

EFTA SURVEILLANCE AUTHORITY DECISION

No 336/94/COL

of 30 December 1994

on the exclusive rights to amusement machine operations in Finland

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement'), and in particular Article 59 (1) and (3) thereof,

Having regard to Article 5 (2) of the Agreement of the EFTA States Establishing a Surveillance Authority and a Court of Justice (hereinafter referred to as the Surveillance and Court Agreement),

Having given the Finnish Government and the undertaking Raha-automaattiyhdistys (Penningautomatföreningen; hereinafter referred to as 'RAY') the opportunity to submit their observations on the matter,

WHEREAS:

I. FACTS AND PROCEDURE

- (1) In Section I of the Finnish Act of 27 May 1976, on amusement machines (*laki ajanveteautomaaateesta*, 426/76, hereinafter referred to as 'the Act on Amusement Machines') on amusement machine is defined as a machine or other gaming device kept available for the use of the public against remuneration where the player cannot win prizes in cash, goods or other material benefit worth money.

Section 2, paragraph 1, of the Act provides that permission to keep an amusement machine within the meaning of Section 1 of the Act for the use of the public can be granted solely to the public-law association referred to in the Act of 1 September 1965 on lotteries (*arpajaislaki*, 491/65; hereinafter referred to as 'the Act on Lotteries') to operate gaming machine activities in order to procure money to the activities which are the purpose of the association. Pursuant to Section 2, paragraph 2, of the same Act, this does not apply to pure music machines (often called jukeboxes), nor does it apply to amusement machines and game devices at funfairs and in amusement parks.

According to Section 1, paragraph 3, of the Decree of 29 December 1976 on slot machines (*raha-automaattiasetus*, 676/76, hereinafter referred to as 'the Decree on Slot Machines'), the association referred to in the Act on Lotteries is RAY. The tasks and the administration of RAY are prescribed in this Decree. The purpose of RAY is to procure money for the public-interest purposes as determined in Section 3, paragraph 4, of the Act on Lotteries.

The Board of Directors of RAY comprises a chairman, two vice-chairmen and 11 other members. The Council of State has the right to appoint the chairman, the first vice-chairman and five other members. There must be one member representing the Ministry of Social Affairs and Health, one member representing the Ministry of the Interior and one member representing the Ministry of Finance.

- (2) Pursuant to Section 3, paragraph 4 of the Act on Lotteries and in particular Section 1 of the Decree on Slot Machines, RAY also enjoys statutory exclusive rights to certain forms of gambling or 'actual' money gaming. It has the sole licence to keep for the use of the public gaming machines which may give prizes in cash or in tokens convertible to cash, to keep for the use of the public gaming machines which may give prizes in goods or in tokens convertible to goods, with certain restrictions, as well as to organize casino gaming and to run a casino.
- (3) The Decree on Slot Machines contains provisions on the use of the proceeds of RAY (Sections 29 to 32 of the Decree). The basic rule is that all the proceeds go as an appropriation in the State budget and shall be distributed by the Council of State, on the proposal of the Ministry of Social Affairs and Health, to non-profit organizations and foundations with certain purposes as determined in the Decree. Support shall, however, not be granted to cover costs for which the State, a municipality or a religious community is otherwise responsible.

RAY's turnover in 1993 was Fmk 2 039 million of which Fmk 1 842,1 million related to slot machines, and Fmk 61,9 million to amusement machines. RAY's net profit totalled Fmk 1 151,9 million.

- (4) The economic activity in question is the keeping of amusement machines for the use of the public against remuneration ⁽¹⁾.
- (5) Following complaints concerning, *inter alia*, the amusement machine business, the EFTA Surveillance Authority requested from the Finnish Government further information and invited the Government to send its comments on the matter by letters of 10 February (1335 D) and 7 July 1994 (9868 D). By letter of 26 October 1994 (15780 D), the Authority urged the Finnish government immediately to take the necessary measures to bring the amusement machine legislation in conformity with the EEA Agreement. By letter dated 1 December 1994 (17496 D) to the Finnish authorities, the EFTA Surveillance Authority indicated its readiness to adopt a decision pursuant to Article 59 (3), should Finland fail to immediately correct the situation. By letter dated 1 December 1994 (17496 D), RAY was informed of the matter and given the opportunity to submit its observations.

The EFTA Surveillance Authority received replies to the letters of 1 December 1994 from Finland and from RAY on 19 December 1994. In its reply the Finnish Government recalled that, on 28 October 1994, the Finnish Parliament had been presented with a bill to replace the Act on Amusement Machines with a new legislation by which the exclusive right at issue would be abolished. Yet the Finnish Government contended it to be necessary that the new legislation enters into force only after three months from its adoption and promulgation, so that certain control measures can be adopted and implemented before the entry into force takes place. Therefore, the new legislation could enter into force on 1 May 1995.

In its reply RAY stated that it does not oppose the abolishment of the exclusive right in question but that the schedule of the legislative proposal is determined by factors beyond the control of RAY. RAY emphasized the need to control the game operations. Finally RAY stated that it does not necessarily consider the Act on Amusement Machines to be in conflict with the EEA Agreement.

II. LEGAL ASSESSMENT

- (6) Article 31 of the EEA Agreement provides, *inter alia*, that there shall be no restrictions on the freedom of establishment of nationals of a State Party to the EEA Agreement in the territory of any other State Party to the Agreement.

