10 STEPS TOWARDS A GAME OF SKILL LICENCE

A GUIDE TO FORTHCOMING GAME OF SKILL WITH PRIZE REGULATIONS IN MALTA FOR FANTASY SPORTS
Executive Summary

This is a guide to securing a Maltese ‘game of skill with prize’ licence for a Daily Fantasy Sports (DFS) operator or similar online gaming company. It is based on forthcoming regulations due in 2017, which are currently under development. As such, the steps outlined in this document are suggestions based on what is currently known about the new regulations and what operators can be doing before they come into effect.

Disclaimer: This document is based on proposed legislation which has not yet been finalised. As such, the accuracy of the information in this document cannot be guaranteed and some assumptions have been made based on existing legislation. Readers should be cautious about how the information contained herein is used and, as always, should take formal advice from a professional advisor before making business decisions.
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The Development of the New Regulations

With tens of millions of players worldwide, fantasy sport has become a multi-billion-dollar industry. With greater awareness comes greater scrutiny over its practices, however, and inevitably calls for regulation. In this way, the industry has effectively become a victim of its own success. As a result, some progressive fantasy sports operators are now actively seeking regulation to position their business clearly as a legal game of skill – and therefore not as gambling.

It is because of the skill and knowledge applied by the player and the impact that it has on the likelihood of winning a prize, and therefore a return on the stake paid to take part, that fantasy sport is in an international grey area regarding whether or not it counts as gambling. Different jurisdictions draw the line between skill games and gambling differently, and this has a significant implication for the operation of the companies providing the games. Many jurisdictions have determined that fantasy sports are exempt from gambling regulation and licensing, but this has been met with some controversy. For example, in the US the Unlawful Internet Gambling Enforcement Act which was passed in 2006 specifically states that fantasy sports are permitted under federal law as they are classed as a game of skill rather than a game of chance. This hasn’t stopped individual states in the US from taking an opposing position, however.

“In Malta, daily fantasy sports have been expressly declared exempt from the requirement for a gambling licence... for now.”

In response to this international grey area, Malta has chosen to clarify the legal position of DFS operators based within its borders. The Malta Gaming Authority (MGA) published a position paper in 2015 on ‘digital games of skill’ following a public consultation, which has in turn led to Legal Notice 271 of 2016, entitled Fantasy Sports (Exemption) Regulations, 2016. By virtue of this notice, in Malta daily fantasy sports have been expressly declared exempt from the requirement for a gambling licence under the Lotteries and Other Games Act (Chapter 438 of the Laws of Malta) or the Remote Gaming Regulations (S.L 438.04) with effect from 1st August 2016.

This exemption is in a sense short lived, as the Maltese Government is committed to introducing legislation to regulate certain skill games which may present increased risks to the consumer. The exemption from the licensing requirement for Fantasy Sports is therefore a temporary measure, to be in effect until the proposed skilled games regulations are enacted into law, as early as January 2017.

The MGA have notified the proposed regulations (issued by the MGA in December 2015) to the European Commission as part of the process for the MGA to roll out its licensing framework to regulate such skill-based games, including Fantasy Sports. The new licensing initiative will create a fresh category of licence, enabling daily fantasy sports operators to apply for lighter regulation in Malta.

During this registration period and until the proposed regulatory framework for skill games is put into force, the MGA is registering expressions of interest from fantasy game providers. This has been done in order to monitor daily fantasy sport operations and evaluate potential risks to the consumer. Entities offering fantasy sports may voluntarily notify
their operations to the MGA and, subject to meeting certain general conditions applicable under general law, the operator would be formally recognised by the MGA.

The temporary period, the length of which depends somewhat on how long the European Commission take to review the proposed legislation, is expected to end at some point in Spring 2017. Once the Skill Games (with Prize) Regulations are enacted, the interim exemption will no longer apply, thereby mandating that fantasy sport operators will then need to seek authorisation under the new regime.

The Potential Benefits of the New Regulations

It is anticipated that once the legislation is introduced in early 2017 it will provide a framework that will identify how to determine whether a given game offered by an operator is a game of skill or a game of chance. It will also provide players with peace of mind on player protection issues, whilst providing skill game operators significant savings in costs compared to gambling operators, and will essentially avoid the bureaucratic process of applying for a full online remote gambling licence. It is anticipated that there will be a reduced level of ongoing compliance, notification costs and reduction in the stringent monitoring carried out by the MGA for licenced online gaming operators. More broadly, the credibility and assurances that come with licensing should make it easier for operators to secure services such as banking and credit card processing, which are often difficult to secure for companies operating in legislative grey areas.

