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This issue covers the following topic:**MEDIA / ENTERTAINMENT AND SPORT****Sports Betting and E-sports in Japan****MEDIA / ENTERTAINMENT AND SPORT****Sports Betting and E-sports in Japan****I. Introduction**

In recent years the worldwide global sports betting market has demonstrated rapid growth year on year and shows no sign of slowing down. For example, the total amount of sports betting in the United States in 2021 was estimated to have been USD 57.22 billion, an increase of approximately 164% from the previous year's total of USD 21.6 billion¹. While there may be some opposition against proposals to legalize sports betting in Japan, including concerns about the effect on the integrity of sports competition and gambling addiction, the Japanese government is actively considering the pros and cons of permitting sports betting in Japan in order to keep up with the movement of the global market, increase revenues from professional sports and protect the image and likeness of clubs and athletes in professional sports in Japan. In that regard, in relation to the legalization of sports betting, the Ministry of Economy, Trade and Industry of Japan (**METI**) has begun preparations and the Japan Sports Agency established the Sports Future Development Council.

Notwithstanding the recent activity around sports betting in Japan, there are still many hurdles to operating a sports betting business in Japan under the current regulations. This article will provide an outline of the sports betting regulations and the key issues to be resolved with regard to the future of sports betting in Japan.

Similar to the sports betting market, the E-sports market has been experiencing strong growth worldwide². However, the relatively small prize money available in Japanese E-sports tournaments has hampered the development of E-sports in Japan and represents one of the barriers to the development of professional E-sports in Japan. This article will also provide an overview of the current E-sports regulatory landscape in Japan.

II. Prohibition on Gambling and Sports Betting

In principle, under Articles 185 and 186 of the Penal Code of Japan (the "Penal Code"), an individual is prohibited from "gambling or wagering" or "running a gambling place for the purpose of gain", respectively. As described in the diagram below, there are principally four kinds of parties that are expected to be involved in sports betting:

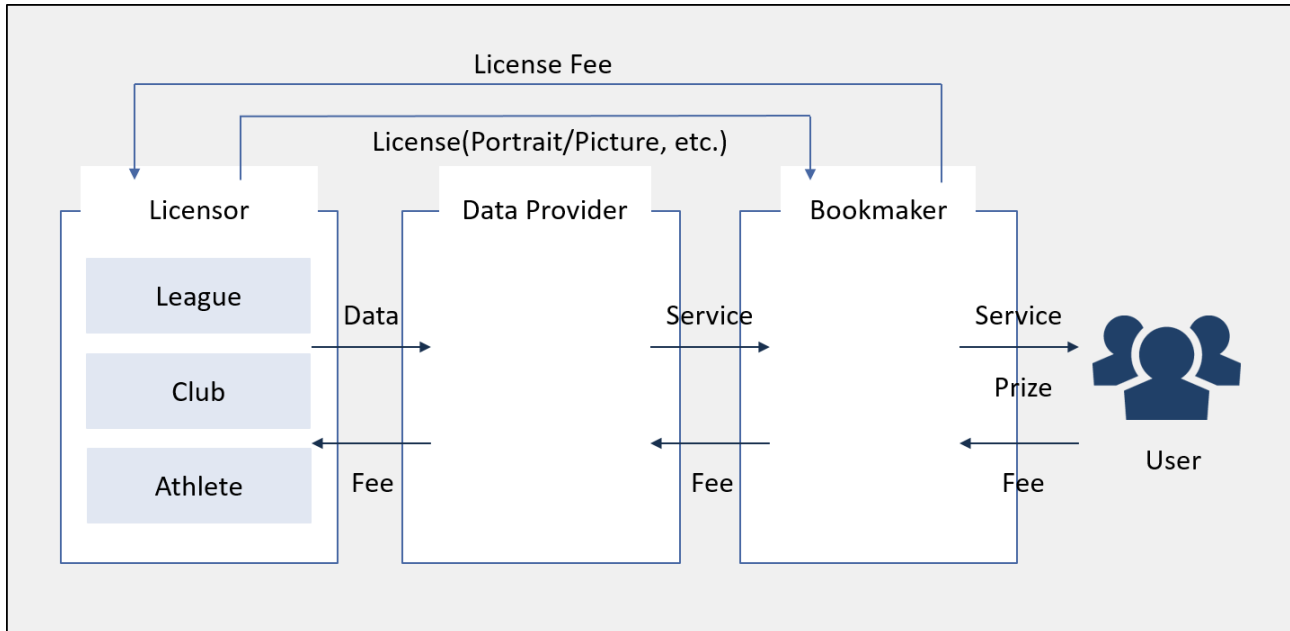
- (i) "users", who bet on certain sports;
- (ii) "bookmakers", who operate and provide sports betting services to users;

¹ Ministry of Economy, Trade and Industry, "Draft outline of the "sports DX Report" (tentative title)", issued on March 11, 2022.

