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DERES REF.:

**SAK: Letter of formal notice vedr. innføring av spillemaskin-
monopol for Norsk Tipping AS**

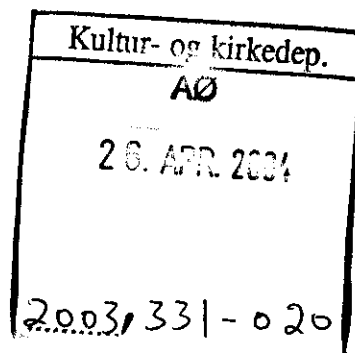
Vedlagt følger Telefax datert 23. april 2004 fra EFTA Surveillance Authority vedr. ovennevnte sak.

Vi ber om at Departementet merker seg fristen for kommentarer som er satt til innen 2 måneder.

Med vennlig hilsen



Kirsten V. Sogge for
Hanna Marit Jahr
Utdanningsråd





Brussels, 23 April 2004
Case No: 2762, 2823, 2915,
3057, 55060
Event No: 257199
Dec. 92/04/COL

Dear Madam/Sir,

Subject: Letter of formal notice regarding the introduction of a gaming machine monopoly for Norsk Tipping AS

I. Introduction and Norwegian legislation

On 17 June 2003, the Norwegian Parliament adopted amendments to the game and lottery-legislation which allows the establishment of a monopoly for Norsk Tipping AS in relation to the operation of gaming machines. These legislative amendments were enacted by the Norwegian Government on 29 August 2003 (*lov 2003-08-29 om endringer i pengespill- og lotterilovgivningen*). As a consequence, current licence holders will be phased out gradually from 1 January 2004 and for a period of 2 years until 1 January 2006. According to information provided by the Norwegian Government, the major part of the current licences is due to expire during the course of 2004. As the Authority's services have informed the Norwegian Government, the Authority has received five complaints with regard to this measure.

In a letter, dated 17 July 2003, the Authority's services asked the Norwegian Government to provide detailed information about the aim and purpose behind the monopoly. With a letter dated 1 September 2003, the Norwegian Government replied. On 6 January 2004, the Authority's services sent an additional letter to the Norwegian Government. In this letter, the Norwegian Government was invited to provide additional information and, in particular, to comment on the consistency of the Norwegian gaming policy – notably Norsk Tipping's advertising activities - in light of the observations made by the Court of Justice of the European Communities (hereinafter the Court of Justice), in Case C-243/01 *Piergiorgio Gambelli and Others*, delivered on 6 November 2003. The Norwegian Government replied to this letter by a letter dated 16 February 2004.

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 an EU Member State or an EFTA State 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 EFTA Court and the Court of Justice 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.¹

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

It follows from the mentioned case law that 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 making slot machines available to the public with a view to their use in return for payment.³ Further, the Court of Justice observed in the *Gambelli* case that the Italian legislation, which made it impossible in practice for companies of other Member States to obtain licences for the provision of sport betting services, was a restriction, not only to the free provision of services, but also to the freedom of establishment.⁴ 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.⁵

As mentioned above, it is established case law that restrictions to fundamental freedoms can be justified, given that certain criteria are fulfilled. In the context of gaming and gambling, it has been acknowledged that states have a scope of discretion in determining the extent of the protection to be afforded on their territory.⁶ However, in each case, the State in question has to show that the restriction is non-discriminatory, justified by imperative requirements in the general interest, suitable for achieving the objective which it pursues and does not go beyond what is necessary in order to attain it.⁷

III. The arguments presented by Norway

In the correspondence between Norway and the Authority concerning the issue, the Norwegian Government (Ministry of Culture and Church Affairs), has stated that the main purpose behind the monopoly is the wish to prevent gambling addiction and crime in relation to gaming machines. In this respect, the Norwegian Government considers a monopoly to be the easiest and most efficient way to control the market.

In the Norwegian Government's view gaming machines are particularly likely to cause gambling addiction. According to the Ministry, gambling behaviour surveys show clearly that it is first and foremost the gaming machines which cause social problems. The highly undesirable development of the gaming machine market is the main reason why the Ministry has found it necessary to impose a total ban on gaming machines in their present

¹ See, to that 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.

² 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, Case C-6/01 *Anomar and Others*, not yet reported, Case C-243/01 *Piergiorgio Gambelli and Others*, not yet reported.

³ See, to that effect, Case C-127/97 *Läärä*, mentioned above, paragraph 29.

⁴ Case C-243/01 *Gambelli*, mentioned above, paragraph 48.

⁵ Case C-243/01 *Gambelli*, mentioned above, paragraphs 55 et seq.

⁶ See, to that effect, Case C-127/97 *Läärä*, mentioned above, paragraph 35.

⁷ See, to that effect, Case C-243/01 *Gambelli*, mentioned above, paragraph 65.

form. Under the new system, the number of machines will be reduced, the new machines will be less aggressive and they will be placed in locations that may easier be controlled. Money games on gaming machines of the type that are operated on the Norwegian gaming market are, unlike the state-owned money games, so called "high risk" games. Against this background, the Ministry has not found it necessary to impose special restrictions on the scope of Norsk Tipping's marketing activities. Furthermore, given the minor risk of developing problematic gambling behaviour from other games, the Ministry has agreed to make the state-owned games available on the Internet on a trial basis.

