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**To: THE ROYAL NORWEGIAN MINISTRY OF CULTURE
MEDIA DEPARTMENT
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CONFIDENTIAL

London, Friday, 19 December 2014

Re: ZEAL Submission and Request for Formal Introduction

Dear Sir or Madam,

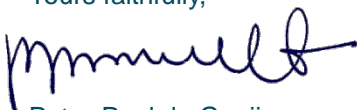
On behalf of ZEAL Network SE ("ZEAL") I herewith send you the ZEAL submission in response to the consultation concerning proposed amendments to the (private) lottery legislation, as notified for public consultation by the Royal Norwegian Ministry of Culture ("the Ministry") on 15 October 2014. We kindly request the Ministry to keep this submission confidential.

ZEAL is extremely gratified and thankful for the opportunity it was given by the Norwegian Government to submit its views and ideas on the Norwegian lottery market in general and the draft legislation in particular. ZEAL has developed an optimistic and positive outlook on the Norwegian lottery market which is good news for Norwegian consumers, the charities and all other stakeholders in Norway. We would like to express our sincere intent to continue to positively contribute to the development of the Norwegian lottery market and the charities that benefit from the lotteries in Norway especially.

ZEAL herewith also respectfully requests for an introduction meeting with the Ministry in which we would like to introduce ourselves further and explain what opportunities we have identified for Norway and to underline our commitment to the Norwegian Government to jointly work towards a better world of lotteries, and most notably in Norway. We are scheduled to visit Oslo early in 2015 and we would very much welcome the opportunity to meet you in person and have a meeting with the Ministry.

We do look forward to meeting the Ministry in the New Year and if there are in the meantime any questions or concerns regarding this letter, the submission or otherwise, please do not hesitate to contact us on the numbers above.

Yours faithfully,



Peter-Paul de Goeij
Regional Director Corporate & Legal Affairs

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1. This submission sets out the comments of ZEAL Network SE (“ZEAL”) on the Consultation on the draft Proposed changes to the Lottery Act¹ as were published by the Government of the Kingdom of Norway (“Government”).
2. ZEAL sincerely thanks the Government and the Norwegian Ministry of Culture (“the Ministry”) for the opportunity to submit comments in response to the draft lottery bill in this consultation process.

About ZEAL

3. ZEAL Network SE is a holding company specialised in the area of online lottery. ZEAL offers consumer facing lottery-based games as well as business to business solutions. ZEAL’s vision is to create a better world of lottery. ZEAL is a London based company, founded in Hamburg, Germany in 1999 originally as Tipp24. In November 2014, the company was renamed in ZEAL Network SE. ZEAL’s shares are listed on the Prime Standard of the Frankfurt Stock Exchange and are included in the SDAX index. To the current day ZEAL has generated stakes of 2.5 billion euros and thus contributed over 650 million euros in taxes and duties.
4. ZEAL holds equity interests in businesses operating under the following brands. Lottovate offers digital services to licenced lottery operators around the world (www.lottovate.com), such as ONCE in Spain. Lotto Network enables private business partners to host their own branded lotto product (www.lottonetwork.com). Geolotto is an innovative geographical based lotto game in the UK (www.geolotto.co.uk). Ventura24 is a lottery ticket broker in Spain (www.ventura24.es) and Tipp24 offers consumer facing secondary lottery products (www.tipp24.com).
5. For ease of reference, in the below ZEAL will follow as much as possible the order as kept in the draft legislation and the consultation documents. If ZEAL in this submission has not - or does not appear to have addressed any particular matter discussed or drafted in draft lottery legislation, this does not mean that ZEAL necessarily agrees with the contents of it.

Introduction

6. In the introduction of the Consultation Paper (‘Høringsnotat’ hereafter: “the Paper”) Ministry reiterates part of the Political Platform (‘Sundvollenplattformen’) as an apparent foundation for or reasoning behind this draft lottery legislation or bill:

“Decision on new game concepts will be made by the Gaming Board. Government will distinguish between addictive gambling and non-addictive lottery concepts. The Government will support the creation of more non-addictive lottery concepts that can strengthen volunteering, assuming they do not challenge the EU exception we have received for our gambling monopoly. The major humanitarian organisations should be prioritised.” (our emphasis added).

