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Malta's new skill-based exemption for fantasy sports

Malta has taken the step to differentiate between fantasy sports - which are deemed a game of skill - from games of chance, by providing an exemption for fantasy sports games under the Maltese gambling regime in order for them to benefit from 'light touch' regulation. The proposal has been sent to the European Commission for approval. Bas Jongmans, Gaming Attorney at Gaming Legal Group, sheds light on the exemption of pure games of skill under Maltese gambling law and the ambiguities inherent in effectively qualifying a pure game of skill, which could mean the proposed regime is ineffective.

As of 1 August 2016, the Malta Gaming Authority ('MGA') issued a legal notice that exempts fantasy sports games ('FSG') that are offered by means of distance communications, as defined within the Lotteries and Other Games Act (Chapter 438 of the Laws of Malta, 'LOGA') from Malta's licence requirements. The MGA feels that in view of the element of skill involved in fantasy sports, these activities should be differentiated from games of chance in terms of licensing and regulation since the risks associated do not warrant such stringent *ex-ante* requirements. This relates specifically to fantasy sports where players choose virtual representations of real-life athletes where the value and points attributed to an athlete reflect the athletes' performance in actual sporting events, and where the outcome is

determined predominantly by skill rather than chance'. The proposal on fantasy sports has been sent to the EU Commission for approval, and the MGA should be in a position to issue new licences in early 2017.

The MGA decided to introduce this 'light touch' regime for skill-based games after a public consultation. This step seems logical; after all, the market for digital games of skill is growing at a considerable pace. New hybrid and widely different forms of games that combine elements of skill with elements of chance call for a more flexible approach to regulation and legislation. The empirical and statistical testing of the features of each game would stifle the growth of the sector. As a result, the MGA requires more flexible regulatory capabilities. However,

one wonders, how can skill games, if such games can truly be said to exist, effectively be categorised as such? Broadly discussed in the consultation are the criteria one should use to decide whether a specific game qualifies as a game of skill. After all, does one without any experience in playing a game of roulette, seen by many as the classic example of a game of chance, have a serious chance of walking away with winnings? And does a highly experienced roulette player who has extensive knowledge of the rules of the game not have a better outlook? It does not seem easy to take the position that even with typical games of chance, skill is not relevant for the outcome of the game. In this regard, even the definition of what should be considered as skill seems unclear. Is skill the ability to respond promptly

FANTASY SPORTS



1. <http://www.mga.org.mt/skill-games-fantasy-sports-focus/>
2. L.N. 271 of 2016.
3. Digital Games of Skill with Prize Position Paper, December 2015, page 1, <http://www.mga.org.mt/wp-content/uploads/Digital-Games-of-Skill-with-Prize-Position-Paper-FINAL.pdf>
4. <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2002:AT8076>

continued

to the conditions of the game? Could skill simply be qualified as extensive knowledge of the rules of the game? Furthermore, should all skills matter? What should be done about skills that operators feel should not have a place in the game, such as the 'skill' of counting cards? Does skill not invite age-based discrimination? Do younger generations hold an advantage as they are more likely to understand a tablet interface from early childhood? Should the MGA for that matter investigate whether or not fortune tellers can actually predict the future? In other words, who is to say which qualities qualify as skill?

In order to qualify for the 'light touch' regime, a game should meet the qualification of:

1. a 'contest played for money or money's worth'; whereby
2. 'the winning outcome is determined predominantly through the skill or knowledge of the player'; and
3. 'where the results are determined by the accumulation of statistical results of the performance of a number of individuals in sporting events'; but
4. 'shall not include the forecast of the score, point spread or any other future occurrence of one or multiple events, and for the avoidance of doubt, the definition of a "bet" as defined in the LOGA shall not be applicable².'

How should 'predominantly' be defined? In its position paper of December 2015, the MGA mentions that games that are very predominant and/or totally influenced by skill should also diminish the element of chance to negligible³. This leads to the conclusion that only the pure game of skill should qualify. But again, how does one define a pure game of skill?

Defining whether the predominant element of a game is chance or skill is very hard to determine as often it would, as concluded in the consultation, be impossible to take into account all the variables in the game. It is mentioned in

the position paper that only a qualitative test would probably make sense, as one would 'simply' have to account for the fact that if a player who lacks experience in playing a game can defeat a player with vast experience, then it is not a game of skill, but a game of chance. On the same lines, if a player can find a method or strategy of play by which they measurably influence the game in their favour, then such a game is not a game of chance, but of skill.

However, even such a qualitative test seems inconclusive. After all, how does one measure skill? In criterion (2) of the legal notice, the MGA distinguishes skill or knowledge. Does this mean that players who have vast knowledge of the rules of a game are not necessarily skilled? Furthermore, should the influence of personal skill not be measured against the average skills of other participating players at a specific point in time?

Despite occurring in 2005, an example which is still illustrative is the gaming tax case regarding the Dutch television show 'Twee voor Twaalf', in which two participants play against two other participants in two subsequent and separate rounds. They need to answer 12 questions in 10 minutes. With each question correctly answered, the team obtains a letter which is the first letter of the provided answer. If the team does not know the answer to a question, they are allowed to browse through an encyclopaedia, which could help them find the correct answer. However, each second spent in browsing the encyclopaedia diminishes the team's bonus. The final objective of the game is to form a 12 letter word with the letters obtained in the two remaining minutes of the game. However, the team does not know whether the answer to the question is correct, hence they do not know if the letters obtained are accurate. They are only informed of this if they 'buy' a letter, which they can only do in the last two

minutes, which also diminishes the team's bonus. The team that retains the largest bonus and successfully forms the twelve letter word, wins.

A couple that won the game refused to pay Dutch gaming tax on their winnings. As their defence, the couple stated that participants who do not possess a broad general knowledge (ergo: the couple categorised itself as being exceptionally knowledgeable, hence skilled) would not have any chance of winning the game. Hence the game show should be seen as a pure game of skill, especially combined with the skill of browsing an encyclopaedia, resolving the twelve letter word and of being 'quick on their feet.' All of these arguments seem convincing. However, the couple was not successful in convincing the Dutch Court. The game show was deemed a game of chance. Since all participants were preselected on these skills, this had a mitigating effect on the outcome, especially combined with the fact that the Dutch court stated that "no human being" could master the extensive amount of knowledge required to have a substantial advantage in answering the twelve questions, which could be on any topic⁴.

In the case of the Dutch game show, even the qualification of two two-player teams seems impossible. How should one even master qualification in an environment with countless virtual players in a virtual arena? In the land of the blind, is the one-eyed man not king? At the same time, does a player's room filled with die-hards with vast experience not negate a potential influence on the outcome of a game?

In conclusion, the introduction of a 'light touch' regime for pure skill games seems logical and is required to prevent unnecessary red tape in regulatory affairs. However, since it seems impossible to effectively qualify pure skill games, the proposed regime runs the risk of becoming a non-starter.