Further, it is the Norwegian Government's view that thefts and burglaries against machines seem to be increasing. The monopoly should make it considerably easier to combat crime.

In light of practice of the Court of Justice, the Norwegian Government finds that the decision to give Norsk Tipping exclusive rights is included among the policy instruments that may be used to prevent socially harmful consequences which can result from the lack of supervision of money games. Further, the Ministry draws attention to the fact that a number of EU Member States run a state monopoly on gaming machines. According to the Ministry, alternative models for the organization of the market would not give the authorities the required possibilities of direct control and supervision. Hence, the monopoly cannot be regarded as a disproportionate measure. Consequently, the Ministry cannot see that the decision to introduce a monopoly is contrary to Norway's commitments under the EEA Agreement.

IV. The Authority's assessment

As the Norwegian Government itself recognises, the introduction of a monopoly is a measure that restricts the freedom of establishment and free provision of services. The question is therefore whether the monopoly is motivated by imperative requirements in the general interest, suitable for achieving the objectives it pursues and does not go beyond what is necessary in order to attain these objectives.

IV.1. The aims that actually motivated the introduction of the monopoly

The Authority does not dispute that the wish to reduce gambling addiction and combat crime are laudable aims which may, potentially, justify a restriction to a fundamental freedom.

In contrast, it follows from the jurisprudence mentioned above that the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy. Even though lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive is ultimately economic and cannot therefore itself be regarded as an objective justification for restrictions on the freedom to provide services.⁸

⁸ See, to that effect, Case C-67/98 *Zenatti*, mentioned above, paragraph 36, and Case C-243/01 *Gambelli*, mentioned above, paragraph 62.

It is therefore of concern that the information presented to the Authority seems to indicate that the wish to secure a continued amount of revenue for charities was a driving factor behind the monopoly solution finally chosen and not just an incidental beneficial consequence thereto.

First, the Norwegian Government's June 2002 proposal for amendments in the gaming legislation did not envisage that Norsk Tipping should play a role in the market for gaming machines. The proposal merely suggested stricter provisions on location of gaming machines. Thus, it would only have allowed machines in areas with access control as such a measure was considered important in order to enforce the 18-years age limit. That proposal was, however, met by mass opposition not only in the market but also by the receiving charities due to fears of expected reductions in potential earnings.⁹ In October 2002, the Ministry of Culture and Church Affairs instead proposed a new model introducing Norsk Tipping as a sole operator and at the same time refrained from continuing with its original proposal which had implied that machines could no longer be placed in kiosks and petrol stations. To the Authority's knowledge, no scientific studies or other new information concerning gaming addiction or criminality was published between June and October 2002.

Second, that a wish to secure continued revenue to charities was a major motivating factor behind the suggestion to establish a legal monopoly is further indicated by the pivotal role that Norsk Tipping seems to have had in the formulation of the final bill. Thus, in Norsk Tipping's initial proposal of 1 July 2002, it was stated that the number of machines in a model with Norsk Tipping as a sole operator could be reduced with 40%, down to 10.000 machines, without any reduction of the revenues.¹⁰ It was also stated that the main reason for giving Norsk Tipping monopoly would be that such a model would secure maximum revenue to charity with a lower number of machines. The Norwegian Government has later, and without presenting any other reasons, consistently referred to a number of 10.000 machines as a basis for the new model.

In the same vein, the Government's change in position as to whether it should suggest stricter provisions on the location of gaming machines seems to have been highly influenced by the statement of Norsk Tipping's letter to the Ministry of 19 September 2002. In this letter Norsk Tipping stated that the so-called "Stjernekiiosk" concept - in which the company should be allowed to place between 2000 and 2500 machines in kiosks and service stations - was a precondition for the suggested model. If the originally more restrictive placement regime would have to be respected, the expected income of Norsk Tipping would be substantially reduced. Following this, the Ministry for Cultural and Church Affairs, in its second proposal of 25 October 2002, stated that the originally envisaged placing-restrictions could not be enacted under a continuation of the licensing system without a significant reduction of the surplus to the social and humanitarian organizations. In comparison, a monopoly solution would - provided that it would still be possible to place machines in, *inter alia*, kiosks and services stations - secure the same level of revenues to charity as before, even if the number of machines would be reduced with 40%.

The Authority takes note of the fact that there has been a certain change in the Government's argumentation during the course of the process. Originally in the above mentioned proposal of 25 October 2002 the economic aim of supporting charity was seen

⁹ Reference is made to the Norwegian Government's letter of 24 February 2003 to the Authority.

¹⁰ See point 2.1 of the letter.

highly important. In subsequent preparatory works that aim was toned down and was now only described as a *positive side-effect* of the proposal.¹¹ In the meantime, the affected operators had presented legal briefs pointing to the fact that under EEA law the financing of social activities through a levy on the proceeds of authorised games may constitute only an incidental beneficial consequence and not the real justification for the restrictive policy.