² Emergen Research, a market research and consulting firm for various industries, has predicted that the E-sports market will expand at a compound annual growth rate of 20.7% between 2021 and 2028 and, by 2028, its market size will reach USD 5.19 billion (<https://www.emergenresearch.com/press-release/global-esports-market>).

- (iii) “licensors”, who hold the rights to official statistical data that is provided to data providers in exchange for fees³; and
- (iv) “data providers”, who obtain the official statistical data from licensors and provide such data to bookmakers with added value such as odds for sports betting.

In the following paragraphs, we analyze the risks of each party contravening Japan’s gambling prohibition.



(1) Users

An individual will have “gambled or wagered” if they have (i) gambled with the possibility of obtaining or losing property (ii) with regard to a matter whose outcome depends on chance. Both elements are required to be satisfied for the crime to be proven.

The first element will be satisfied if some users obtain winnings which are more than they initially wagered and other users lose the amounts that they have wagered. The second element regarding ‘matters whose outcome depend on chance’ refers to cases where the result depends on extrinsic circumstances to at least some extent. This element has been interpreted widely by Japanese courts. For example, even matters whose outcome depends on skill (or circumstances other than chance) are deemed to be cases where the result depends on extrinsic circumstances and are also included in the prohibition, except for certain limited situations⁴. Japanese courts have found that prohibited gambling has occurred in instances of betting on matches of Japanese chess (“Igo” and “Shogi”). In light of this wide interpretation, as sports betting involves users wagering money on the outcome of sporting events played by others, those results are considered to ‘depend on extrinsic circumstances’ and thus satisfy the second element.

(2) Bookmakers

A bookmaker, who receives bets from users, allocates winnings and obtains fees for providing the betting service, may be charged under Article 186 of the Penal Code for running a gambling place for the purpose of gain. The elements to be satisfied under Article 186 are (i) the provision, as an organizer, of a certain place under his/her control to be used for gambling (ii) for the purpose of gain.

The Supreme Court has ruled that in order to satisfy the element of providing a certain place for gambling, it is not

³ In addition to licensors holding the rights to official statistical data, licensors typically also grant licenses for the use of their image and likeness in exchange for a fee.

⁴ For example, where the outcome is predetermined by fraud or other similar means.

necessary to gather gamblers into a particular physical location⁵. In a recent case⁶ where a baseball bookmaker received bets through a mobile phone application, the Osaka High Court held that *“a gambling place is constituted by a place where a person receives bets and where bets are tallied, and does not necessarily refer to a location where gambling physically occurs”*. Whilst another lower court (the Fukuoka District Court) has taken a different view⁷, using the Internet to provide sports betting services without physically gathering the users is likely to satisfy the element of providing a gambling place.

(3) Data Providers and Licensors

Licensors and/or data providers, who provide certain data and/or odds to a data provider or a bookmaker with the knowledge that such data and/or odds will be used for gambling, may be charged as an accessory to either gambling or running a gambling place for the purpose of gain.

In previous cases, the courts have ruled that providing roosters for cockfighting⁸ and informing market prices for gambling⁹ (i.e., intentionally facilitating the act of gambling) is sufficient to sustain a charge of accessory to gambling and/or running a gambling place¹⁰. In light of this, depending on the nature of the relationship between the parties involved, a licensor and a data provider that provides data or odds for sports betting to other data providers and/or bookmakers, may be charged as an accessory to either gambling or running a gambling place for purpose of gain, or both.

