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Royal Ministry of Culture and Church Affairs

EFTA Surveillance Authority
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**REPLY TO THE REASONED OPINION REGARDING THE INTRODUCTION
OF A GAMING MACHINE MONOPOLY FOR NORSK TIPPING AS**

Reference is made to the EFTA Surveillance Authority's (hereinafter "the Authority") reasoned opinion of 20 October 2004 concerning the Storting's decision in June 2003 to introduce exclusive rights for Norsk Tipping for the operation of gaming machines. Reference is also made to previous correspondence concerning the case.

I. Introduction

The EFTA Surveillance Authority (ESA) argues that the Storting's decision in June 2003 concerning the introduction of exclusive rights for Norsk Tipping AS for the operation of gaming machines is contrary to the provisions of the EEA Agreement Articles 31 and 36.

The Norwegian Government maintains that Norway has fulfilled its EEA obligations and that the new Norwegian legislation in question is in conformity with applicable EEA law.

The Government notes that the Authority is of the opinion that the introduction of the monopoly is contrary to the EEA Agreement, firstly because it finds that financial considerations lay behind the chosen model with Norsk Tipping as a sole operator of approximately 10 000 gaming machines. Secondly, the Authority considers the Norwegian Government's gaming policy to be inconsistent within the meaning of the

case law of the ECJ. Finally, the Authority fails to see that the introduction of exclusive rights for Norsk Tipping to operate gaming machines is necessary and proportionate in order to prevent gaming addiction and crime.

The Norwegian Government is surprised and concerned that the Authority does not accept that the alarming increase in social and public health problems related to gaming in Norway is directly connected to the current operation of gaming machines, and that the Storting's decision is motivated by the need to deal with these problems as swiftly and effectively as possible. Due to the Government's obligation to prevent such problems and protect the tens of thousands of people in Norway who are addicted to gaming, the Government finds that the existing 17 000 machines licences cannot, under any circumstances, be renewed or extended.

The Government maintains that the decision made by the Storting is, in the current situation in Norway, necessary and proportional in order to establish an acceptable and manageable level of social control and consumer protection in the area of gaming machine operation. On the basis of the case law of the ECJ, the Government finds it clear that the reasons for the Storting's decision that there should be a sole government-controlled body holding the licence for gaming machine operation lies within the scope of discretion of the national authorities, as it is *certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities*, see the Läärä case paragraph 41.

The Norwegian Government refers to its elaboration of the factual and legal issues in its reply of 28 June 2004 to the letter of formal notice. In the following the Government will only focus on some of the key issues that were also discussed there.

II. Financial considerations

It follows from the jurisprudence of the ECJ that the financing of social activities through the proceeds of authorised gaming must constitute only an incidental beneficial consequence and not the real justification for a restrictive policy on gaming. This means that the profits from the game can only be a side-effect or secondary motivation for restrictions in the regulations. As the Norwegian Government stated in its letter of 28 June 2004, the introduction of a single operator model is not in any way driven by financial considerations.

Indeed, if the Norwegian authorities had had a "hidden agenda", i.e. maximising revenues from gaming machines, as the Authority seems to imply, a competitive regime like the present one would have been continued, as it would not have made sense to restrict the gaming activities. As the Government has repeatedly stressed in previous correspondence with the Authority, the social cost of the current competition regime has accelerated and is now totally unacceptable. In the Government's view, a

satisfactory level of protection against gaming problems can only be achieved by means of optimal control in a long-term perspective through an exclusive rights model with a public body such as Norsk Tipping as operator.

III. Proportionality of the Norwegian legislation

Where a restriction has been established, it is for the government concerned to demonstrate that the measure is both suitable and necessary in order to obtain the aims that motivated it. In part 13 of its letter of 28 June 2004 to the Authority, the Norwegian Government explained in detail why a satisfactory level of responsible gaming and public control cannot be achieved within the scope of the existing gaming machine regulations in Norway. On the basis of several attempts to regulate the gaming machines' functionality within the existing regime, the Government has come to the conclusion that an acceptable level of consumer protection from addiction to gaming machines can only be achieved through a state-owned system.

The Government is therefore of the opinion that the arguments put forward by the Authority do not alter its choice of a system that provides the best possible level of protection for the consumers and the public, i.e. a system where:

- providing responsible gaming opportunities is the main purpose of the regulation of Norsk Tipping's games, and profit is only an incidental benefit.
- the operator Norsk Tipping has no financial interest in maximising profits from the operation of the games.
- the operator Norsk Tipping has no financial interest in challenging the technical standards of the current regulations in order to develop more attractive, high-risk games.
- the Government can, if there is any indication of negative consequences of the current regulations, amend the regulations for Norsk Tipping's games at any time, and where Norsk Tipping as the sole operator can implement the new regulations immediately by centrally amending the software for all of its gaming machines.