Since the MGA has announced its intention to introduce the legislation the MGA have confirmed that operators have already been knocking on the door to voluntarily notify their operations to be formally recognised by the Authority. Once the legislation for Skill Games (with Prize) Regulations is enacted the interim exemption will no longer apply and fantasy sports operators will be under a mandatory obligation to seek authorisation under the new regime. As such, it is clear that both European and international operators are already undertaking the necessary steps to prepare to submit the application under the new legislation in order to enjoy an early mover advantage.

As such, in anticipation of the regime coming into force we have outlined below the ten steps that we recommend operators should begin to undertake in order to obtain a Game of Skill licence in January 2017.

THE BENEFITS OF LICENSING: A SUMMARY

1. Better access to banking and payment processing than unlicensed operators.
2. Legal clarity (and EU approval) supports business continuity and planning.
3. Access to international markets.
4. Credibility with players.
5. Differentiated, lighter regulation compared to games considered as gambling.
The First Five Steps: Preparation (2016)

The first five steps outlined below can and should be completed by an interested operator as soon as possible, as they do not require the new regulatory regime to be in place. Instead, they are aimed at having all of the necessary materials in place prior to the new legislation coming into effect, with the intention of making the eventual application process as speedy as possible.

It is important to undertake these steps now if your fantasy sports operation intends on benefiting from an early mover advantage in this market. Many operators are already well along this path.

Step 1: Register interest with the MGA

During the current period and until the regulatory framework for skill games is finalised and enacted, the MGA is receiving ad hoc notifications from interested operators. Operators offering Fantasy Sports may voluntarily notify their operations to the MGA via their online notification form. Those operators that are recognised may opt to be part of a ‘formal recognition’ process which has been made available in anticipation of the licensing framework that will come in with the Skill Games Regulations.

The formal recognition process involves the collation and submission of supporting documentation, including information on the shareholders and director due diligence documentation, rules of the game and other documentation requested by the Authority, and after this is vetted, the Authority may issue a formal letter of recognition in the name of the operator, which will also include binding obligations imposed on the operator in terms of regulation 4 of the Remote Gaming Regulations S.L. 438.10. The Authority will be able to monitor the industry and the risks to consumers and this will link with the licensing framework for skill games. Additionally, those operators which are formally recognised will also have a seal of recognition issued by the MGA and should mean that certain processes would not have to be repeated once the skill games licence becomes available.

Step 2: Preparation of Licence Application

Although it is anticipated that the Skill Games (with Prize) Regulations will not be as descriptive as the current gambling regulations in Malta, specific regulation is still warranted to ensure fairness of the games, imposing responsible gaming measures, protecting players funds and ensuring that the necessary anti-money laundering compliance is undertaken to prevent industry fraud and crime.

Applicants will be required to submit the necessary application form with supporting documents such as details on all roles within the company and due diligence on all key persons. Applicants will also be required to prepare and submit a business plan identifying the current or proposed company structure, information and declaration for key persons. They must undertake the relevant market research, competitor research, identify and outline the proposed operations and back office reporting requirements, to name but a few.

Preparation of your licence application includes collation of due diligence documents, drafting of business plan, policies, procedures and financial forecasts. The relevant application forms may not yet be ready but the information required is
likely to closely mirror the current MGA gambling licence application, so information like personal declarations of key persons and personal references of key persons can be collected now.

**Step 3: Proof of Skill**

You will need to instruct lawyers to draft legal opinion on proposed operations to determine whether the operations are a game of skill or a game of chance, as well as outlining proposed countries of operation and preparation of terms of business.

The current Act and Regulations in Malta state that there is a licencing requirement for games of chance and games of chance and skill that may result in a prize. In order for operators to define their operations under the current legislation they are required to look at how the outcome of the game is generated. Games of skill are likely to be defined as dependant “mainly” on the skill of the player, a qualitative test that views whether the player can obtain better results or defeat other players based on experience of the game. If this is the case then the operations will be deemed to be games of skill.

The Skill Games (with Prize) Regulations will provide more clarity on the definitions and interpretation of games of chance with skill and pure games of skill, however the MGA released a Position Paper in December 2015 which identified two ‘types’ of games and it is likely that similar categories will be in the new legislation:

**Type 1:** Games in which skill plays a predominant role, with a small element of chance still evident (for example, board games such as chess or rummy and some fantasy sports games).

