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## HEARING ON THE REGULATIONS IMPLEMENTING THE BAN ON PAYMENT TRANSACTIONS RELATED TO GAMBLING

### 1. INTRODUCTION

- 1.1.1 We are writing on behalf of Remote Gambling Association.
- 1.1.2 We refer to the hearing document published by the Ministry on 1 April 2009. The hearing concerns the regulations by which the ban on payment transactions related to gambling will be implemented. The ban was enacted by Act No 117 of 19 December 2008. The proposal to the statutory ban was itself on hearing during which several observations were submitted, arguing the ban's incompatibility with European law as well as its infeasibility.
- 1.1.3 It is clear that these arguments have not carried the day, so far. Paying heed to those arguments could have sparked off a review of Norwegian gambling regulations – much needed – to the benefit of all stakeholders. We regret that this opportunity was missed.
- 1.1.4 Moreover, the draft implementing regulations have not in any way reduced the force of those arguments. On the contrary, it has become even more apparent that the envisaged regime will not be in accordance with European law.
- 1.1.5 The incompatibility stems from the fact that the monopolies of Norsk Tipping and Norsk Rikstoto that the ban seeks to protect is at odds with the free movement of service and the free movement of capital. The European Commission has by now commenced infringement proceedings against ten Member States for pursuing policies parallel to the one pursued by Norway. Moreover, numerous references are pending before the Court of Justice questioning Member States' restrictions in the area of gambling.<sup>1</sup> Faced with the justified criticism expressed by the European Commission, an increasing number of Member States are taking steps to liberalise their gaming policy, for instance France, Sweden and Denmark.
- 1.1.6 Below we shall, point for point, set out in more detail the multiple aspects of the envisaged regime that are not acceptable. In the enclosure are set out the technical shortcomings and thus the inefficiency of the envisaged regime.
- 1.1.7 Before doing so, we shall recall and stress again that we do share the objectives of the gambling policy pursued, i.e. the prevention of crime and gambling addiction, and in a broader sense, the protection of consumers. Still, as the European Commission in parallel cases, we

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<sup>1</sup> See amongst others, Cases: C-409/07, C-316/07, C-358/07, C-359/07, C-360/07, C-153/08, C-64/08, C-258/08, C-46/08, C-212/08, C-447/08, C-448/08.

doubt that the means deployed to the attainment of those objectives are consistent and proportionate.<sup>2</sup>

## 2. NO FOUNDATION FOR THE REGIME

- 2.1.1 We shall recall that the objective basis for claiming that Internet-gaming en bloc represents enhanced risks for gaming addiction is non-existing.
- 2.1.2 The reports established by SINTEF of December 2007 and of November 2008 show that the prevalence of gaming problems in the Norwegian population is relatively stable, no matter the level of gaming over the Internet<sup>3</sup>.
- 2.1.3 Moreover, after the discontinuation of the previous slot machines in 2007, research shows that the slot machines players did not resort to Internet gaming as a substitute for the machines that disappeared.<sup>4</sup>
- 2.1.4 Next, international research shows that when dealing with the effects of Internet gaming, one must take account of the 'adaptation effect'. After the introduction of a new medium, there will be an initial period during which the medium will attract much interest; then, the public will adjust to the new medium. Thus, prevalence studies show that after the introduction of new gaming, prevalence rates will eventually return to their normal<sup>5</sup>.
- 2.1.5 The figures provided by the 'Helpline' do not provide any basis for the regime. In the first place, it must be underlined that figures from the Helpline are not scientifically based in the sense that the figures are based on self-reporting – a method that carries inherently risks for inaccuracies. Next, the statistics provided by the Helpline suggest that the amount of gaming problems created by the games offered the incumbent Norwegian operators outnumber the problems created by 'Internet gambling'<sup>6</sup>. Next, the Helpline does not record whether the self-reporting persons have been playing on regulated sites or on un-regulated sites.
- 2.1.6 Concluding on this, it must be held that there the objective foundation for the regime envisaged which is very intrusive, is very poor.

## 3. INCONSISTENCY

- 3.1.1 We shall recall that Norsk Tipping over many years has ranked amongst the top ten Norwegian firms as concerns expenditures on marketing.<sup>7</sup> The pursuit of a restrictive gambling

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<sup>2</sup> By 'consistency' we understand that the allegedly pursued aims of a restrictive gambling policy must be appropriately reflected in the very actions of the two monopoly incumbents. By 'proportionate measures' we understand measures that mean the proportionality test under European law. For the recollection, the proportionality test falls in three; suitability, necessity and proportionality in the narrow sense.

<sup>3</sup> SINTEF Rapport "Pengespill og pengespillproblemer i Norge 2008", p. 65, (Summary in English - Gambling behaviour and gambling problems in Norway 2008, p. 3), published in November 2008.

<sup>4</sup> Ingeborg Lund: "Gambling Behaviour and the Prevalence of Gambling Problems in Adult EGM Gamblers when EGMs are Banned. A Natural Experiment", published in Journal of Gambling Studies 2009, p. 9.