7. First of all ZEAL wholeheartedly supports the stated goal of the Norwegian Government of creating more non-addictive lottery concepts that strengthen charities. Generally lotteries are not addictive and in the end, lotteries were

¹ Høring - forslag til endringer i lotteriregelverket, Vår ref 14/4341 Dato 15.10.14 and Forslag til forskrift om endringer i forskrift til lov om lotterier m.v., skrapeloddforskriften, bingoforskriften og forskrift om lotteritilsynet m.m. as was published on 15 november 2014 on the website of the Ministry of Culture:
https://www.regjeringen.no/globalassets/upload/kud/spill_og_lotteri/horingsnotat_lotteriregelverket.pdf

created long ago to enable societal activities that would otherwise not be possible. All around the world, existing lotteries provide for important revenues streams of various charity, sports, health, culture and other societal organisations. ZEAL as fully commits to the classical lottery model; lotteries that enable and fund charities, sports and cultural organisations in their important work.

8. The statement in the Political Platform mentions that as a condition, that the new non-addictive lottery concepts should not challenge the 'EU Exception' that Norway has received for its gambling policy. ZEAL respectfully submits that this 'EU exception' for the gaming monopoly, as the Government refers to it, in itself does not exist and even if it would, it would not apply to the Norwegian classical lottery market.
9. ZEAL understands that when the Government speaks of the EU exception, it actually refers to jurisprudence of the European Free Trade Association's ("EFTA") Court², a prejudicial judgment that was handed down in the so called 'Ladbrokes Case'³, ref. the Paper's statement p. 3:

"This model is accepted by the EFTA Court and is considered to be in line with the EEA Agreement."

and with a footer referring to the Ladbrokes judgement. The Ministry seems to have misinterpreted the judgment of the EFTA Court as it repeatedly states throughout the Paper that the main rationale of the bill is to strengthen the Norwegian lottery and gaming model's legal position, by setting new and clearer conditions and limitations for private lotteries and to ensure Norsk Tipping's channelling capabilities or to protect the exclusive rights model. Because it is important to establish what was ruled in this particular case and what the ramifications are for the Norwegian lottery market, we will first address the Ladbrokes Case in the below.

Ladbrokes

10. In the Ladbrokes Case, the Oslo Tingrett court asked an Advisory Opinion ("the Opinion") from the EFTA Court on the Norwegian monopoly on gambling. The questions raised were the following;
 - 1) *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that certain forms of gaming may only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes?*
 - 2) *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that licences to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding?*
 - 3) *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that licences to certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose?*
 - 4) *Under EEA law, is it legitimate for national legislation to emphasise that the profit from gaming should go to humanitarian and socially*

² So the EFTA Court, the court of the European Free Trade Association, rather than coming from the EU (see the Government's referring to the 'EU-exception').

³ EFTA Court, 30 May 2007, Case E-3/06 - Ladbrokes Ltd. v The Government of Norway, Ministry of Culture and Church Affairs and Ministry of Agriculture and Food.

http://www.eftacourt.int/uploads/tx_nvcases/3_06_Judgment_EN.pdf

beneficial purposes (including sports and culture), and not be a source of private profit?

- 5) *Does Article 36 EEA preclude a national statutory rule which forbids the providing and marketing of gaming which does not have permission to operate in Norway, but which is approved under national law in another EEA State?*

It is important to note that betting and gambling corporation Ladbrokes Limited had applied for permission to operate and provide sports gaming, betting on horse and dog racing, betting on special events and random number games with set odds in Norway, and to establish gaming outlets in Norway (including over the internet) to carry out these activities, subject to supervision by Norwegian authorities. Ladbrokes apparently had not applied for a classical lottery or lotto licence, a licence to offer games identical to the lottery games as are being offered by Norsk Tipping and some other private lotteries or in any event, this was not part of this lawsuit. The Court therefore did not specifically consider the Norsk Tipping's monopoly of classical lottery games in Norway in the Advisory Opinion, it only looked at the broader gambling monopoly of Norsk Tipping. This has consequences for the conclusion of the Opinion as we will see in paragraph 30 and further below.