Article 36 of the EEA Agreement provides, *inter alia*, that there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of a State Party to the EEA Agreement.

Article 59 of the EEA Agreement provides, *inter alia*, that, in the case of public undertakings and undertakings to which a State party to the EEA Agreement grants special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in the EEA Agreement, in particular to those rules provided for in Articles 4 and 53 to 63. According to Article 59 (3), the EFTA Surveillance Authority shall ensure within its competence the application of the provisions of Article 59 and shall, where necessary, address appropriate measures to the States falling within its territory.

According to Article 1 (2) (e) of the EEA Agreement, the attainment of the objectives of the EEA Agreement entails the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected.

- (7) The complainants have drawn the attention of the EFTA Surveillance Authority to the fact that amusement machines which do not give material prizes and gaming machines which may give material prizes differ in relevant aspects from each other.

⁽¹⁾ It is noted here as background information that RAY keeps the machines both in its own gaming arcades and in rented space in bars, filling-stations and other places frequented by the public.

The EFTA Surveillance Authority considers that the two kinds of services are different in nature from one another as gaming machines may yield prizes in cash or worth money and amusement machines are pure entertainment with no chance to win any material prize. The excitement factor is therefore appreciably different in the two groups, even though both may be in some way attractive or even addictive. The player is bound to consider the services markedly different despite any similarities there may be in the form of the organization of the activities, in the looks of the machines, in the locations where they are installed or in the like circumstances.

The difference between amusement machine activities and actual gaming machine activities leads the EFTA Surveillance Authority to the conclusion that amusement machine activities are, in relation to gaming machine activities, an activity which is apt to be carried out separately by undertakings others than the one carrying out gaming machine operations. The amusement machine service market is to be considered a neighbouring but yet a separate one from the actual gaming machine service market. Considerations which may be capable of justifying the maintenance of indiscriminatory exclusive rights in the actual gambling activities, such as moral, religious and cultural aspects involved in gambling, the risk of crime and fraud, the fact that gambling facilities constitute an incitement to spend which may have damaging individual and social consequences as well as the fact that organized gambling may yield a significant contribution to the financing of benevolent or public-interest activities ⁽²⁾, are not applicable as regards amusement machine activities.

- (8) RAY is an undertaking governed by a special statute as specified above. The Finnish Government exercises considerable influence on its policy and administration also through the exercise of the right to appoint half of the members of the Board of Directors including the chairman. For these reasons, RAY is an undertaking within the meaning of Article 59 (1), of the EEA Agreement. The Act on Amusement Machines constitutes a measure within the meaning of Article 59 of the EEA Agreement.
- (9) The exclusive right granted to RAY to keep amusement machines for the use of the public cannot be regarded as justified on the grounds relating to the special nature of gambling activities. By effectively granting RAY an exclusive right to keep amusement machines for the use of the public against remuneration and by making it thus, without an objective necessity or justification, impossible for any other undertaking to carry out such economic activity in any form in Finland, Finland is infringing Article 59 (1), of the EEA Agreement, read in conjunction with Articles 31 and 36 of the EEA Agreement providing for the freedom of establishment and the freedom to provide services.
- (10) The exclusive right in question also distorts competition at the expense of undertakings from other States Parties to the EEA Agreement. The exclusive right is therefore incompatible with the objective embodied in Article 1 (2) (e) of the EEA Agreement, concerning the institution of a system ensuring that competition is not distorted, which is to be achieved in particular by observance of the principles contained in Articles 53 and 54 of the EEA Agreement.
- (11) The Finnish Government appears to have accepted the obligation to amend the legislation so as to abolish the exclusive right granted to RAY to keep amusement machines for the use of the public. The Finnish Government has indicated, in correspondence addressed to the EFTA Surveillance Authority, that the national legislation will be amended accordingly and it has presented a bill to the Parliament to that effect. Nevertheless, the Finnish government contends that the date of entry into force of the new legislation could be 1 May 1995.
- (12) The EEA Agreement does not provide for any transitional period that would be applicable in this case for the adjustment of the national legislation awarding exclusive rights where such adjustment is necessary. Therefore, the Finnish legislation ought to have been rendered compatible with the EEA Agreement by the entry into force of the EEA Agreement, that is by 1 January 1994. The necessary changes have still not been adopted.

⁽²⁾ See the judgment of the Court of Justice of the European Communities in Case C-275/92 Schindler [1994], ECR I, p. 1039.

The EFTA Surveillance Authority sees no imperative reasons that would justify any further delay in bringing the infringement to an end.

For the above reasons, the EFTA Surveillance Authority finds it necessary to have recourse to Article 59 of the EEA Agreement in order to have Finland take the necessary measures to this end,

HAS ADOPTED THIS DECISION:

Article 1

The Finnish Act of 27 May 1976 on Amusement Machines (*laki ajanvieteauteista*, 426/76) is incompatible with Article 59 (1), of the EEA Agreement, read in conjunction with Articles 1, 31 and 36 of the EEA Agreement in so far as it provides for exclusive rights to keep amusement machines available to the public against remuneration.

Article 2

Finland shall take all necessary legislative or administrative measures to bring the infringement to an end as soon as possible. Finland shall inform the EFTA Surveillance Authority within one month from the date of notification of what measures have been taken to comply with this decision.

Article 3

This Decision, which shall be authentic in the English language, is addressed to the Republic of Finland.

Done at Brussels, 30 December 1994.

For the EFTA Surveillance Authority

Knut ALMESTAD

The President