<sup>5</sup> LaPlante D., Schumann A., LaBrie R.A., Schaffer H.J.: "Population trends in Internet sports gambling", published in Computers in Human Behaviour (24) 2008, p. 2410-2411; LaPlante, DA & Shaffer, H. J.: "Understanding the Influence of Gambling Opportunities: Expanding Exposure Models to Include adaptation", published in American Journal of Orthopsychiatry 2007, p. 621-622.

<sup>6</sup> SINTEF Rapport "Pengespill og pengespillproblemer i Norge 2008", p. 60, (Summary in English - Gambling behaviour and gambling problems in Norway 2008), published in November 2008.

<sup>7</sup> See for instance press report at <http://www.kampanje.com/annonsering/article196818.ece>

policy does not call for a massive marketing that cannot be met by any private operator, let alone the fact that competing private operators are not allowed to do any marketing at all.

- 3.1.2 Moreover, according to a recent report established by the State Auditors it is inappropriate that Norsk Tipping's marketing expenditures – already high – do not include the sums that the firm has spent in sponsoring; these sponsoring sums amount to more than 600 million NOK in the period 2000-2007.<sup>8</sup> If these sums are added to the marketing expenditures in a narrow sense, as would be normal, Norsk Tipping's total marketing expenses are beyond those of any other Norwegian firm, i.e. beyond the sums spent by firms that are in fierce competition in the market place.
- 3.1.3 The effect is that over 2 million citizens are players with Norsk Tipping, i.e. at least half of the adult population. Moreover, Norsk Tipping still wants to recruit new players.<sup>9</sup>
- 3.1.4 We hold that it does not require any elaboration that the above data are at odds with an allegedly restrictive gambling policy.

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<sup>8</sup> The report is available at: [http://www.riksrevisjonen.no/NR/rdonlyres/1E21D877-162A-48E3-8664-2931E6F39AAB/0/Dok\\_3\\_14\\_2008\\_2009.pdf](http://www.riksrevisjonen.no/NR/rdonlyres/1E21D877-162A-48E3-8664-2931E6F39AAB/0/Dok_3_14_2008_2009.pdf), see in particular p 16 and 28 of the report. The State Auditors are in general critical to the absence of State control over Norsk Tipping, see for instance p 27 and 28 of the report. The report also mentions a number of other issues, worthy of criticism, such as the granting of State aid in violation of European rules.

<sup>9</sup> See for instance press report at [http://www.nrk.no/nyheter/distrikt/hedmark\\_og\\_oppland/1.6578111](http://www.nrk.no/nyheter/distrikt/hedmark_og_oppland/1.6578111)

## **4. THE DISPROPORTIONATE NATURE OF THE REGIME**

### **4.1 Regulated and non-regulated operators**

- 4.1.1 The regime does not distinguish between regulated and non-regulated operators. We represent operators that are regulated in a jurisdiction within the EEA. The regulations that our Members are submitted to, are in general equivalent to or even more stringent than the Norwegian rules.
- 4.1.2 The regime submits these operators to the same treatment as non-regulated operators. It is a well known fact that non-regulated operators represent a sort of risk to the consumer that is absent from the relation between the consumer and the regulated operator.
- 4.1.3 By striking at all operators, be they regulated or non-regulated, the regime goes beyond what is required for the purposes of preventing gaming addiction.

### **4.2 Equivalent games**

- 4.2.1 The regime envisaged makes no distinction according to whether the games in relation to which the payment ban operates are games that are equivalent to games that are allowed in Norway.
- 4.2.2 It follows that if a consumer plays for instance Lotto through Norsk Tipping's website, the payment for that service is allowed. On the other hand, if the same consumer plays the equivalent of Lotto through a foreign website, the payment will not be allowed.
- 4.2.3 By hitting all games, no matter the kind of game at issue, the regime is disproportionate. We recall that under the relevant case law, winnings from abroad cannot be submitted to taxation different from the one that applies to domestic winnings. Equally, winnings, being it domestic or foreign, must be submitted to the same regime.

### **4.3 Lawful gaming transactions**

- 4.3.1 The regime envisaged is particular in that it hinders otherwise legal transactions. Under Norwegian law, consumers are not banned from accessing websites that offer gaming and to acquire services on those sites. As the service provider is licensed abroad, he is submitted to the jurisdiction of his home State. This is even clearer in the case the foreign service provider is in no way addressing the Norwegian market. Thus, the acquisition of gaming services is legal.
- 4.3.2 Thus, the ban strikes at lawful transactions by not allowing intermediaries to perform the services necessary for the transactions to be carried out.
- 4.3.3 It is hard to see the coherence of such a regime. If the main transaction is legal, there is no need to hinder its execution.

