

**NORGES DELEGASJON TIL DEN EUROPEISKE UNION,  
BRUSSEL**

17, rue Archimède  
1000 Brussel

Telefaks: +32 2 234 11 50 / 280 15 53  
Telefon: +32 2 234 11 11  
E-post: eu.brussels@mfa.no

DATO: 12. Januar 2004

TIL: Kultur- og Kirke departementet  
Lotteriseksjonen  
Fax.: + 47 22 24 95 50

KOPI TIL: UD EØS-seksjonen

Intern fordeling:

VÅR REF.: HMJ/kvs 200400032

DERES REF.:

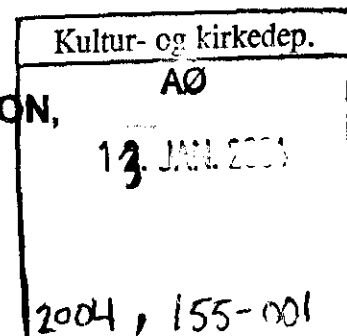
**SAK: ENDRING AV LOTTERILOVEN – TILDELING AV  
EKSKLUSIVE RETTIGHETER TIL NORSK TIPPING AS**

Vedlagt følger brev av 6. januar 2004 fra EFTA Surveillance Authority vedr.  
ovennevnte sak.

Vi ber om at Departementet merker seg fristen for innsendelse av informasjon som  
er satt til **senest 16. februar 2004.**

Med vennlig hilsen

*Hanna Marit Jahr*  
Hanna Marit Jahr  
Utdanningsråd



AU-avd.	
Saknr. 04 / 155	doknr. 001
Vedlegg nr. 1 av 1	

Case Handler: Paulina Dejmeck  
 Tel: (+32)(0)2 286 1882  
 e-mail: [pde@eftasurv.int](mailto:pde@eftasurv.int)

Brussels, 6 January 2004  
 Doc. No: 03-8984-D  
 Ref. No: SEA.073.400.015  
 SEA.073.400.016, SEA.  
 073.400.020,  
 SEA.073.400.021

EFSA SURVEILLANCE  
 AUTHORITY

EU-DEL. Brussel AM
Ref.: 200400032-1
12-01-2004
Arkivkode 546.4

Dear Madam/Sir

**Subject: Amendments to the gaming and lottery legislation – granting of exclusive rights to Norsk Tipping A/S**

## I. Introduction

The legislative amendments introducing a monopoly for Norsk Tipping A/S were adopted by the Norwegian Parliament on 17 June 2003. The aim is to gradually phase out current licence holders of gaming machines as from 1 January 2004 and for a period of 2 years until 1 January 2006.

As the Authority's services have informed the Norwegian Government, the Authority has received five complaints with regard to this measure. On 17 July 2003 (doc.no 03-1322-D), the Authority's services sent a letter to Norway, requesting information on the aim and purpose behind the introduction of the monopoly. On 1 September 2003, the Norwegian Government replied to that letter. The case was further discussed at the so-called Package Meeting in Oslo on 24 September 2003.

According to the information provided by the Norwegian Government, there are three main purposes behind the monopoly for Norsk Tipping A/S, namely i) prevention of gambling addiction ii) reduction of crime, including breaches of conditions and regulations concerning the operation of machines and iii) considerations related to more efficient and easier control.

In the following, the Authority's services invite the Norwegian Government to provide some additional information, in particular in light of a judgment delivered by the Court of Justice of the European Communities (hereinafter the Court of Justice) in plenum (nine judges) on 6 November 2003 in case C-243/01 *Gambelli and Others*.

Norwegian Mission to the European Union  
 Rue Archimède, 17  
 1000 Brussels



## II. Relevant EEA law

Article 31 of the EEA Agreement states that, within the framework of the Agreement, there shall be no restrictions on the freedom of establishment of nationals of a Contracting Party in the territory of any other of these States.

Article 36 of the EEA Agreement states that, within the framework of the Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of the Contracting Parties.

It is settled case law of the Court of Justice and the EFTA Court that national measures liable to hinder or make less attractive the exercise of the fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain this objective.<sup>1</sup>

The Court of Justice has on numerous occasions ruled on gaming and gambling legislation, most notably in the cases *Schindler*, *Läärä*, *Zenatti* and *Anomar and Others*.<sup>2</sup>

It follows from this case law that the operation of gaming machines constitutes provision of services. Legislation, which prohibits any person other than a licensed public body from running the operation of the machines in question, constitutes an impediment to freedom to provide services in that it directly or indirectly prevents operators in other Member States from themselves making slot machines available to the public with a view to their use in return for payment.<sup>3</sup>

Hence, it is necessary to examine whether that obstacle to the freedom to provide services can be justified. In this context, the Court of Justice has, hitherto, acknowledged that the Member States have a scope of discretion in determining the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling.<sup>4</sup>

## III. The Gambelli case

Case C-243/01 *Gambelli and Others* concerned the Italian legislation related to betting.<sup>5</sup> In Italy, the right to undertake this kind of activities was reserved to the public undertaking CONI. The defendants in the proceedings in the national courts had been prosecuted due to the fact that they were collecting and forwarding bets on behalf of the British company Stanley plc. Stanley is a bookmaker duly licensed in the United Kingdom. The defendants invoked, in particular, the right of establishment and freedom to provide services. Further, they pointed to the inconsistency in the Italian Government's policy, since it was, on the one hand, prohibiting foreign operators, as Stanley's, to enter the market, and, on the other

<sup>1</sup> See, to this effect, *inter alia*, Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37, Case E-6/00 *Dr Jürgen Tschannett*, paragraph 28.