IV.2 As to the consistency of the Norwegian gaming policy

a) Introduction

As mentioned above, it follows from the case law of the Court of Justice in the gaming and gambling field that restrictions 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.¹² 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.¹³

In assessing the consistency of the Norwegian gaming policy the Authority takes as a starting point that Norsk Tipping is a company wholly owned by the Norwegian State. Moreover, Norsk Tipping is also repeatedly referred to by the Ministry of Culture and Church Affairs as "*a policy instrument for regulating and controlling gaming activities*".¹⁴ For that reason, the Authority will – although the Norwegian Government is, of course, not bound by any statements by Norsk Tipping – identify Norsk Tipping with the Norwegian State.

As the Authority will show in the following, the Norwegian authorities' approach to gambling addiction seems inconsistent in, notably, three respects. First, consumers have, increasingly, been encouraged to engage in a broad range of gaming activities. Second, new games are being developed without there being any presented evidence that these games are substantially less addictive than slot machines. Finally, the explicit aim of the new monopoly holder is to double the number of gaming machine players.

b) Increased encouragement of consumers to play in different kind of lotteries and games

Norsk Tipping is the only gaming company on the Norwegian market which is allowed to advertise for its games and products. Moreover, according to information available to the Authority, Norsk Tipping has in recent years been among the three largest advertisers in Norway. In the last years – including the last months following the adoption of the contested law – Norsk Tipping has apparently spent increasing amounts on advertising.

¹¹ See Ot. prp. Nr 44 (2002-2003), page 8. In contrast, the revenue for charities was for the majority of the Parliamentary Committee in the Storting a major argument behind the introduction of the monopoly model. Reference is made to Imst O nr. 124 – 2002-2003, point 2.4.1. See also the article of the Minister for Culture and Church Affairs in "Dagbladet" 6 November 2002.

¹² Case C-243/01 *Gambelli*, mentioned above, paragraph 67.

¹³ Case C-243/01 *Gambelli*, mentioned above, at paragraph 69.

¹⁴ See the Norwegian Government's letter of 1 September 2003, p. 3 and of 16 February 2004, p. 5, where it is stated that "*Norsk Tipping is the key strategic instrument in the implementation of Norway's gaming policy*".

The Norwegian Government has argued that *“an increase in Norsk Tipping’s marketing budget will not necessarily mean an increase in the turnover and profit”*.¹⁵ However, whether or not the marketing activities of Norsk Tipping will actually have a higher or lower different degree of success is not relevant for the consistency of the approach taken by Norway. What matters is the *intended* effect of the activities. In that respect, the Authority considers it highly unlikely that Norsk Tipping would spend huge sums on advertising if the purpose was not to encourage consumers to participate in lotteries, games of chance and betting.¹⁶

The Authority has further noted that Norsk Tipping’s advertisements have had an assumingly tempting and encouraging character with such slogans as *“the possibility to become a Lotto millionaire is never further away than a mouse click”*, and, with regard to the relatively new gaming product, “Oddsbomben”, slogans as *“very high prizes in relation to the bets”* and *“very high maximum bets”*.

c) Expansion of games run by the Norwegian State through Norsk Tipping

The Authority also observes that Norsk Tipping has introduced several new games in recent years. Norsk Tipping has furthermore developed new ways of gambling, including by offering its existing games over the internet, digital TV and by mobile phone (SMS). These new modalities have been accepted by the Norwegian Authorities also after the act introducing the monopoly was enacted.

Once again the Authority fails to see the consistency of the Norwegian Government’s gaming policy. On the one hand Norway enables potential gaming addicts to sit home and participate in money games such as “Oddsbomben” using credit cards as a means of payment. In view of the Norwegian Government itself such easy access to gambling from the privacy of one’s own home could pave the way for undesirable gambling behaviour.¹⁷ On the other hand, with respect to gaming machines, the Government argues that there is a need to bring the gaming into the controlled rooms and to shelter persons with gambling problems from unwillingly coming across such machines.

In order to justify this apparent inconsistency Norway has argued that a distinction should be drawn between what is called “high risk” and “low risk” games. In the view of the Norwegian Government, it is therefore not inconsistent to, at the same time, restrict the freedom to provide some gambling services and actively encourage consumers to participate in other types of games. In this respect, the Government argues that all Norsk Tipping’s existing games with a possible exception of “Oddsen” should be classified as “low risk” games.

In the opinion of the Authority, it is doubtful whether one can establish such a clear division between “high risk” and “low risk” games, enabling two very opposite approaches being taken with respect to the two categories. No factual information has

¹⁵ Reference is made to the Norwegian Government’s letter of 16 February 2004.

