Bundesliga Manager Game („Fantasy League“) is Not a Game of Chance – Notes on the Decision of the Federal Administrative Court (file no. 8 C 21.12)

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In its judgment of 16 October 2013 (8 C 21.12), the Federal Administrative Court (BVerwG) decided that a so-called Bundesliga manager game is not to be classified as a game of chance under the Inter-State Treaty on Gambling (GlüStV). This leads to chances for media companies and sports associations to offer similar sports manager games without causing conflict with gaming law regulations.

In this specific case, a media company offered a Bundesliga manager game on its web- site, in the form of a „Fantasy League“, and advertised this game accordingly. In return for payment of EUR 7.99, participants were able to put together a fictitious team from the players of the first German football league. Through further payments (of EUR 7.99 in each case), the participants were able to increase the number of their teams to a total of ten, whereby every third fictitiously assembled team could be put together free of charge. After registration and payment, the object of the game was for the participants to select their teams for each match day. At the end of the match day, the selected players were awarded points by the organiser, these being based on the actual evaluation of these players by sports journalists. The evaluation matrix

served to distribute material and monetary prizes to the best participants. At the end of each month, material prizes were given to the best players, small monetary prizes were paid out at the end of the first and second half of the season respectively, and monetary prizes were paid at the end of the season for the overall ranking. The winner ("Super Manager") received a cash prize of 100,000 euros.

The BVerwG endorsed the view held by the Baden-Württemberg Higher Administrative Court (VGH) that the football manager game offered in Baden-Württemberg via the internet, without a licence during the 2009/2010 Bundesliga season, was not a game of chance as defined in the GlüStV. The standard for the court's assessment is section 3 (1) 1 of the GlüStV, which defines a game of chance as a game „during which a payment is demanded in exchange for a chance of winning, and where the decision on winning or losing completely or predominantly depends on chance."

The BVerwG judgment is worth noting for a variety of reasons:

First of all, it will probably end for the time being the discussion regarding the uniform definition of the term „game of chance" in criminal and administrative law. Up until now, it had been controversial among the courts and legal scholars whether the term „game of chance" as used in the GlüStV is identical with the term as used in the German Criminal Code (StGB).[1] This relates in particular to the question as to whether or not the term „remuneration" under the GlüStV is wider than the term „more than insignificant stakes" as used in the StGB. The term „game of chance" in criminal law only comprises the significant sum which must have been paid in direct expectation of the possible prize, in contrast to a mere participation fee. The BVerwG, following the VGH's statements, has now held „that the element of remuneration for purchasing a chance of winning pursuant to section 3 (1) 1 of the GlüStV corresponds to the concept of stakes for a game of

chance under section 284 of the StGB, at least in as far as it requires that the chance of winning originates from the remuneration itself.“[2]

Secondly, the element „stakes“ or „remuneration“ is delimited against the mere „participation fee“. Pursuant to the BVerwG, it is necessary that „the payment of the remuneration as such already leads to the chance of winning or possibility of losing“. The Court held that this is not the case „if the chance of winning or possibility of losing is only caused by further circumstances, such as the conduct of other players or the activities of the player himself/herself“.[3] Accordingly, the BVerwG in the specific case decided that the required necessary connection between payment of the remuneration and the chance of winning or possibility of losing did not exist. „It is not the payment as such which results in a chance of winning, but only the subsequent conduct of the participant and his/her competitors. The chance of winning therefore is not opened up through the fee-based registration, but only if and when the participant decides to take part in the gaming action and to invest the required time during the match season. This decision is taken independently of the payment of the remuneration. Furthermore, the participant can at all times exit the game without having an incentive to try an compensate for a loss of assets. Under no circumstances will he/she be paid back the registration fee.“[4] The statements given by the Court at first instance appears to point to the relevance of elements of skill; however, the BVerwG explicitly left open the issue of games of skill, and obviously merely evaluates the players‘ „activities“ within the framework of the distinction between stakes/participation fee, thus justifying through this the fact that the „direct connection“ between the stakes and the decision on winning no longer exists. The BVerwG seems to confirm its approach in a subsequent decision in which it held that participation fees for a poker tournament where the winners were given the right

to participate free of charge in a generously prized poker tournament did not constitute stakes with relevance under gaming law.5 It remains to be seen whether or not this line of legal argumentation regarding the element „mere participation fee“ will, in the future, be clarified further.

Thirdly, the considerations regarding the „spirit and purpose“ as well as the statements relating to constitutional law can clearly also be interpreted as a teleological interpretation and limitation in scope of the term “game of chance”, with the result that „harmless“ games of chance are excluded from the area of application of the GlüStV and the StGB.[6] The Court ultimately clarifies that sanctioning under the GlüStV or even the StGB ist not required if the protective purposes set out in section 1 of the GlüStV are not put at risk by the relevant game. For these cases, a „regulation under trade law“ would be sufficient, taking into consideration the principle of proportionality.

Ultimately, the judgment has significant practical relevance as it shows options for a (harmless) design of fee-based games providing the chance of winning prizes, which results in such games not being covered by the scope of application of the GlüStV. These options could be used by classical gaming providers, but also by advertising companies, media houses or sports associations.

1) Regarding the current status of discussion, see Bolay/Pfütze, in: Streinz/Liesching/Hambach, Glücks- und Gewinnspielrecht in den Medien 2014, § 3 GlüStV, par. 2 et seq.

2) BVerwG, K&R 2014, 217 (218), par. 22.

3) BVerwG, K&R 2014, 217 (218), par. 25.

4) BVerwG, K&R 2014, 217 (219), par. 28.

5) BVerwG, judgment of 22 January 2014, court ref.: 8 C 26.12 (not yet published).

6) BVerwG, K&R 2014, 217 (218 et seq), par. 26 et seq.