11. In its Advisory Opinion the Court accepted that, while it did by necessity involve restrictions on freedom of establishment and freedom to provide services, it could be justified by overriding reasons relating to the combating of gaming addiction, crime, consumer protection and the maintaining of public order. The Court explained that fighting gambling addiction could only serve as valid and proportionate justification if the monopoly reflected a concern to bring about a genuine diminution in gambling opportunities. If in effect the objective was to reduce gambling addiction, the fact that the monopoly provider engaged in marketing of gambling was a factor that had to be taken into account as this could be at odds with the objective pursued.
12. EFTA Court ("the Court") considers in paragraph 40 and further of the Advisory Opinion, that a system under which a State-owned company such as Norsk Tipping has an exclusive right to operate gaming schemes completely denies private operators access to the respective market. Such exclusion constitutes a restriction on the right of establishment and the free movement of services under Articles 31 and 36 EEA. It must be examined whether the restrictions on the freedoms may be justified by reasons of overriding general interest. The restrictive measures must satisfy the conditions laid down in the case law of both the Court and the Court of Justice of the European Communities (hereinafter "the ECJ") as regards their proportionality. In that respect, the burden of proof is on the State responsible for the restriction.
13. In the field of gaming, the Court and the ECJ have held that justification grounds put forward by a State must be taken together and considered as a whole. The Courts have recognized that the aim of fighting gambling addiction, as well as crime and malpractice, and more generally of consumer protection and the maintenance of order in society, are amongst those which may serve to justify restrictions on the right of establishment and the freedom to provide services.
14. The aim of fighting gambling addiction can serve as justification only if the restrictive measures reflect a concern to bring about a genuine diminution in gambling opportunities. In order for there to be a genuine diminution, the gaming policy as a whole must at least provide for a lower level of gambling

addiction in society than would be the case without restrictions on free movement in relation to gaming services.

15. The Court further considers that the aim of preventing gambling from being a source of private profit may in principle justify restrictions on the right of establishment and free movement of services and this aim must be based on a resentment of games of chance for reasons of morality, in particular if it relates to non-addictive games. Thus, the aim of preventing gambling from being a source of private profit can serve as justification only if the restrictive measures reflect that moral concern. If a State-owned monopoly is allowed to offer a range of gambling opportunities, the measure cannot be said to genuinely pursue this aim.
16. Norsk Tipping is allowed to offer a wide range of gambling opportunities, hence in accordance with the Opinion of the Court, preventing gambling from being a source of private profit by imposing a monopoly on gambling cannot genuinely be pursuing the moral concern of gambling being a source of private profit.
17. In addition, the Court declares that insofar as the national court concludes that the legislation at issue may be justified by legitimate objectives, it must further examine whether the legislation complies with the principle of proportionality under EEA law. This means that the Court itself does not even implicitly state that the Norwegian legislation's restriction on gambling is justified by legitimate objectives. In fact it does not approve or judge whether the restrictions in Norway are justified by legitimate objectives, as this was not part of the questions brought before the Court. This it leaves to the national court. It is clearly reflected in Oslo Tingrett's statements that it was Oslo Tingrett, not the EFTA Court, that found the restrictions justified, ref.:

"Pursuant to the court's appraisal, less radical restrictions, for example a commercial licencing system, cannot secure just as well the target in that respect to prevent that money games be a source of private profit, considered individually or together. The restriction is therefore deemed as necessary and not disproportionate"⁴.

18. Ladbrokes argued that the extensive marketing of Norsk Tipping as well as its expansion of games is of such a nature that they do not form part of a consistent and systematic gaming policy. In light of this, the Court notes that **insofar** as the legislation at issue is found to be aimed at fighting gambling addiction, the marketing activities and the development of new games by Norsk Tipping are relevant for the assessment of the consistency of the gaming policy. A system of exclusive rights can only be suitable as a means of fighting gambling addiction if it is required to operate in a way which serves to limit gaming activities in a consistent and systematic manner.
19. The Court further considers that particularly development and marketing of addictive games by the monopoly provider are relevant in the context of the above. Development and marketing of addictive games by the monopoly provider may be at odds with the aim of fighting gambling addiction. However, in order to persuade people who might otherwise engage in games which pose crime related problems, to turn instead to authorised games, controlled expansion in the gaming sector, including the offer of an

⁴ "Etter rettens vurdering kan ikke mindre inngripende restriksjoner, eksempelvis et kommersielt konsesjonssystem, like godt sikre målsetningen forsåvidt gjelder målsetningen om å hindre at pengespill får være en kilde til privat profitt, vurdert enkeltvis og samlet. Restriksjonen er dermed nødvendig og ikke uforholdsmessig."

extensive range of games, advertising on a certain scale and the use of new distribution techniques may be necessary. Similar channelling measures may be envisaged for the purpose of drawing players away from highly addictive games offered via the Internet or other channels which are hard to suppress. It is for the State to demonstrate that such channelling measures, including, if relevant, the development of new games, may reasonably be assumed to serve their purpose.