¹⁶ See the interview with the Managing Director of Norsk Tipping, Mr. Reidar Nordby, published in IGWB, International Gaming and Wagering Business, volume 25, February 2004, according to which: “Nordby noted that turnover has increased every year for the past 20 years, even as the market has flattened somewhat due to competition from Internet bookmakers affecting the lottery’s own odds games. He cited strong growth in instant games thanks to a ‘restructuring, better marketing, and a more clear positioning of the product line’.” The article is available at <http://www.gemcommunications.com/Publications/currentpubs/igwbabout.htm>.

¹⁷ Reference is made to the preparatory works of the contested act.

been submitted to the Authority that points to such a simple two layer division in the risk assessment of different kind of games. Norway has in the correspondence with the Authority stated that gambling behaviour studies show that it is first and foremost the gaming machines which cause social problems.¹⁸ As already stated, Norway has also submitted that the danger of developing undesirable gambling behaviour is less significant with respect to the games offered by Norsk Tipping. However, no actual scientific studies have been presented to that effect. Hence, the Authority would like to know whether the distinction between high risk and low risk games is generally accepted among scholars and if so, invites Norway to submit copies of or references to studies which represents the basis for the mentioned distinction. In this context, it would be of particular interest to receive studies which categorise the kind of games that are offered by Norsk Tipping into high risk and low risk games, respectively.

At the same time the Norwegian Government is invited to explain how the studies, upon which the Government claims to have introduced the said distinction, relates to other scientific studies that apparently find that, although a substantial number of gambling addictive persons play on gaming machines, a number of games might be similarly addictive and that gambling addicts actually play on a number of different games.

Reference shall be made to the country-covering survey of gaming and gambling that was conveyed by the Norwegian institute SIRUS in 2003.¹⁹ The extent of problem gambling is dealt with in Chapter 4 (at p. 61 et seq.). Table 4.8 shows the prevalence of problem gamblers (including former problem gamblers) among all participants in different games during the last 12 months. It follows from that table that 4,7 % of all participants on gaming machines last year were identified as problem gamblers, compared to 5,1 % on Oddsen,²⁰ 6,7 % on horse race betting and 9,2 % on Internet games. Table 4.2 shows the percentage of problem gamblers, who have participated in different games either daily or weekly during the last 12 months. According to that table, 78 % of all problem gamblers participated in gaming machine games daily or weekly in the last 12 months, while 67 % participated in Oddsen games, 60 % on football bets and 51 % on lotteries (like Lotto). The complexity of the problem is further illustrated by table 4.9, showing how many different groups of games the problem gamblers participated in during their lives and during the last 12 months. This table shows that 30,6 % of the problem gamblers had participated in 0-3 groups of games during the last year, whereas 47,2 % had participated in 4-6 groups of games during the same period and 22,2 % had participated in 7-9 groups of games during the last 12 months.

In the Authority's view, these data indicate that gaming machines are only one of several potentially addictive means of gaming. In this context, reference is made to the Norwegian Government's own statements according to which "*it seems ... that there is a certain risk of developing gambling addiction by gambling on AWP [gaming] machines and participating in horse race betting, but also games offered by Oddsen (Odds games) seem to represent an increasing danger of developing problematic gambling*".²¹ This view is further supported in Norsk Tipping's Annual Report for 2002, in which the company concludes at p. 23 (the Authority's unofficial translation):

¹⁸ See the Government's letter of 16 February 2004 to the Authority, p. 11.

¹⁹ Pengespill og pengespillproblemer i Norge, SIRUS Rapport 2/2003. The Survey is available at <http://www.loneritilsynet.no/dav/253168CBD8F347519A2D5CCC5D91AE96.doc>

²⁰ Oddsen is a game, operated by Norsk Tipping, in which the player is supposed to predict the result of football matches.

²¹ Reference is made to Ot.prp. no 124 (2002-2003), at p. 41.

“The growth with regard to Oddsen is gratifying, but, at the same time, there are particular challenges linked to that game. Oddsen is the game which attracts the largest number of players outside Norsk Tipping’s main target groups, i.e. professional players who put high stakes, and hence, might be at risk for gambling addiction and other undesirable, social side effects.”

The Authority takes note of the information provided by the Norwegian Government that the maximum stake for such fixed odds games was reduced in the course of 2003, and that Norsk Tipping’s revenue because of the deliberate restrictions was reduced from NOK 1,847 million in 2002 to NOK 1, 612 million in 2003.²² Nevertheless, that reduction seems to be just a minor correction taking into account that Norsk Tipping’s revenue from Oddsen increased 62% the year before, from NOK 1138 million in 2001 to 1 847 million in 2002.²³

Consequently, the Authority takes the view that Norway has not presented any scientific material supporting its distinct line between high risk and low risk games. It also seems difficult to conclude decisively that gaming machines is the game that first and foremost cause gambling addiction since, in particular, problem gamblers appear to participate in several kinds of games and problem gambling is also known in relation to a number of other games. Furthermore, it may be assumed that the increased use of uncontrollable channels such as the internet, the use of which is offered also by Norsk Tipping, might itself imply a “high risk”.²⁴

d) Norsk Tipping’s aim to double the number of gaming machine players

The third apparent inconsistency in the Norwegian policy relates to the often and explicitly stated aim of Norsk Tipping to double the number of gaming machines players from 500.000 to 1 million.²⁵

According to Norsk Tipping such an increase is not a problem with respect to gambling addiction since the machines will be less aggressive. In this context, the Authority would like to point out that it would appear that not only the absolute number of machines, but also the range and type of games offered are of relevance. The Authority questions how Norsk Tipping, through adjustments in machine functionality, can control gambling addiction to such an extent that the aim to double the number of players – and thereby the exposure of twice as many potentially addictive players to gaming machines – will not increase the problem of gambling addiction. The Norwegian Government is therefore invited to substantiate how that would be the case. Similarly, the Authority would like information about how Norsk Tipping plans to reach its goal of doubling the number of players with less aggressive machines and without advertisements or other forms of active marketing.

