

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 492/09/COL

of 2 December 2009

Complaint by Norsk Lotteridrift ASA against alleged State aid in favour of Norsk Tipping AS (NORWAY)

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

Having regard to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 thereof and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 thereof,

Having regard to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement ⁽⁴⁾,

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement ⁽⁵⁾,

WHEREAS:

By letter dated 22 October 2004 (Event No 296715), the Authority asked the complainant to provide some additional information on certain specific points.

By letter dated 15 November 2004 (Event No 299345), the complainant provided the Authority with its answers to the questions raised.

By letter dated 8 December 2004 (Event No 300861), the Authority provided the Norwegian authorities with a copy of the complaint and asked them to submit comments and additional information.

By letter dated 10 February 2005 (Event No 308469), the Norwegian authorities provided the Authority with their comments and additional information.

There was no exchange of correspondence after that date.

I. FACTS**1. Procedure**

On 12 October 2004, the Authority received a complaint by Norsk Lotteridrift ASA concerning alleged State aid in favour of Norsk Tipping AS (Event No 295765).

By letter dated 12 March 2008 (Event No 469510), the lawyer representing the complainant informed the Authority that Norsk Lotteridrift ASA was dissolved and no longer wished to pursue the complaint, which was consequently withdrawn.

⁽¹⁾ Hereinafter referred to as 'the Authority'.

⁽²⁾ Hereinafter referred to as 'the EEA Agreement'.

⁽³⁾ Hereinafter referred to as 'the Surveillance and Court Agreement'.

⁽⁴⁾ Hereinafter referred to as 'Protocol 3'.

⁽⁵⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and EEA Supplement No 32, 3.9.1994, p. 1 (hereinafter referred to as the State Aid Guidelines). The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

2. Grounds of the complaint

Norsk Lotteridrift ASA was the largest company in Norway operating so called Amusement With Price machines (gaming machines, hereafter referred to as 'AWP'). Norsk Tipping AS is Norway's largest gaming company and wholly owned by the Norwegian State. Until 2003, Norsk Tipping AS was not operating on the market of AWP machines.

In June 2003, legislation was passed giving Norsk Tipping AS an exclusive right to operate such machines. As from 1 January 2006, Norsk Tipping AS would be the only company operating AWP machines in Norway.

During the transitional period from June 2003 to 1 January 2006, Norsk Tipping AS started introducing its first AWP machines while the existing operators were forced to withdraw from the market as the authorisations to operate such machines were progressively expiring. During the transitional period, Norsk Lotteridrift ASA and Norsk Tipping AS were therefore competing on the same market. Presently, Norsk Tipping AS enjoys an exclusive right to operate AWP in Norway ⁽¹⁾.

Norsk Lotteridrift ASA complained that, in a situation where Norsk Tipping AS was competing with other operators of AWP machines, two measures in favour of Norsk Tipping AS distorted competition and affected trade between the Contracting Parties.

The complainant referred to the two following elements:

- firstly, Norsk Tipping AS did not pay corporate tax whereas the private operators were subject to the tax (2.1),
- secondly, the complainant argued that Norsk Tipping AS enjoyed much more flexibility in determining what revenues to donate to charities as it paid its contributions to charity from its net surplus, whereas private operators had to pay 40 % of the income of each machine to charity (2.2).

2.1. Exemption to pay corporate tax

Section 2-30(g) No 3 (previously No 5) of the Tax Act No 14 of 26 March 1999 provides that Norsk Tipping AS was exempted from corporate tax. This provision must be read in conjunction with Act No 103 of 28 August 1992 relating to Money Games (hereinafter ‘the Money Games Act’) which provided that Norsk Tipping AS was obliged to pay all its profits after allocation to reserves for the investment fund ⁽²⁾.

The complainant — which was subject to the obligation to pay corporate tax — argued that the possibility for Norsk Tipping AS to benefit from such an exemption constituted State aid.

2.2. Possibility for Norsk Tipping AS to determine its own profits

Regulation No 960 of 22 September 2000 regarding permission to set up AWP machines provided that such

permissions would be granted on the following conditions: a minimum of 40 % of the surplus from each machines was to be paid to charity, a maximum of 20 % was paid to the owner of the premises where the machines are placed and a maximum of 40 % was kept by the operator. This regulation did not apply to Norsk Tipping AS ⁽³⁾.

The activities of Norsk Tipping AS were regulated by the Money Games Act which provided that Norsk Tipping AS’ profit, after allocations to reserves, must be paid to charities.