<sup>2</sup> Cases C-275/92 *Schindler* [1994] ECR I-1039, C-124/97 *Läärä and Others* [1999] ECR I-6067, C-67/98 *Zenatti* [1999] ECR I-7289, C-6/01 *Anomar and Others*, not yet reported.

<sup>3</sup> See, to that effect, Case C-127/97 *Läärä*, paragraph 29.

<sup>4</sup> See, to that effect, Case C-127/97 *Läärä*, paragraph 35.

<sup>5</sup> Part of this legislation had already been examined by the Court of Justice in *Zenatti*.

hand, encouraging gaming via national operators in order to increase national tax revenues.

The Court of Justice made the following observations:

Firstly, the Court concluded that legislation such as the Italian was a restriction, not only to the free provision of services, but also to the freedom of establishment. Further in this context, the Court of Justice recalled that free provision of services includes also the freedom to receive and benefit from the services offered.<sup>6</sup>

Following the same approach as in *Schindler, Zenatti and Läärä*, the Court of Justice continued by assessing whether these restrictions could be justified.

The Court of Justice made clear that diminution or reduction of tax revenues does not constitute a matter of general interest that may be relied on as a general justification. Further, the restrictions must in any event reflect "a concern to bring about a genuine diminution of gambling opportunities and the financing of social activities through a levy on the proceeds of authorized games must constitute only an *incidental beneficial consequence* and not the real justification for the restrictive policy adopted"(emphasis added).<sup>7</sup>

On the other hand, the Court of Justice acknowledged that "moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a *margin of appreciation* sufficient to enable them to determine what consumer protection and the preservation of public order require"(emphasis added)<sup>8</sup>, provided that the restrictions were justified by imperative requirements in the general interest, suitable and proportionate.

Further, the Court of Justice explicitly pointed to the necessity of limiting betting and gaming activities in a *consistent and systematic manner* (emphasis added). Hence, the Court of Justice held that if a Member State incites and encourages gaming activities to the 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 as those at issue in the main proceedings.<sup>9</sup> Hence, it appears that public order concerns can be invoked only if the state in question combats gaming in a consistent manner.

As far as the proportionality of the Italian legislation was concerned, the Court of Justice made one particular observation that appears to be relevant in the context of the Norwegian monopoly. The Court of Justice stated that even if the objective of the authorities of a Member State is to avoid fraud, it must be considered whether there might be less restrictive and alternative means to achieve this objective.<sup>10</sup>

<sup>6</sup> Case C-243/01 *Gambelli*, paragraphs 55 et. seq.

<sup>7</sup> Case C-243/01 *Gambelli*, paragraph 62.

<sup>8</sup> Case C-243/01 *Gambelli*, paragraph 63.

<sup>9</sup> Case C-243/01 *Gambelli*, paragraph 67.

<sup>10</sup> Case C-243/01 *Gambelli*, paragraph 74.

#### IV. The Authority's services observations and questions

It is the Authority's services view that the principles established by the Court of Justice in the case law cited above are relevant in the EEA perspective.

The Authority's services are aware that the Norwegian introduction of a monopoly for Norsk Tipping differs from the situation at stake in *Gambelli*. However, given that the Court of Justice has hitherto approached different kinds of lottery/gaming/gambling legislation in the same way, regardless of the type of gaming activity that the legislation at stake intended to regulate, it would appear that the conclusions that may be drawn from the cases *Schindler*, *Läärä*, *Zenatti* and *Gambelli*, are valid also in the current Norwegian context.

Following the Court's of Justice reasoning in *Läärä*, it appears that the Norwegian monopoly constitutes an impediment to the free provision of services. This is so because it directly prevents operators in other EEA States from making gaming machines available to the public.<sup>11</sup> Further, it appears clear from *Gambelli*, that the monopoly prevents operators from other Member States to establish themselves on the Norwegian market. As is well known, the fact that the measure is non-discriminatory in that it excludes Norwegian operators from the market in the same way as foreign operators, is irrelevant.<sup>12</sup>

Hence, as indicated during previous contacts with the Norwegian Government, the main issue is whether the monopoly for Norsk Tipping can be considered as justified in the public interest, necessary, suitable and proportionate.