(4) Conclusion

As outlined above, each party involved in sports betting may face criminal charges under the Penal Code. However, because actions outside Japan do not constitute crimes under the Penal Code¹¹, bookmakers located outside Japan providing a sports betting service that is only available to residents outside Japan or licensors or data providers in Japan providing data to a bookmaker outside Japan, may fall outside of the aforementioned provisions of the Penal Code. Having said that, if such sports betting service is available to residents in Japan, through the Internet or otherwise, the bookmakers, licensors and data providers will then be subject to the Penal Code.

As we have seen so far, it is difficult under the current Japanese laws for Japanese users to engage in sports betting and for businesses in Japan to operate a sports betting enterprise. If Japan wishes to capitalize/cash in on the wave of sports betting market expansion, it is inevitable that Japan will need to consider amending the current laws significantly.

III. Prize money in E-sports tournaments in Japan

The organization of an E-sports tournament in Japan with prize money is regulated by the Act on Control and Improvement of Amusement Business (the “Amusement Business Act”) and the Act against Unjustifiable Premiums and Misleading Representations (the “Premiums and Representations Act”). Since using the participation fees paid by participants as prize money may constitute gambling under the Penal Code, tournament prize money is provided by a third party, which is not deemed to fall under gambling under the Penal Code. This article will only discuss circumstances where tournament prize money is provided by a third party.

⁵ Sup. Ct. Feb. 28, 1973

⁶ Osaka High Ct. Feb. 9, 2017

⁷ Fukuoka Dist. Ct. Oct. 28, 2015. In this case, where a bookmaker received bets from gamblers via e-mail, the defendant was charged with aiding and abetting the opening of a gambling hall by forwarding e-mails containing handicap information on the games to other gamblers. The Fukuoka District Court held that it would be difficult to state that the bookmaker had secured and provided a certain location or facilities that comprised a gambling place. The court also refuted the argument that the electronic space by which the bookmaker and participating gamblers were connected constituted a gambling place and stated that such an interpretation is far from what is normally understood from the wording of the statute. The Osaka High Court subsequently overruled the reasoning of the Fukuoka District Court and ruled that such an interpretation is reasonable and valid.

⁸ *Taishinin* Jun. 25, 1926

⁹ *Taishinin* Nov. 26, 1927

¹⁰ *Taishinin* Jul. 9, 1913 and *Taishinin* Sep. 26, 1932

¹¹ Article 2, 3 and 3-2 of the Penal Code

(1) The Amusement Business Act

The Amusement Business Act outlines certain restrictions on the amounts of prize money¹² that can be offered when, subject to particular exceptions¹³, *“customers are able to use slot machines, video game machines or other game machines in stores and other similar facilities in ways other than their originally intended purpose and doing so is likely to stimulate customers’ desire for gains by chance.”*¹⁴ If an E-sports tournament meets that definition, the prize money of the tournament will be restricted.

As a precondition, because the Amusement Business Act prohibits businesses using amusement equipment in *“stores and other similar facilities”*, on-line E-sports tournaments are not subject to the restriction. Separately, in regard to off-line (on-site) E-sports tournaments, although the Amusement Business Act restricts business held at stores and other similar facilities with *“slot machines, video game machines or other game machines which can be used for purposes other than their originally intended purpose”*, computers, tablets, smart phones or other transmittable devices do not fall under the definition of slot machines, video game machines or other game machines¹⁵. Thus, E-sport tournaments where competitors use computers, tablets, smart phones or other transmittable devices are not subject to the Amusement Business Act restriction.

It is less clear whether the Amusement Business Act restriction applies to E-sports tournaments that use video game machines. The National Public Safety Commission, which has supervisory authority over the Amusement Business Act, has not issued a formal opinion on whether E-sports tournaments using video game machines are subject to the Amusement Business Act restriction.

Similarly, there is room to argue that the Amusement Business Act is not applicable because E-sports tournaments are not designed to stimulate customers' desire for gains by chance. In this regard, the Japan E-sports Union (“JeSU”) has established guidelines¹⁶ which stipulate conditions for off-line E-sports tournaments so as to ensure that the restrictions of the Amusement Business Act do not apply. The guideline indicates that the Amusement Business Act will not apply when E-sports tournaments are designed so that the total amount of the participation fees collected from the competitors does not exceed the cost of setting up the event (i.e., no profit is made by the event operator from the participation fees). We believe that it is a reasonable position to assume that E-sports tournaments that follow JeSU’s guideline will not be subject to the restrictions of the Amusement Business Act.