20. It is important to point out that the Court thus considers that especially development and marketing of addictive games by Norsk Tipping are relevant to assess whether a system of exclusive rights can only be suitable as means of fighting gambling addiction. For classical long-odd lottery games the development and marketing of (other) games by Norsk Tipping are irrelevant, as classical long-odd lottery games are not considered addictive nor is there a need to channel Norwegian consumers away from illegal classical lottery offers that are hard to suppress – as there are none. In any event it is up to the State of Norway to demonstrate that a classical lottery in a restricted monopoly prevents addiction to lotteries and into what extent it needs channelling away from illegal lotteries.
21. In paragraph 57 of the Opinion it is reflected that the Government of Norway during the oral hearing indicated that Lotto poses no appreciable danger of causing gambling addiction. The fact that there is no risk of problem gambling related to lottery is also confirmed in court rulings from EU Member States. An important and highly relevant court ruling was the decision of the administrative court of Halle, Germany in November 2010⁵. In this case the court found that addiction to lotteries ‘*essentially does not exist*’. Therefore, it found that the overly stringent advertising and sales restrictions for lotteries were not justified by concerns over gambling addiction.
22. Moreover, in Ladbrokes it was considered that the principle of necessity prescribes that it must be assessed whether the measures go beyond what is necessary to meet the aims pursued. Ref. Oslo Tingrett's statement:

*“the court relies on that the Norwegian restriction ensures a high level of protection, cf. the remarks above. It must be considered whether or not the level of protection may be achieved with less radical restrictions, for example a licensing system”.*⁶

In other words it must be evaluated whether a monopoly for classical lottery for Norsk Tipping is functionally needed in order to achieve the legitimate objectives of the legislation (preventing addiction to lotteries – which is not existing, channelling consumers away from illegal classical lottery offerings – that are also not existing) at the level of, or whether this could equally well be obtained through other, less restrictive means, such as an open classical lottery licensing system, in which Norsk Tipping competes with other lottery operators, under the same strict licence conditions. It is not at all made probable that a monopoly for classical lotteries is the only way of achieving the level of protection opted for by Norway.

⁵ Verwaltungsgericht Halle, 11 November 2010 (3 A 159/09 HAL). The basis of the ruling was a very detailed survey the Halle court had conducted amongst 100 medical institutes and 600 court houses. As a result the court ruled that all legislative restrictions regarding private lottery companies such as internet and advertisement bans are invalid.

⁶ “Retten bygger på at den norske restriksjonen sikrer et høyt beskyttelsesnivå, jfr. bemerkningene ovenfor. Det må vurderes om ikke beskyttelsesnivået kan nås med mindre inngripende restriksjoner, for eksempel konsesjonssystem.”

23. EFTA Court further deliberates that restrictions placed on Norsk Tipping must be taken into account when identifying the level of protection actually sought under the exclusive rights system. A low level of protection exists if high numbers of gaming opportunities and a high level of gaming activity exist. To assess this we should look at restrictions for Norsk Tipping on how often per week or per day classical lottery games are on offer, what are the restrictions on the number of outlets for the classical lottery and on sales and marketing activities of the outlets, as well as restrictions on advertising and on development of new games from Norsk Tipping.
24. ZEAL notes that currently Norsk Tipping reasonably is held to an average level of protection only. The opportunities for a Norwegian to enter into a classical lottery game with Norsk Tipping are quite widespread in a nationwide off-line distribution network of 4,028 points of sale in 2011⁷. This equates to one point of sale per 1,278 Norwegians.⁸ If this spread of points of sale in Norway is compared to another well-established lottery market in an industrialised, first world country in the EU such as the Netherlands with one lottery sales point per 4,678 Dutch consumers, Norsk Tipping outranks this oldest lottery in the world⁹ in points of sale per capita with a staggering factor 3.66.¹⁰
25. Based on the above it is clear that Norsk Tipping is very well represented in the Norwegian streetscape and pretty much in the face of the Norwegian consumer. Moreover it is quite easy and simple to play Norsk Tipping lottery online.¹¹ In any event, no higher levels of protection as mentioned in Ladbrokes, seem to be applicable and no unusual restriction seems to be imposed on Norsk Tipping's distribution network for classical lotteries. Any claim to the contrary will have to be demonstrated by Norway, ref Oslo Tingrett's statement:
- "It is the State that here must substantiate that the terms have been fulfilled."*¹²
26. With regard to marketing, the Court considers that several factors have to be taken into account by the national court. In particular, it will have to look into the extent and effect of marketing and development of games of chance, inter alia how much Norsk Tipping spends in that regard as well as the form and content of the marketing and the susceptibility of the targeted groups. To illustrate the rather high level of – and focus on marketing and development of games of chance in Norsk Tipping and how much it spends we submit a quote from Norsk Tipping's annual report 2013 as can be found online¹³:

⁷ Page 39 of the Norsk Tipping Annual Report 2011:

http://norsktipping2011.iteragazette.no/media/28547/norsk_tipping_annual_report_2011.pdf "At the end of the year the company had 4,028 retail partners."