**Type 2:** Games where the outcome is entirely dependent upon the skill of the player (for example, for off the shelf games such as FIFA, World of Warcraft etc.).

Within the Position Paper, the MGA determined that the new Regulations would define “games of skill” as they are in the current Act, therefore to include games whereby the result is determined by the knowledge, reaction time and/or dexterity of the player. This definition would cover Type 2 games and render this type of game not licensable. Applicants ought to note, however, that if their operations fall under the Type 2 category there will still likely be a set of policies and guidelines on specific gaming consumer matters which must be adhered to. The Authority has suggested that these guidelines will require operators to implement policies such as minimum age restrictions, data retention requirements, financial protection, and maximum stake limitations.

Those applicants applying for a Skill Game (with Prize) licence for their operations as a Type 1 game will categorised by an assessment on a case by case basis. The assessment will be undertaken by the MGA and the review will identify whether certain criteria are evident in the respective operator’s games.
Step 4: Restricted Testing

An operator who wishes to apply under the Skill Games (with Prize) Regulations for a “skill games” licence will be required to prove that their operations are in fact a game of skill and the onus of proof is vested in the operators themselves. Therefore, as part of the application operators will be required to obtain the relevant legal opinions in support of their view that the game is classed as a game of skill and any relevant data or statistics from running a restricted testing phase where no prize was offered. The data should consider and provide answers to the following questions:

- Is there a random draw presence which has an effect on the game outcome?
- How long is each game?
- Is the game for amusement or competition purposes?
- Is a skilled player more likely to win compared to an unskilled player?
- Is a player’s chance of winning increased by experience in playing the game?
- Can a player’s skill be acquired through research?
- Is the game played against other human players or against the house?

Step 5: Certified Testing

This step involves the review and testing of games, website and back office systems including instructing a testing house and providing a gap analysis for compliance with technical and reporting requirements. At this stage, the company would usually select and engage with the relevant service providers, where required, including data centre and hosting, payment service providers, auditors, customer support, etc.

The applicant will be required to engage with a certified testing house which will test the operator games and/or software and, if satisfactory, will provide a testing certificate. Applicants will be required to submit a copy of the testing certificate and a copy of the games rules on how games are settled, what the cancellation procedures are, how to handle player disputes and how mistakes, errors, or omissions will be dealt with.

In regards to hosting, operators should note that there is a requirement for licencees to host their operations through Malta. The applicant should engage the relevant hosting centre and provide evidence to the MGA that the website for the games will comply with the new regulations.
“It's not the will to win that matters; everyone has that. It's the will to prepare to win that matters.”

Paul "Bear" Bryant
The Last Five Steps: Submission (2017)

These steps will only become possible once the new regulations for skilled games come into effect, which is expected early in Q1 2017, possibly as soon as January. If the first five steps have been completed properly in anticipation of this, the last five steps should proceed quickly.

Step 6: Pre-submission Hearing

There will be pre-submission hearing with the Malta Gaming Authority prior to submission of the licence application. This is simply to ensure that proper preparation has been done and that a submission is appropriate.

Step 7: Formal Submission

The next step is formal submission of a licence application to the Malta Gaming Authority alongside all supporting documents and payment of the application fee. Once the application form is completed and submitted to the MGA a licence hearing date will be set. During this time the MGA will undertake a full review of the application and will circulate to all committee members with any queries or questions that have been raised to be addressed in full, prior to the licensing hearing date.

Step 8: Review

The Malta Gaming Authority will review the application and any hearings should be attended by all key persons including Directors and appointed officers running the gaming operation (including CEO, etc.).

Step 9: Licence

Assuming everything goes smoothly, the licence will be granted and all licence conditions must be attended to, test certificates must be provided, and quarterly returns submitted thereafter.

Step 10: Payment and Sign Off

Payment of full licence application fee will then be due and all conditions must be signed off within the first 3 months. At this stage, applicants will be required to ensure that the Player Protected Funds account is opened and operators must maintain a balance equal to that of player deposits and unpaid winnings, as registered on the company’s servers. This figure will be the sum reported on the player balance as recognised in the players’ accounts, despite the fact that the funds may not have arrived from the payment service provider. At this stage the Company should also register for VAT if appropriate and the website will “go-live”.

Find more resources at bostonmfo.com
Further Information

We have tried to cover all of the key information about the forthcoming regulations in this guide. If you would like to know more about this topic, however, please get in touch with us directly. We are always happy to provide more information, with no hidden fees or charges. Our experts on this topic are Bruce and Becky. Their direct contact details are below and they can be contacted during European office hours.

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