Without further information the Authority would assume that since the new legislation already in general terms has established where the machines can be located, a strong

²² See the Norwegian Government’s letter to the Authority of 16 February 2004.

²³ See Norsk Tipping’s annual report for 2002.

²⁴ See, to that end, an article published on Aftenposten online on 9 March 2003. According to this article, “Nettspill – farligere enn andre spill”, experts claim that a new group of problem gamblers has arisen lately, namely Internet gamblers. The main reasons for Internet gambling appear to be the absence of social control (possibility to play from home) and the possibility to stake large sums using electronic payment means.

²⁵ See e.g. the interview with the Managing Director of Norsk Tipping Mr. Reidar Nordby in Kapital no. 1/2004.

increase in the number of players would first and foremost depend on how attractive the gaming machines will be to potential players. According to the Ministry's letter of 16 February 2004, Norsk Tipping signed in October 2003 a contract with EssNet Interactive AB. The fact that the statements from Mr. Nordby was made later could therefore indicate that Norsk Tipping has contracted machines that will be significantly more attractive to players than the existing ones.

As already stated, in the light of Norsk Tipping being a fully controlled government instrument for the State's gaming policy, the Authority would assume that the objective of doubling the number of players is also the Government's own policy. If that objective, however, should not reflect the Government's own gaming machine policy, the Authority would appreciate information on what actual and concrete measures the Government has planned and/or enforced in order to hinder Norsk Tipping's ambitions to be fulfilled.

The Government is also invited to comment on a recent article in the publication IGWB,²⁶ which contains yet another interview with Mr. Reidar Nordby. In the article it is confirmed that Norsk Tipping plans to operate approximately 10.000 machines. However, it is further stated that "Each machine will have two video screens, so that more visual options are available." The Authority would like to know whether that means that two players can play at one machine at the same time.

IV.3 As to whether the introduction of a monopoly is suitable and does not go beyond what is necessary in order to attain the objectives

It follows from the argumentation of the Court of Justice that it is for the Norwegian Government to provide evidence that the desired results of the monopoly cannot be achieved by less restrictive means.²⁷

a) Prevention of gambling addiction

In general terms, it could be argued that if gaming machines are indeed particularly detrimental and likely to cause addiction, the most efficient measure would be to introduce a complete ban on this particular kind of gaming. However, the Authority observes that there appears to be a clear economic incentive to abstain from the introduction of a total ban on gaming machines.²⁸

The Norwegian Government does not seem to dispute that players will not become less addicted to gambling for the sole reason that a given type of machine is operated by Norsk Tipping and not by a private operator. Norway has, however, advanced several arguments to the end that a monopoly will assist the Norwegian authorities in preventing and reducing gambling addiction. First, a link is made between the monopoly and the effective control of software and a reduction of the number of machines. Second, it is argued that the Government would not be able to swiftly adapt the relevant rules on gaming machines when new studies and experience shows the need to restrict certain forms of or places for

²⁶ International Gaming and Wagering Business, see footnote 16, above.

²⁷ See, to that effect, *inter alia*, Case C-243/01 *Gambelli*, mentioned above, paragraph 65.

²⁸ See, to that end, the statements made by the Minister of Culture and Church Affairs, Mrs Valgerd Svarstad Haugland in connection with the Ministry's reply to the Authority's letter of 6 January 2004, as distributed by Norges Telegrambyrå. "Vi vil ikke godta noe tap i første omgang. Det er snakk om store inntekter fra automatene til norske organisasjoner. Derfor er det ikke bara å å forby dem slik noen tar til orde for. Jag kan ikke uten videre gi fra meg alle disse milliardene".

gambling. Third, the Government invokes the need to have a stricter enforcement of the 18-years age limit.

b) The control of software and the number of machines

In the letter dated 1 September 2003, the Ministry for Cultural and Church Affairs states that *"In order to prevent gambling addiction and under-age gambling, the Ministry considers it necessary to improve the control of the machine software and reduce the number of machines as well as achieve more stringent regulations regarding machine location."*