⁸ CIA World fact book on Norway. In July 2014 Norway had an estimated population of 5,147,792 people:

<https://www.cia.gov/library/publications/the-world-factbook/geos/no.html>

⁹ Year Lottery Founded: 1726 (oldest lottery in the world) <http://www.lotteryinsider.com/lottery/dutchnat.htm>

¹⁰ The Netherlands Staatsloterij in 2013 had 3608 points of sale (together with De Lotto), page 7 Annual Report Staatsloterij 2013,

http://www.nederlandsestaatsloterij.nl/sites/default/files/uploads//uploads/publicatiesendownloads/Jaarverslag%20Nederlandse%20Staatsloterij%202013_1.pdf on a population of 16,877,351 (CIA Fact book:

<https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html>). This is equates to one lottery sales point per 4,678 Dutch consumers.

¹¹ Norsk Tipping Lottery online : https://www.norsk-tipping.no/lotteri/eurojackpot?NT.mc_id=nt-MiniBanner-Euro-490mill-0512

¹² "Det er staten som her må godtgjøre at vilkårene er oppfylt."

¹³ Norsk Tipping Annual Report 2013: <http://2013.norsk-tipping.no/en/rapport/hovedtall>

“The figure shows a relatively high growth in profits from 2.75 billion kroner in 2004 to 3.85 billion kroner in 2013. Costs as a percentage of net gaming revenues have been relatively stable throughout the period, with a variation between the interval 37.5 % - 40.1 %. The percentage in 2013 was 39.3 %. The growth in both revenues and costs is strongly linked to the ongoing and vigorous development of the company’s portfolio, where the number of games and product categories is on the increase. New products have been launched during the period, new channels have been established and existing products and channels have been improved. This includes amongst other things the establishment of Multix and Belago from 2008/2009, the establishment of the gaming channel portal “Spill i kasse” (In-lane lottery sales) and the establishment of new games through Liveoddsen and Eurojackpot. There was hectic activity throughout 2013 in connection with the development and remodelling of the launch of Internet-based games and the new game Nabolaget”, (our emphasis added).

27. Next to the above, the Court states in *Ladbrokes* that it must be ascertained whether the advertising of the gambling and betting services by Norsk Tipping is rather informative than evocative in nature. In response to this requirement we submit it is fair to say that the advertisements made by Norsk Tipping for classical lottery games are not only informative in nature (when, how, where, how much to play the lottery) but rather enticing Norwegians to play Norsk Tipping’s lottery games, so rather evocative in nature. Currently only as one example hereof on Norsk Tipping’s consumer website various lottery games are advertised with words and lines that directly tap into consumer’s emotions, persuading them to play (‘don’t miss out’, ‘do not forget’, ‘a jackpot of 490 million on Friday’ (in large attractive golden font) and app. 39 million second price pot, ‘Win a dream holiday to Sri Lanka’, ‘Playing is easy’, ‘A giant Euro Jackpot on 5 December’, et cetera).¹⁴ Furthermore, Norsk Tipping employs successful and even award winning¹⁵ TV campaigns on Norwegian Television and thus appeals to consumers to play lotteries with Norsk Tipping.
28. The EFTA Court concludes in its Opinion that national legislation which establishes that certain forms of gaming may only be offered by a Norsk Tipping, must pursue legitimate aims such as fighting gambling addiction and maintaining public order. The legitimate aims must be pursued in a suitable and consistent manner, and the legislation must not go beyond what is necessary in order to achieve the aims in question. Financing of humanitarian and socially beneficial purposes may not constitute the real justification for legislation such as the legislation at issue, but may only be a beneficial consequence, an accessory. Preventing private profit as an aim in itself may, on the other hand, in principle justify such legislation provided that the national gaming policy reflects the moral concerns underlying this aim.
29. ZEAL submits that the restrictive exclusive rights model and the monopoly for Norsk Tipping to provide classical lottery games in light of the above, does not sit well with the requirement of pursuing legitimate aims, such as

¹⁴ Norsk Tipping website page on lottery games: <https://www.norsk-tipping.no/lotteri>

¹⁵ From the 2013 Annual Report 2013: “Every year Norsk Tipping participates in a European Lottery Conference, where one of the items in the programme is a competition for the best advertising film. Our advertisements “Football wife” (Lotto), Oddsens “Hooligans” (Oddsens) and “Heart” (Flax) were all voted best in their categories during the conference in Israel” <http://2013.norsk-tipping.no/en/rapport/viktige-hendelser/trippel-seier-i-reklamekonkurranse>.