The main justification grounds presented by Norway in its letter of 1 September 2003 are the wish to prevent gambling addiction and to reduce crime. Moreover, control considerations appear to be of particular importance.

In light of these statements, the Authority's services observe the following:

The Authority's services note that Norsk Tipping offers its customers the possibility to participate online in all its different lotteries and games, hereby paying directly with a so called smart card, which is linked to a credit card or to a regular bank account (cf. [www.norsktipping.no](http://www.norsktipping.no)). Moreover, it appears to the Authority's services that Norsk Tipping has fairly recently introduced new kinds of games, as *inter alia*, gaming via SMS.

Further, the Authority's services take note of the fact that Norsk Tipping A/S is very active in promoting and advertising its different games. The Authority's services observe that Norsk Tipping has during the past months increased its purchasing of advertising spots considerably (cf. [www.kampanje.com/00/37/95/5.html](http://www.kampanje.com/00/37/95/5.html), article published on 29 August 2003). In July 2003, Norsk Tipping was reportedly the Norwegian company which spent the largest amount of money on advertising. The Authority's services would assume that the purpose of this measure was to increase Norsk Tipping's turnover and profits.

1. Please comment on these observations in light of the statements of the Court of Justice in the *Gambelli* case with regard to a consistent and systematic gambling policy (see above).

<sup>11</sup> Case C-127/97 *Läärä*, paragraph 29.

<sup>12</sup> See, to that effect, *inter alia*, Case C-127/97 *Läärä*, paragraph 28.

2. *Has the Norwegian Government examined the potential addictive effects of games that are provided via Internet and the consequences hereof? (cf., inter alia, a letter from Prof. Götestam to the Cultural Committee of the Parliament dated 14 May 2003). If so, please provide the Authority's services with this information, preferably with reference to relevant statistical data.*
3. *In a letter to the Ministry of Culture and Church Affairs dated 19 December 2002, Norsk Tipping puts as a condition for accepting the monopoly that it will be allowed to develop alternative games, in case the profits to the charities will decrease in the monopoly system. How does this coincide with the aim to reduce and prevent gambling addiction?*
4. *How is the remuneration system of Norsk Tipping designed? (e.g. fixed salaries, performance related pay, potential bonus schemes).*
5. *Please provide the Annual Report and annual accounts for Norsk Tipping in relation to the years 2001 to 2003 (as available). In this context, the amounts spent on advertising are of particular interest.*
6. *What kind of social activities are the charities involved in, to which the profits from the gaming machines are mainly allocated?*
7. *It follows from the letter dated 1 September 2003 that Norsk Tipping has started making enquiries into the market with regard to machine types and possible manufacturers and suppliers. What has been the result of these enquiries? Is any public procurement procedure foreseen?*
8. *Have final regulations been issued with regard to the location of machines?*

As far as the second main argument for the monopoly is concerned, i.e. prevention of crime, the Authority's services observe that the Lottery Inspection Board (*Lotteritilsynet*) found fewer illegal machines and irregularities than expected during 2002 (cf. the Annual Report of 2002, at p. 17-18). However, in the letter dated 1 September 2003, the Norwegian Government stated at p. 5 that "[I]llegal use of charity revenues to secure and improve market shares is also a well known problem within the current regime".

*The Norwegian Government is invited to provide background documentation which supports this statement.*

Further, the Authority's services note that the Norwegian authorities have themselves acknowledged that crime prevention could be met also in a system with private operators (cf. the letter dated 1 September 2003, p. 5).

The third argument repeatedly presented by the Norwegian Government is related to control and the possibilities to amend regulations quickly, without having to involve the Norwegian Parliament. Notably, the Government argues that "more efficient player protection will be achieved as machines can be adjusted without delay upon receiving new knowledge concerning which factors increase the risk of developing gambling problems". Without taking a position on whether the wish to avoid involvement of a State's legislative institution may ever justify a restriction to a fundamental freedom, the Authority's services would like to draw the Government's attention to the notification obligations foreseen in Directive 98/34/EC<sup>13</sup> and the three-month standstill period provided for therein.

*The Norwegian Government is invited to comment on this observation.*

<sup>13</sup> Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services.



► Page 6

Further, in this context, the Authority's services observe that it appears from the Ministry's letter dated 1 September 2003 that the intention is to use software that would be less likely to cause gambling addiction. The Authority's services would be interested to learn more about this special software.

Finally, the Authority's services would like to invite the Norwegian Government to comment on and substantiate whether the allocation of profits to charities can be considered only an incidental beneficial consequence of the new monopoly.

May I invite the Norwegian Government to submit the above information, together with any additional comments or observations it wishes to present, so that it reaches the Authority's services by *16 February 2004* at the latest.

After that date, the Authority will proceed to consider, in light of any observations received from Norway, whether to initiate infringement proceedings under Article 31 of the Surveillance and Court Agreement.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Jónas Fr. Jónsson".

Jónas Fr. Jónsson

Director

Internal Market Affairs Directorate