No evidence has been presented to the Authority that the mentioned restrictions could not have been imposed in a license system by issuing new regulations on software, on the number of permitted machines and on the places where gaming machines can legally be located. Moreover, control could be increased and a more tough system with easier withdrawal of licenses or issuing of high fines as a reply to violations could be introduced. Finally, it has not been shown that an on-line control broadly similar to the one envisaged in the monopoly model could not be introduced in relation to private operators. Indeed, the Norwegian Government does not really seem to dispute this assessment since the Government itself finds that *"There is reason to believe that basically all kinds of regulations concerning the location of gaming machines could be implemented within both a competition/concession market and a state owned monopoly. However, it is emphasised that the Ministry expects that violations to the regulations are less likely to occur within a monopoly model"*.²⁹

As regards the Government's claim that the private operators do not follow the regulations, the Authority has noted that the Norwegian Government acknowledges that only few breaches have been detected. Indeed the Government has stated that *"in Norway the problem is not the presence of unlicensed software. The problem is, however, the presence of aggressive machines in locations that are not considered as natural gaming environments with regard to social considerations"*.³⁰ In the Authority's view this latter problem would – as argued below – be better remedied by rules on the placing of gambling machines than by the introduction of a monopoly. Moreover, if the Norwegian Government is of the opinion that there is a need for improved control, it could consider reorganisation of its supervisory system before removing private operators from the market.

With regard to the Government's argument that economic operators find loopholes and bend the framework of current regulations,³¹ suffice is to remark that where such a behaviour would result in a violation of the relevant rules, the normal remedies of both civil and criminal law applies. Where an operator is acting within the legal remits of a public law regulation, the Authority fails to see that a monopoly would be a more suitable and necessary remedy than a change of the apparently unfortunately worded regulation.

c) The argument that it is more easy to regulate the gaming sector through ownership control than through regulation of a public law character

²⁹ Reference is made to point IV.1.2 of the Norwegian Governments letter to the Authority of 1 September 2003.

³⁰ See point IV.3 of the Governments letter to the Authority of 1 September 2003.

³¹ See, in this respect, *inter alia*, point IV.2 of the Government's letter to the Authority of 1 September 2003.

The Norwegian Government has repeatedly presented arguments to the effect that, in a monopoly situation, the Government will be better able to quickly and efficiently take the measures it, at any time, should consider necessary to combat gambling addiction.³² It has also stated that it for several years unsuccessfully has been endeavouring to impose special restrictions on the gaming machines market. In the meantime, the gaming machines have developed into increasingly aggressive, casino-like money games. The Norwegian Government notably argues that *"previous attempts to regulate the market within the existing system have failed, due to massive opposition from the market participants"*.³³

With these arguments, Norway basically claims that the monopoly is justified by its apparent lack of ability to regulate the market through laws and regulations.

As a preliminary remark, the Authority would dispute that the desire to avoid public discussion and political pressure from charities and economic operators can be seen as a legitimate aim even if that aim is construed as a means to be able to react swiftly in order to combat gambling addiction. The fear that the Norwegian Parliament might to a larger extent than the Government accept social problems related to gaming machines, *inter alia*, in order to secure revenue for charities, cannot constitute a justification for restricting the free movement of services.

In addition, the Government has stated that it is an important argument for the introduction of the monopoly that the "Lotteritilsynet" (the public supervisory body for gaming activities) under the present licensing system shall respect the same public law guarantees for legal protection as other administrative bodies under Norwegian law. In contrast thereto, steering via the ownership of Norsk Tipping will not necessitate the use of time consuming public law procedures.³⁵

As for the wish to avoid administrative inconvenience, the Court of Justice has repeatedly held that such a wish is not a compelling reason to justify a restriction of one of the fundamental freedoms guaranteed by the Treaty.³⁶ Moreover, that the need to ensure legal protection might imply that a given measure can only be introduced after a relatively short

³² See also the arguments presented by the Minister for Culture and Church Affairs, Valgerd Svarstad Hauland, in the parliamentary discussion of the bill in the Odelsting.

³³ See, *inter alia*, point IV.3 of the Government's letter of 1 September 2003. Similarly, on p. 4 in the Government's letter of 24 February 2003, less restrictive alternatives to the monopoly solution are refused by the argument that *"non-profit organisations have found it necessary to implement countermeasures and active influence upon the decision making process when their income development is threatened as a consequences of restrictions in lottery legislation."*

³⁵ Cf. paper from the Ministry of Church of Culture to the Norwegian Parliament of 23 May 2003, p. 15. The Norwegian text reads as follows: *"At Lotteritilsynet innenfor dagens automatmarked må forhold sig til de samme forvaltningsrettslige rettssikkerhetsgarantier som andre forvaltningsorganer er et vesentlig argument i forhold til innføring av eneren for Norsk Tipping, fordi Norsk Tippings virksomhet er direkte styrt av departementet og dermed ikke underlagt de samme forvaltningsmessige og dermed tidskrevende procedurer for fastsettelse og endring av regelverk og praksis i forhold til selskapets spillvirksomhet."*

³⁶ See, to that effect, Case 29/82 *Van Duyn* [1983] ECR 151, Case C-205/84 *Commission v Germany* [1986] ECR 3755, paragraph 54.

time span is not, in the opinion of the Authority, a valid reason for restricting a fundamental freedom under EEA law.