fighting gambling addiction and maintaining public order. In the above we already pointed out that classical lottery games are not addictive, as was also stated by Norwegian Government during the oral hearing. Furthermore, classical lottery games offered in an open and strict licensing system (as opposed to the current exclusive rights system or monopoly) do not pose any threat to the public order and offer a less restrictive and invasive restriction on the fundamental freedoms as protected by the EEA in articles 31 and 36. Moreover, the current Norwegian legislation does not meet the requirements of pursuing legitimate aims as it does not restrict Norsk Tipping in its advertising to be informative only, expand its gambling and lottery products. In other words, the current policy in Norway does not meet the requirements of consistency and does not meet the necessity criterion. In the current situation, the exclusive rights model of monopoly for classical lottery games cannot be justified as less invasive measures that do not impair the fundamental freedoms of EEA are effective and possible to implement.

30. Finally, the Court considers that under Article 36 EEA, to the extent the national court concludes that the exclusive rights systems constitute lawful restrictions, national authorities have the right to ban the provision and marketing of games of chance from abroad, no matter whether or not these are lawful in their State of origin. The same applies to the extent the national court concludes that the exclusion of commercial operators under the Lottery Act constitutes a lawful restriction on the free movement of services. To the extent the national court comes to the conclusion that the bans implied in the three Acts on commercial operators organising any form of game of chance are not justified, the answer must be that a licence may still be required in view of possible differences in the level of protection throughout the EEA. However, national measures must not be excessive in relation to the aims pursued. They have to be non-discriminatory and must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State.
31. In other words – and as a conclusion of this part discussing the meaning of the Ladbrokes case, the Court does not imply whether or not the exclusive rights system in Norway is lawful, it only says what the consequences would be in case it is being deemed lawful (or not). This is implied by the choice of words: “to the extent...” The Court in Ladbrokes does not assess the question of whether or not the Norwegian exclusive rights system or Norsk Tipping monopoly (in the classical monopoly market) is lawful or whether it violates articles 31 and 36 of the EEA. This is clearly shown also in Oslo Tingrett’s statement:

“The court’s conclusion is that the restriction is legitimately motivated, apt and necessary, and therefore deemed to be in line with the EEA Agreement’s articles 31 and 36. When laws are compatible with articles 31 and 36 of the EEA Agreement, the State is entitled to prohibit the arrangement and marketing of gambling, cf. Ladbrokes section 83”¹⁶.

Consultation Paper

32. The Consultation Paper sets out the goal of the bill, which is to strengthen the Norwegian lottery and gaming model’s legal position,

¹⁶ "Rettens konklusjon er at restriksjonen er legitimt motivert, egnet og nødvendig, og anses dermed forenlig med EØS-avtalens artikler 31 og 36. Når lovene er forenlige med EØS-avtalens artikler 31 og 36, har staten rett til å forby formidling og markedsføring av pengespill, jfr. Ladbrokes avsnitt 83."

by setting new and clearer conditions and limitations for private lotteries.

33. ZEAL notes that the goal of this bill rather seems to be seeking to meet the criticism of the EFTA Surveillance Authority (“ESA”) Letter of Formal Notice of 22 January 2014, in which ESA opens a case against Norway (“LFN”).¹⁷ In the LFN, ESA addresses competition problems in Norwegian law in relation to private lotteries and it states that Norwegian lottery legislation is not in line with the European Economic Area (“EEA”) Agreement and mentions the key areas of contention.

34. For ease of reference the LFN informed Norway that:

“The Authority must conclude that, by maintaining in force Sections 6 and 7 of the Lottery Regulation which limit the types of lotteries offered to the public, impose an open list of conditions to be fulfilled in order to obtain a licence, involve the supervisory authorities of Norsk Tipping in the authorisation procedure and apply different rules in the authorisation of lotteries organised by Norsk Tipping, Norway has failed to fulfil its obligation arising from Article 31 and Article 36 of the EEA Agreement.”

35. The Ministry in the introduction of the Paper further states that the proposed changes will ensure that all parties are treated equally. ZEAL in principle applauds this approach of equal treatment and we shall in any event apply it throughout our submission.

36. The Ministry then asserts after having discussions with ESA in preparation of the Paper, the current legislation ‘is in line with the EEA Agreement (as further explained in the Norwegian response letter to ESA of 26 March 2014’, hereafter: “the Response Letter”)¹⁸. However, the Ministry further considers that the legislation ‘could be improved and some of the amendments suggested by ESA are met by the proposed legislation amendments’. ZEAL respectfully submits that in case the current legislation would not be problematic and would be in line with the EEA Agreement (which it in our opinion is not), there reasonably would be no need to embark on this laborious undertaking of the consultation process and amending the lottery legislation.

