council wanted the BGS to apply to these systems as well, but the Federal Council's version prevailed **AB 2017 N 1266**.

Before 1 April 2012, such systems were treated as lottery-like undertakings. The Federal Supreme Court subjected gift circles to the Lottery Act and punished their founding and acts of operating them, but not mere payment of a contribution **BGE 132 IV 76**. Since the UWG revision, the prohibition has been in Art. 3(1)(r) UWG **BBI 2009 6151**.

The test. It is unfair to offer goods, premiums or services on terms under which the recruit gains mainly from recruiting further persons rather than from selling or using the goods **Art. 3 UCA**. Unlike the former lottery law, it is enough that the advantage lies mainly in recruitment. Systems where the distribution of goods is merely a pretext are also covered, whereas legitimate network marketing distributes a genuinely marketable product **BBI 2009 6151**.

Application by the Zurich courts.

- The Zurich High Court identified the following as indicators: purchases beyond personal needs, a substantial entry

investment, commissions on the turnover of lower-ranking participants, and no right of return **UE150133**.

- In another case it acquitted the accused because it was not established that their earnings came mainly from recruitment. A mere share in the sales revenue of sub-distributors is not enough **SB220107**.
- In 6B_538/2022 the Federal Supreme Court left the objective question open and upheld the acquittal for lack of intent, because the accused had assumed the business model was lawful **6B_538/2022**.

Criminal consequences. The offence is prosecuted only on complaint and carries a custodial sentence of up to three years or a monetary penalty. Anyone entitled to bring a civil claim may file a complaint, and the Confederation has the rights of a private claimant **Art. 23 UCA**. Where collective interests are threatened, the Confederation, represented by the State Secretariat for Economic Affairs (SECO), may file a criminal complaint **UE150133**.

Civil consequences.

- A Zurich court refused provisional dismissal of an objection in debt enforcement (Rechtsöffnung) for a sales contract concluded within a snowball system. It held the contract void under Art. 20 of the Code of Obligations (OR) and took the nullity into account of its own motion, even though the acknowledgment of debt was abstract and excluded defences **RT150182**.
- The Thurgau High Court allowed payments into gift circles to be recovered under the law of unjust enrichment, because Art. 66 OR covers only payments made for an unlawful or immoral purpose (Gäunerlohn) **RBOG 2012 Nr. 02**.

Both decisions still rest on the former lottery law. The nullity, however, follows from unlawfulness, which today results from the UWG.