In summary, it is likely that following types of E-sports tournaments will not be subject to the restrictions under the Amusement Business Act:

- (i) online E-sports tournaments;
- (ii) off-line E-sports tournaments using devices that can be used for purposes other than amusement, such as computers, tablets, smart phones or other transmittable devices; and
- (iii) off-line E-sports tournament using amusement equipment that comply with the JeSU guidelines.

(2) The Premiums and Representations Act

The Premiums and Representations Act defines “premiums” as *“any article, money, or other source of economic gain given as a means of inducing customers, directly or indirectly, whether or not a lottery system is used, by an*

¹² The value of any prize shall not exceed JPY 9,600 plus an amount equivalent to consumption tax.

¹³ The restrictions only apply to machines specified by Rules of the National Public Safety Commission and excludes facilities used for hotel businesses and other businesses which are specified by Cabinet Order.

¹⁴ Article 2, Paragraph 1, Item 5 of the Amusement Business Act

¹⁵ Under the Amusement Business Act, “other game machines” are specifically limited to (i) slot machines and similar game machines, (ii) video game machines (excluding those which are clearly used for games that may arouse gambling interest), (iii) flipper game machines, (iv) game machines used for games where the outcome is indicated by numbers, letters, other symbols, or objects, and (v) roulette tables, playing cards and playing card tables, and other amusement facilities used for roulette games or games similar to playing cards.

¹⁶ JeSU “Guidelines for tournament with participation fee”

(https://jesu.or.jp/wp-content/themes/jesu/contents/pdf/terms/participationfee_guidelines.pdf)

*Entrepreneur*¹⁷ to another party, in connection with a transaction involving goods or services which the *Entrepreneur* supplies.”¹⁸ If prize money awarded to participants of E-sports tournaments is considered to be a “premiums”, certain restrictions¹⁹ on the amount of the prize money will apply. In this regard, JeSU inquired with the Consumer Affairs Agency on August 5, 2019 as to whether providing prize money in an E-sports tournament in the following two cases would be subject to the Premiums and Representations Act: (i) providing prize money only to participants who JeSU has certified as professional licensed E-sports competitors, and (ii) providing prize money tournaments where the participants are limited to competitors with a certain level of skill based on objective criteria such as previous performances and the result of qualifying rounds²⁰. On September 3, 2019, the Consumer Affairs Agency answered that prize money awarded such tournaments does not fall within the definition of “premiums” under the Premiums and Representations Act. The Consumer Affairs Agency reaffirmed the “Operational criteria for notification of designation of premiums, etc.” (Secretariat circular No.7, April 1, 1977) which states that the provision of money or goods that are considered as remuneration for work, even if they are economic benefits provided to the counterparty of a transaction, does not constitute the provision of premiums²¹. In addition to the Consumer Affairs Agency confirming the award of prize money to professional E-sports competitors as remuneration for work, it also confirmed that non-professional competitors can receive tournament prize money when the tournament itself is limited to competitors with a certain level of skill.

Although the Consumer Affairs Agency has jurisdiction over the Premiums and Representations Act, its opinion is not legally binding. Nevertheless, absent any contrary opinion by another official body, it is reasonable for promoters of E-sports tournaments to rely upon it going forward.

(3) Conclusion

Whilst there are a number of restrictions to be navigated, it is possible to structure an E-sports tournament in Japan that allows the award of prize money to the tournament winners. However, it is difficult for tournaments that are subject to the Amusement Business Act or the Premiums and Representations Act to provide competitive winnings. In order to promote E-sports industry in Japan, further amendment to the current regulations to allow greater prize money may be necessary.

¹⁷ In the Article 2, Paragraph 1 of the Premiums and Representations Act, “Entrepreneur” is defined as any person who runs a commercial, industrial, financial or any other business

¹⁸ Article 2, Paragraph 3 of the Premiums and Representations Act

¹⁹ The “Restrictions on the Offering of Premiums by way of Sweepstakes” notice, which is mandated by Article 4 of the Premiums and Representations Act, stipulates that the maximum amount of premiums shall not exceed JPY 100,000.

²⁰ https://www.caa.go.jp/law/nal/pdf/info_nal_190805_0001.pdf

²¹ https://www.caa.go.jp/law/nal/pdf/info_nal_190903_0002.pdf

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