37. ZEAL further respectfully submits that the Ministry’s assertion that the current Norwegian lottery legislation is in line with the EEA Agreement, is fundamentally flawed. Yes, the tabled issue of the restrictions of the fundamental freedoms of the EEA Agreement, e.g. the limitation on the number of (private) lotteries in Norway, at first hand seems to be addressed in the proposed bill. However it only partly remedies it as the maximum number of additional licences is arbitrarily put at five.

38. The monopoly of Norsk Tipping and preferential position in classical lottery games market remains unaffected. Furthermore the Ministry fails to explain this number of five, it is not justified in any way nor does the Ministry show or refer to any results of market research or surveys on which this number has been based. No proper market analyses seems to have been undertaken whilst proper market analyses is common practice before deciding on the regulation of markets and market segments.

¹⁷ EFTA Surveillance Authority Letter to Norway: <http://www.eftasurv.int/media/public-documents/693160.pdf>

¹⁸ The Response Letter as filed by the Norwegian Government in response to the LFN: <http://www.eftasurv.int/media/public-documents/703627.pdf>

39. ZEAL submits that the limitation of five private lottery licences with an annual turnover limit per lottery of NOK 300 million is too narrow and it will not lead to a sustainable market for any prospective lottery operators. It continuously will be impossible to withstand the protected market pressure that it will have to endure from state monopolist Norsk Tipping, that can wield its market power unrestrained and protected from real competition.
40. Furthermore the draft legislation is inconsistent policy by the Government of Norway to increase the number of private lotteries with five whilst its own stated gambling policy is all about restricting the supply and possibilities for Norwegians to gamble, protecting consumers from adverse effects of gambling and to diminish problem gambling. Based on relevant jurisprudence¹⁹ Norway must apply consistency and systematically regulate all types of gambling, across all distribution channels whether it is offline or online.
41. ESA in its LFN also addressed the different procedures and rules that apply to Norsk Tipping on the one hand and private lotteries on the other. This bill does not at all remedy that problem, it seems to even make this situation more problematic. The two separate licensing regimes remain unchanged in the bill.
42. In draft legislation section 4.4.3 Paragraph 2, the Ministry proposes a maximum spend of fifteen percent of the revenue for advertising. This may well be too restrictive as it does take a lot of time and effort to achieve a level of brand awareness and recognition by the Norwegian public of any new lottery. The fact that it takes time is acknowledged by the Ministry in the Paper in paragraph 4.2.6, where the Ministry is considering that it may take some time before such lotteries become profitable and therefore considers the duration of seven years for a licence to be suitable. ZEAL submits that the restriction of fifteen percent therefore is unrealistic for achieving satisfying sales of such type of lottery and inconsistent compared with Norsk Tipping's spending on marketing. We suggest to allow start-ups to spend more on advertising, especially in the beginning of operations.
43. Furthermore ZEAL is surprised by the limitation that the Ministry suggests, namely to exclude issuing licences for lotteries with interactive draws in electronic channels i.e. internet lottery or iLottery. This is an unwarranted and unnecessary limitation. This is supported by the statements from the Hamar-utvalget in their expert report to the Government 'Rapport frå ekspertgruppe, desember 2014 Grenselause pengespel - krev ny teknologi ny regulering?' where is stated on p. 10:

"It should be possible for lawful gaming operators to offer their existing games of chance in an attractive manner by amending the regulations and introducing new framework conditions that allow for digital development. [...]"

¹⁹ See requirement of consistency as was laid down by the Court of the European Union ("CJEU") in C-46/08 'Carmen Media' and C-316/07 'Markus Stoß' also by CJEU: 1. Carmen Media: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80778&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=16993> 2. Marcus Stoß: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80772&pageIndex=0&doclang=EN&mode=lst&ir=&occ=first&part=1&cid=15497>: the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities;

The natural technological progress that takes place in society indicates that the authorities must consider amending the regulations so that operators that offer games of chance can introduce new technology. If the authorities want the legal Norwegian market to continue to offer the existing games of chance, where the profits will go to good causes in future as well, the authorities must dare to allow gaming operators to make use of the new technology. [...]

Lawful Norwegian gaming companies should have an opportunity to offer existing games of chance in digital channels in order to secure the basis for their existence in the market. This also involves the following recommendations:

- *It should be possible to make entrepreneur bingo (bingo run by professionals on behalf of sports clubs, organisations etc.) accessible in real time on digital platforms linked to local bingo halls.*
- *It should be possible for organisers of lotteries to offer their lotteries on digital platforms. [...]*

All Norwegian games of chance that are offered on digital platforms must be required to be registered and to use other responsible gaming tools.”