The Finnish legislation, which also grants exclusive rights to operate gaming machines to a single public body, was accepted by the ECJ in the *Läärä* case. In this case the ECJ finds that a system that is practically identical to the one decided on by the Norwegian Storting does not appear to be disproportionate or in any other way precluded by the Treaty provisions. In fact the ECJ finds that the Finnish system is certainly more effective in ensuring strict limits to the lucrative nature of gaming machine operation. The Norwegian Government notes, however, that the Authority has reached a conclusion that differs from that of the ECJ, without indicating why the ECJ's view on such regulation of gaming machine operation is no longer valid.

IV. The consistency of the Norwegian gaming policy

It follows from the case law of the ECJ that restriction on gaming services must reflect a concern to bring about a genuine diminution of gambling opportunities. Further, the restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. In the view of the Government, the only inconsistency of any relevance in the present regulation of gaming in Norway is the current regulation of gaming machines, which allows high-risk games to develop without satisfactory control. It is also the Government's view that by far the most efficient and consistent way to re-regulate the operation of gaming machines to achieve this goal is by means of an exclusive rights model with a state-owned body as sole operator.

In paragraph 69 of the *Gambelli* case the ECJ holds that in so far as the authorities of an EEA State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. The Government finds it clear that the statement by the Court in paragraph 69 must be seen in connection with the specific factual situation in that case, as referred to by the Court in paragraph 68.

Under no circumstances can the statement of the ECJ be interpreted to the effect that advertisement and public incitements for licensed gaming activities cannot be part of a consistent and restrictive gaming policy. It is obvious that many of the restricted gaming opportunities must be advertised or in other ways presented to the public in order to constitute a real alternative to illegal gambling or other unregulated gaming opportunities. At the same time the marketing of restricted games must not, of course, be conducted in a manner that could undermine the purpose of the restrictions, namely that the betting activities are limited in an consistent and systematic manner. The same view is also laid down by Regeringsrätten (High Administrative Court of Sweden) in a judgement of 26 October 2004, see below.

The Government fails to see that any of the Authority's arguments reveal an inconsistency in the Norwegian approach to gambling addiction. The distinction between high-risk and low-risk games is documented under point 4.2 of the Government's letter of 28 June 2004. However, the Authority finds reason to doubt the validity and relevance of this distinction. In the Government's view, the Authority's doubts concerning fundamental facts of vital importance in this particular area cannot be accepted as a permanent premise for the future gaming policy in Norway.

Lastly, the Government would like to take this opportunity to remind the Authority that the number of persons seeking treatment for gambling addiction has increased dramatically in the last several years, as documented in our letter of 28 June 2004. The vast majority (80-90 per cent) of those seeking treatment have problems with gaming machines. This very unfortunate social development coincides with the large increase in turnover from gaming machines, from NOK 9 billion in 2001 to NOK 22 billion in 2003, which makes the turnover from the gaming machines substantially larger than the total turnover from all other money games in Norway. It is therefore a matter of concern that the Authority questions the Norwegian authorities' immediate need to take action against the gaming machines, given the large numbers of these machines and their high-risk profile.

V. New factual and legal elements to be taken into account by the Authority

Enclosed with this letter is a copy of the Ministry's letter of 17 November 2004 to Norsk Tipping, with corrections and instructions to the company, concerning the major aims and the further development of the exclusive rights system for gaming machines. The letter also includes corrections to the technical functionality of Norsk Tipping's pilot machines, according to specifications set out by the national gaming authority, Lotteritilsynet, in a letter dated 1 November 2004.

In a judgement of 26 October 2004, Regeringsrätten holds that the Swedish regulations on gaming activities do not constitute an infringement of EU law. The Swedish regulations also include an exclusive right for the state-owned company Svenska Spel to operate gaming machines. Please find enclosed a copy of Regeringsrätten's judgement.

VI. The Governments conclusion

On the basis of the observations set out above, the Government requests the Authority to reconsider its conclusions in the reasoned opinion. The Government also requests the Authority to make a thorough assessment of the outstanding issues that have not been studied in depth. If, however, the Authority still finds it necessary to take further action and put the case before the EFTA Court, the Government will consider postponing the implementation of the new exclusive rights system until the EFTA Court has made a final decision in the case.

Given the unacceptable social and public health problems connected to the current gaming machines, the Government finds that the existing 17 000 gaming machine licenses cannot, under any circumstances, be renewed or prolonged.

The Government respectfully requests the Authority to look into this matter once again.

Yours sincerely,

Henning Gorholt
Director General

Eivind Tesaker
Deputy Director General