On a more factual basis, the Authority fails to understand how the economic interests of the charitable organisations for several years could hinder the Norwegian Government, from imposing necessary control in a market that, in the opinion of the Government causes social problems. Moreover, presuming that is indeed the case, the Norwegian Government is invited to explain why charities will not be likely to exert a similar influence in relation to future similar restrictions with regard to Norsk Tipping's activities. In the Authority's view, if the Norwegian Authorities, as a result of a public debate, come to the conclusion that no stricter rules should be introduced even if such rules would reduce the risk for gambling addiction, the reason can only be that the Government itself takes the political stand that securing revenues for charities is more important than the prevention of gambling addiction.

Similarly, the Authority finds the argument about the lack of ability to control the market somewhat surprising in the light of the Government's earlier regulatory actions in the gaming market. It is the Authority's impression that the Government for years has not just passively observed the development in the market but, on the contrary, through adoption of significantly more liberal regulations, led the development of the market to where it is today. As recognised by the Ministry of Culture and Church Affairs, "*There is reason to believe that the rise in revenues from the gaming machine market is a result of the development of new types of machines pursuant to the amendments of the requirements for type approval of 1st October 2000.*"³⁷ Those amendments to the gaming legislation allowed 10 times higher prices, from NOK 200 to NOK 2000, and halved the minimum speed sequence from 3 to 1,5 seconds. Under those circumstances the Authority fails to see that it should be necessary for the Norwegian State to prohibit all private activities within the relevant market without beforehand having made attempts to strengthen the regulation of the market and thereby reverse an undesired development that was, partially, initiated by the Government itself.³⁸ This is especially so when the Government itself states that it introduced the more liberal rules in order "*to maintain the turnover in the gaming machine market and avoid economic losses for the charities*".³⁹

The Authority cannot follow the Government's argument that a normal use of regulatory means will not be sufficiently swift and effective. It is the Authority's understanding that the Norwegian legal order foresees a possibility to delegate regulatory power to the Government. Hence, if desirable, the Ministry of Culture and Church Affairs should be able to issue regulations that would be binding on private operators, without having to involve the Parliament. Moreover, as to the time it takes to conduct a public hearing and afford affected operators the normal legal guarantees under Norwegian law, it is the Authority's understanding, that according to Norwegian law, a public hearing can normally be carried out within six weeks just as even faster procedures can be applied where this is objectively necessary. The Authority also fails to appreciate the submissions of the Government that a licensing system necessarily should imply that software, which

³⁷ Reference is made to the Norwegian Government's letter to the Authority of 24 February 2003, p. 2.

³⁸ In this respect, the Authority notes that the Government in its letter of 16 February 2004 highlights how reduction of maximum prices, described as "deliberate restrictions", for the game "Oddsen" resulted in a decreased turnover from 2002 to 2003. On that basis, the Authority questions why deliberate restrictions in the form of e.g. lowering maximum prices could not have been carried out also with respect to gaming machines.

³⁹ Reference is made to the Norwegian Government's letter to the Authority of 24 February 2003, p. 2.

is type-approved for gaming machines, cannot be withdrawn from the market even if it is later concluded that this software is likely to cause an undesirable degree of gambling addiction.⁴⁰ It might be true that the current rules for gaming machines does not allow for the withdrawal of a license until the license period has expired regardless of whether scientific studies would show that the particular type of machine should be especially addictive. However, nothing would prevent the Government from introducing such a right in a new licensing system.

Finally, some of the arguments advanced by Norway for not using a regulatory system can also be put forward against the use of control via ownership. Thus, as already pointed out in the Authority's letter of 6 January 2004, Directive 98/34/EC lays down a special procedure, including time limits for the provision of information, which must be adhered to when technical standards are modified.

d) Enforcement of the 18-year age limit

The abovementioned SIRUS study confirms the assumption that minors are particularly drawn to gaming machines and Internet games and more vulnerable to develop an addictive behavior than adults. The study concludes (at p. 117 et seq.) that major problems are due to the fact that the 18 years-age limit is not adhered to and that machines are located in shopping malls, kiosks, petrol stations and other non-supervised places.

The Norwegian Government has argued that the monopoly model as such, with less aggressive machines and better control through price vouchers, will enable Norsk Tipping to place gaming machines in areas accessible to minors such as gas stations, kiosks, public waiting rooms etc without damaging the effectiveness of the enforcement of the 18-year age limit. In view of the Ministry, *"the benefits from the monopoly model itself make it possible to allow machines into locations without absolute access control"*.⁴¹

The Authority, however, cannot see it otherwise than that the enforcement of the age limit in the new system will still depend on the firmness of the control exercised by the location owner and thus not be related to the monopoly holder. Furthermore, the location owner will also in the new model have an economic incentive to let as many players as possible use the machines. Moreover, a system with vouchers could also be introduced under a licence system. Finally, controlling underage gambling could have been more effectively achieved through restrictions relating to, *inter alia*, the premises where the machines can be placed. That the Government, contrary to its proposal from June 2002, accepted Norsk Tipping's argument that a monopoly should be combined with a continued acceptance of machines in areas without access control, gives the Authority the impression that the monopoly was neither aimed at nor an effective means of bringing about a more effective enforcement of the 18-years age limit.

e) Combat of crime

As far as the monopoly's necessity to combat crime is concerned, the Government has itself, in its letter of 1 September 2003, acknowledged that crime prevention can be met also in a regime with stricter concessions. As far as theft and burglaries are concerned, the Government, in its letter dated 16 February 2004, suggests that it has seen indications that burglary and thefts are increasing problems. It would therefore, in the view of the

⁴⁰ Reference is made to the Norwegian Government's letter to the Authority of 16 February 2004, p 8-9.