The consequences if not opening up for internet lotteries etc. are even clearer stated on page 57:

“The committee is of the opinion that if we are to have a Norwegian, regulated bingo and lottery market in the future, the terms for these must be altered in applicable regulations to maintain basis for existence in the market. Technological developments have led to that the competitors in these two groups today operate on the Internet and on social media. The committee does not see any other future for the private money games branch than to give them permission to develop digitally.”²⁰

44. Moreover, this is in violation of standing EU case law to which Norway is held, that any restriction of gambling may only be based on objective and non-discriminatory criteria, which are set in advance in such way as to circumscribe the exercise by the authorities of their discretion so that it is not used arbitrarily.²¹
45. Any measures that restrict or make the exercise of the fundamental freedoms less attractive must fulfil four conditions to be admissible:
 - a. the rules must be applied non-discriminatory;
 - b. they must be justified by imperative requirements in the general interest;
 - c. they must be suitable to achieve the objective pursued; and

²⁰ Utvalet meiner det er klart at dersom vi skal ha ein norsk, regulert bingo- og lotterimarknad i framtida må desse få endra rammevilkåra i regelverket for å oppretthalde grunnlaget forsin eksistens i marknaden. Den teknologiske utviklinga gjer i dag at konkurrentane for desse to aktørgruppene opererer på nett og på sosiale medium. Utvalet ser ikkje anna framtid for den private pengespelbransjen enn å gi dei løyve til å utvikle seg digitalt.

²¹ In accordance with the established 'four-part'-test as worked out in EU jurisprudence cases: 'Gebhard', C/EU 30-11-1995, C-55/94, and 'Gambelli', C/EU 6-11-2003, C-243/01.

- d. they must not go beyond what is necessary in order to achieve the objective.
46. The Norwegian lottery bill effectively prohibits online lotteries to be organised, which is a restriction on the freedom to provide services as guaranteed under article 36 EEA Agreement. Based on the four-part test, this restriction may only be justified by compelling reasons such as protecting consumers or preventing illegal gambling.
47. ZEAL respectfully notes that the draft lottery legislation in restricting online lotteries does not satisfy the suitability requirement as the intended aim of consumer protection and/or preventing illegal gambling are not achieved and moreover, the requirements of efficiency, suitability and necessity of the draft law are as was already pointed out in paragraphs 24-27 above, are just not met.
48. The only stated policy of the draft law is to strengthen the Norwegian lottery and gaming model's legal position, by setting new and clearer conditions and limitations for private lotteries and to ensure Norsk Tipping's channelling capabilities or to protect the exclusive rights model. This is not even barely enough to justify restrictions of the fundamental freedoms of the EEA Agreement.
49. The ban on iLottery is also inconsistent and forms unequal treatment as e.g. Norsk Tipping is continuously allowed to offer iLottery on a wide scale to Norwegians (paragraph 27 above) and Norway also allows the sale of Bingo tickets over the internet. This differential treatment is not justified or explained.
50. ESA in the LFN e.g. raised the problem of the arbitrary conditions imposed by the authorities on the application for lottery licences. The bill however does not state that these arbitrary conditions are not upheld and as such this issue remains unremedied by the bill.

Conclusion

51. Although we do appreciate the efforts by the Norwegian Government and the open and transparent method that the Ministry has applied in this legislative process by offering interested parties the opportunity to submit comments, we submit that the bill at hand at least is insufficient to remedy the problems that were exposed by the ESA LFN, which concluded that currently Norway with Lottery Regulation unlawfully restricts Article 31 and Article 36 of the EEA Agreement. The bill does not alleviate the identified problems and even creates new problems.
52. ZEAL suggests that a complete overhaul of the Norwegian lottery legislation (possibly simultaneously with the whole gambling legislation) is necessary and an open and transparent licensing system should be introduced, to which also Norsk Tipping is submitted. In this way the Government would create a strictly regulated but fair market and a level playing field for lotteries in Norway whilst preventing any adverse effects of gambling.
53. ZEAL trusts that these comments will be useful in review of the draft lottery legislation and ZEAL will be fully committed to the Norwegian lottery market. ZEAL offers continued support to the Government to jointly come to an even better lottery market in Norway, which will lead to more funding for charity

organisations in Norway and further strengthening and enriching Norwegian culture.

54. Should the Ministry have any questions regarding this submission, ZEAL will be pleased to discuss these in a meeting in person.

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