#### **4.4 Other lawful transactions on the Net**

- 4.4.1 The scope of the envisaged regime is unclear and it would appear against the principle of the rule of law to impose sanctions for transgressing an ill defined ban.
- 4.4.2 In Germany a similar ban has been considered. In German legal literature there have been critical voices as to whether such a ban would be in conformity with the above principle that is also constitutionally protected in Germany.
- 4.4.3 The principle ultimately derives from fundamental rights. Such rights form an integrated part of European law; it is settled case law that restriction imposed by a State on cross border transactions must be in compliance with those principles to be acceptable<sup>10</sup>.
- 4.4.4 The draft implementing regulations state on the one hand that the ban applies to payments that can be identified through the MCC code. On the other hand, it provides that the ban applies to bank transfers and e-money.
- 4.4.5 While the draft elaborates on how it is envisaged to control bank transfers, there is no such elaboration as concerns e-money. The lack of clarity in the scope of the ban is not in accordance with European law and principles that the Norwegian State are attached to.

#### **4.5 Lawful transactions abroad in presence**

- 4.5.1 Residents in Norway, holders of debit or credit cards issued by Norwegian payment institutions, may go abroad. It is absolutely clear under European law that citizens are allowed to travel abroad and to be recipient of services in the States they may visit. Thus, they are entitled to buy gaming services. It shall be recalled that those services are regulated by that State and thus, one is not in presence of unregulated gambling.
- 4.5.2 The envisaged regime would also strike at the payment for such services that have been acquired in full accordance with European law.
- 4.5.3 This aspect of the envisaged regime is thus also clearly disproportionate.
- 4.5.4 Moreover, even if one assumed – quod non – that Norway should be permitted to ban such transactions, identified through the MCC code, the following problem would remain: A visitor to a casino which has MCC code 7995, may also consume foods and drinks. There are no mechanisms in place to split those expenses out from those that relate to gambling.

#### **4.6 Citizens abroad holding accounts with Norwegian payment service providers**

- 4.6.1 It shall be recalled that payment services have been harmonised through Directive 2007/64. The aim is to facilitate free movement of payment services and freedom of establishment in the sector. The Directive provides, with a few exceptions, for full harmonisation. The notion of payment service providers includes banks.
- 4.6.2 As the draft implementation regulation stands, the scope of the ban also covers payment of gaming transactions, made by residents outside Norway, through Norwegian payment service providers.

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<sup>10</sup> Case C-260/89 *ERT et al. v DEP and others* ECR [1991] Page I-2925, par. 43.

- 4.6.3 Such a consequence cannot be allowed under European law. Even in the hypothesis that the regime envisaged as such would be in compliance with European law, there would be no reason whatsoever to include such payments in the ban.

#### **4.7 Norwegian and foreign payment service providers**

- 4.7.1 The envisaged regime applies to an enumerated number of institutions that are governed by Norwegian law, namely commercial banks, savings banks, financial undertakings and e-money undertakings. The enumeration does not cover the notion of payment service provider in the narrow sense under Directive 2007/64 the implementation of which is currently being processed. It would need to be clarified whether these service providers come within the scope of the regime envisaged.
- 4.7.2 If the Norwegian legislative intent is that they should be covered by the regime envisaged, the compatibility of such an approach would appear at odds with the Directive. As mentioned above, the Directive provides in short for free movement of payment services and execution of payment should not be refused unless justified under European secondary law or national law which is in accordance with European primary law. It appears clear that for instance the payment for gaming services contracted by a non-resident cannot be banned under European law, and thus the regime envisaged would run foul of the Directive.
- 4.7.3 If payment service providers in the narrow sense should not be covered by the regime envisaged, this would appear to amount to a manifest distortion of competition.
- 4.7.4 In any case, as it is clear that the Norwegian State cannot prohibit its citizens from having recourse to payment services provided from abroad, the regime envisaged is to the detriment of Norwegian service providers.
- 4.7.5 Such a distortion of competition may also qualify as a disproportionate effect of the regime envisaged.

#### **5. SITUATION IN OTHER COUNTRIES**

- 5.1.1 As mentioned above, Germany has adopted, via the State Treaty between the Lander, law that allows each Lander to implement financial transaction blocking measures. Since January 2008 when the law came into effect, no Lander have brought forward any provisions to implement this section of the law.
- 5.1.2 The US has sought to implement a similar ban. However, as foreseen by multiple commentators and stakeholders, the ban is entirely ineffective. Recent statistics indicated that Gross Gaming Yield decreased by 25% in the United States and US internet gambling consumers were reduced from 28 million to 20 million, but evidence indicates that the effectiveness of the prohibition has been a failure. Thus, it is not surprising that the ban is currently under review in the US.

## 6. CONCLUSIONS

- 6.1.1 Against this background we strongly encourage the Ministry to reconsider the regime envisaged. We are open to a dialogue with the Ministry and will always be willing to contribute with our know-how and expertise in a process to ensure a regulatory approach to the best of Norwegian consumers and in accordance with European law.

ADVOKATFIRMAET SCHJØDT DA



Jan Magne Juuhl-Langseth

Enclosure