⁴¹ Cf. point IV.1.3 of the Norwegian Government's letter to the Authority of 1 September 2003.

Norwegian Government, be an advantage to be able to initiate necessary (assumably crime-preventive) measures quickly and efficiently through a monopoly model.

Firstly, the Authority must reiterate its observation from its letter of 17 July 2003, i.e. that it appears highly unlikely that thieves would be less inclined to break into a state owned machine than into a machine owned by private operators. Indeed, the Norwegian Government itself states that the elements to combat crime envisaged in the so-called new model can "*also be achieved in a system with private machine operators*".⁴² Secondly, the Authority observes that the Norwegian Government has not submitted any facts that would confirm that crime in relation to gaming machines is a serious problem in Norway. Thirdly, as already pointed out by the Authority in the letter dated 17 July 2003, the most recent Annual Report of the Lottery Board showed fewer irregularities than expected. In any event, the causal link between a monopoly structure and the combat of crime remains unclear.

V. Conclusion


It follows from all the above stated that the amendments to the Norwegian gaming and lottery legislation, introducing a monopoly with regard to the operation of gaming machines (*lov 2003-08-29 om endringer i pengespill- og lotterilovgivningen*) is a restriction to the free provision of services in Article 36 of the EEA Agreement and to the freedom of establishment in Article 31 of the EEA Agreement, which appear not to be justified.

Therefore, acting under Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and Court of Justice, the EFTA Surveillance Authority invites Norway to submit its observations on the content of this letter within *two months* following the receipt thereof.

After that time limit has expired, the EFTA Surveillance Authority will proceed to consider, in the light of any observations received from Norway, whether there is ground to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority,

Yours faithfully,


Bernd Hammermann
College Member

⁴² Cf. point IV.2 of the Norwegian Government's letter to the Authority of 1 September 2003.

► press release ► pressemitteilung ► pressemelding ► fréttatilkynning

PR(04)10
23 April 2004

EFTA SURVEILLANCE
AUTHORITY

Infringement proceedings initiated against Norway with regard to the introduction of a monopoly for Norsk Tipping on the operation of gaming machines

The EFTA Surveillance Authority sent a letter of formal notice to Norway today regarding the introduction of a monopoly for Norsk Tipping AS on the operation of gaming machines.

On 17 June 2003, the Norwegian Parliament adopted legislation aimed at granting the state-owned gaming company Norsk Tipping a monopoly on the operation of gaming machines. Gaming machines are currently run by private operators and charitable organizations under a license system. According to Norway, the new regime is mainly motivated by the wish to combat gambling addiction and prevent crime. Further, a monopoly situation is considered easier to control and regulate.

Article 36 of the EEA Agreement ensures the right of service providers to operate throughout the entire EEA without restrictions. Similarly, the freedom of establishment guarantees that legal and natural persons who wish to take up business in another EEA State are not prevented from doing so by the host state. Limitations on these freedoms may be accepted only if the State in question shows that the restriction imposed is non-discriminatory, justified by imperative requirements in the general interest, suitable for achieving the objective which it pursues and does not go beyond what is necessary in order to attain it.

The Authority does not dispute that the wish to reduce gambling addiction and combat crime are laudable aims which may, potentially, justify a restriction to a fundamental freedom. However, in light of case law, the Authority questions the extent to which considerations of an economic nature have motivated the choice of a model with Norsk Tipping as a sole operator. Furthermore, the Authority cannot see that the Norwegian Government has shown that its general gaming policy is systematic and consistent enough to justify a restriction to the free provision of services and the freedom of establishment as far as the operation of gaming machines is concerned. In this context, it is noted, *inter alia*, that consumers are encouraged to play different games and that the Norwegian State, through Norsk Tipping, has lately increased the number of available games and means of gaming.

With regard to other possibly legitimate aims, the Authority is not convinced that a monopoly is necessary in order to prevent gambling addiction or under-age gambling, to control software, to introduce new regulations more quickly, or to combat crime. It appears that the same effects could be achieved by less restrictive means, e.g. by imposing stricter rules on the private operators.

A letter of formal notice is the first stage in the Authority's formal infringement procedures against a Member State. The Government of Norway is requested to submit their observations within two months.

For further information, please contact Mr. Jónas Fr. Jónsson (Director, Internal Market Affairs Directorate), tel. (+32)(0)2 286 18 60.