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# Guiding DFS operators across the pond – DFS in supposedly “unregulated” European markets

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**D**aily Fantasy Sports (‘DFS’) have been quite the phenomenon and craze in the U.S. for some years now. However, with the popularity of the game came the regulators’ interest in the qualification of the game (gambling/skill/combination of both) and the potential need for licensing under gambling laws and/or creating specific regulation for DFS operations – not least to join in on the fun and potentially gain some tax revenues in the process.

Multiple U.S. states have moved to regulate DFS in some way or another, yet the regulatory approaches taken by the states differ considerably throughout the U.S. Whilst some states have chosen to clarify by legislation that DFS is legal or have provided for specific DFS regulation, DFS remains prohibited in other states and/or is qualified as gambling operation requiring a licence.

Let alone the inconsistency of U.S. DFS-regulation, one will clearly have to conclude that things have become more complicated and that the unregulated days of DFS in the U.S. have long gone.

All the more reason for U.S. DFS operators to try out and test new, potentially lucrative DFS markets elsewhere.

Would Europe, where only few countries have specific DFS regulation or guidelines in place and as a consequence most countries seem “unregulated”, be a viable option?

Taking Germany as an example, the following will outline the key regulatory issues and potential pitfalls DFS operators will be confronted with in supposedly “unregulated” European DFS markets. The article will emphasize the importance of potentially having

to make adjustments to the product depending on the (gambling) regulations that are in place in the respective jurisdiction in order to ensure compliant and tax-efficient operations. Clearly, the extent to which the product will have to be adjusted will be a determining factor when making the decision on which European markets to enter.

## “Gambling”?

Much like in the U.S., starting point of any legal discussion on DFS in Germany or any other country where DFS is not specifically regulated, will be whether the offering in question at all qualifies as “gambling”.

German gambling regulations, namely the Interstate Treaty on Gambling, subjects all “games of chance” to German gambling regulations. A “game of chance” consist of three elements which have to be met collectively and is a game where (1) the player pays a consideration of money’s worth in order to (2) acquire a chance to win a prize of money’s worth, and (3) the outcome predominantly is a matter of chance.

Germany, current FIFA World Cup champion and a football-obsessed country full of aspiring football managers and wannabe-coaches, has of course already seen courts rule on the question of whether a certain manager-style fantasy league game qualifies as a game of chance or not.

In 2013, the Federal Administrative Court (the ‘Court’) clarified that a fantasy league game where players let their virtual football teams compete against each other and winnings depended on whether and how the real-life Bundesliga players met certain criteria in a real-life game did not qualify as a game of chance, despite players paying to register a team and being able to win prizes if at the end of the month/the

end of the season their team ranked among the best teams.<sup>1</sup>

The Court argued that the game did not qualify as a game of chance since players paid an entry fee but at all times knew that their registration alone would not suffice to have a chance at winning prizes, that they would have to undertake further steps (e.g. put together a team) in order to achieve a chance to win and that the entry fee would be lost irrespective of whether the player decided to proceed with putting together the team or not. It, therefore, did not find the consideration given to be sufficiently linked to the acquisition of a chance to win. Although the Court hinted at the importance of evaluating the extent to which the player's own actions are relevant in the game, it did not specify whether it considered the fantasy league game in question to be a game of skill or consisting of predominantly skill, rather than chance elements.

If the element of skill involved in a DFS game is the predominant factor determining the outcome of the game, the game will not fall within the scope of German gambling regulations. Due to the lack of specific regulations on games which are predominantly determined by skill, rather than chance, said game will not require a gambling licence in Germany. Operators will, however, have to comply with basic consumer protection standards.

The question of whether a DFS game falls within the definition of gambling will have to be assessed on a case-by-case basis.

### **"Gambling"!**

Should the element of chance have to be considered the predominant factor determining the outcome of the game and the consideration given to play be directly linked to the acquisition of a chance to win, things get a little bit more complicated.

Unlike e.g. in the UK, where major U.S. operators tested the waters and were

required to obtain a (software and) pool betting licence, a DFS game which were to fall under the definition of a game of chance as per German gambling regulation and involved a prize-pool would likely have to be considered a lottery under German law.

In consequence, operators offering such a DFS game would at the moment not be able to obtain a licence for their operators in Germany, since the operation of lotteries is exclusively reserved for the state monopoly.

Whilst the state monopoly on lotteries may be criticised and arguably violates EU law, operators may understandably have reservations to risk "unregulated" operations in the Germany, not least since the German state-controlled lottery companies have been known to be fierce when it comes to defending "their" market shares.

### **Ways to react**

The means to go about this issue and reduce the unnecessary risk of being accused of operating unlawful gambling is to critically assess whether and to which extent the offering can or should be adjusted so as to ensure that either the skill element is the predominant factor determining the outcome and/or to ensure that the payments involved do not qualify as "consideration of money's worth paid in order to acquire a chance to win a prize of money's worth".

Options e.g. are to incorporate fees similar to the entry fee in the Super-Manager-case which the Federal Administrative Court ruled on.

### **What about tax?**

Finally, DFS operators will have to consider tax implications when assessing the viability of the offer.

In Germany, the applicable tax-rate if the respective DFS game may be considered a game of skill is likely to be 19% (VAT). If a DFS game were to qualify as a game of chance as per the Interstate Treaty and were to feature a prize pool, the 16,66% lottery tax would apply.

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<sup>1</sup> Federal Administrative Court, judgment of 16 October 2013, file no.: 8 C 21.12.