The complainant argued that Norsk Tipping AS benefited from a much greater flexibility than its competitors. Indeed, it argued that ‘it is a total different matter to pay parts of the net surplus from the combined activities of a company to charities, as compared to paying a fixed percentage of the surplus from each machine to charities regardless of the general profitability of the company’. Norsk Lotteridrift ASA considered that Norsk Tipping AS benefited from a greater flexibility when determining its budget and especially when deciding to make necessary investments in a situation where new investments were needed. The legislation did not contain any limitations as to the size of the reserves for the investment fund or any minimum requirement as to the level of the payments to be made to charities. Norsk Tipping AS had the option to make the necessary allocations to reserves for such investments while the competitors such as Lotteridrift ASA had less possibilities.

The complainant argued that such a benefit constituted aid within the meaning of Article 61 EEA.

II. ASSESSMENT

1. The presence of State aid

Article 61(1) EEA reads as follows:

‘Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.’

In its assessment of the complaint, the Authority will examine successively the two grounds of the complaint.

⁽¹⁾ The introduction of the exclusive rights was upheld by the EFTA Court in Case E-1/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Ct. Rep. 20.

⁽²⁾ The purpose of the investment is to secure that the company’s needs for investment can be met by the necessary capital.

⁽³⁾ The Regulation has been substantially changed since the complaint was lodged, however, for present purposes the Authority does not consider it necessary to describe those changes.

2. Exemption to pay corporate tax

The measure must be granted by the State or through state resources.

The Authority takes the view that through the grant of the exemption, the Norwegian State renounced tax revenue which it would normally have received. The absence of these funds represented a burden on state resources from charges that are normally borne from the budgets of undertakings⁽¹⁾. A loss of tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure⁽²⁾. The Authority therefore considers that the fact that Norsk Tipping AS is exempted from income tax at the outset involved the consumption of state resources.

The measure must moreover be selective in that it favours 'certain undertakings or the production of certain goods'. In order to determine whether a measure is selective, the Authority will examine whether, within the context of a particular legal system, the measure constitutes an advantage for the undertaking in comparison with other undertakings which are in a comparable legal and factual situation. In this regard it is necessary first to identify the common or normal regime under the applicable tax system which constitutes the reference framework.

The Authority considers that the reference framework for assessing selectivity is the Norwegian Tax Act from which Norsk Tipping AS enjoys an explicit exemption in section 2.30(g) No 3 of the Norwegian Tax Act.

It is in relation to the common or 'normal' tax regime that the Authority must, secondly, assess and determine whether the advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as the measure differentiates between economic operators who, in light of the objective assigned to the tax system of the EFTA State concerned, are in a comparable factual and legal situation.

The Authority considers, *prima facie*, that the tax exemption appears selective as Norsk Tipping is individually exempted.

As mentioned above, Norsk Tipping AS, indeed the gaming sector as such, is subject to special regulatory regimes in Norway. There are restrictions in place both with regard to who is permitted to offer gaming services, the performance of the services as such and finally the use of revenue generated

from gaming. Indeed, no other operator is now allowed to offer similar games as Norsk Tipping AS since it enjoys exclusive rights to operate a number of different money games. Such regulatory restrictions, both with regard to market access and the performance of the services have been accepted by both the Court of Justice and the EFTA Court on the basis of moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming⁽³⁾.

Prior to the introduction of the exclusive rights regime for AWP, the complainant, Norsk Lotteridrift ASA and other private operators of gaming machines operated on the market and were subject to regular income tax in addition to the special regulatory AWP regime according to which they could retain up to 40 % of the machine surplus⁽⁴⁾.

Providers of other gaming services, such as Norsk Rikstoto which organises horse race betting and charitable organisations, which organise different types of lotteries are subject to other regulatory regimes. A common denominator for these other gaming providers, is that in principle, all the revenues generated from the gaming services shall be channelled to specific charitable causes. Thus, the former AWP business was unique in the sense that it allowed private operators to keep profits generated from money games.

The profits of Norsk Tipping AS are by law clawed away and earmarked for sports, cultural and, since 2006, also for humanitarian and social beneficial causes, cf. Section 10 of the Gambling Act No 103 of 28 August 1992 (*lov om pengespill*). Thus, for Norsk Tipping AS, the exemption from ordinary income tax is replaced by a different form of 'taxation'.

Consequently, while Norsk Tipping is exempted from income tax its profits are subject to another form of imposition and as a result the company cannot retain them. The Authority takes the view, in the circumstances of this case, that the difference of treatment of Norsk Tipping is justified by the reasons relating to the logic of the system of redistribution of profits from the state monopoly gaming company.

Accordingly, based on the special nature and regulation of gaming services, the Authority considers that Norsk Tipping AS is not in a comparable factual and legal situation with that of undertakings subject to ordinary income tax, neither the former private operators of gaming machines nor other types of commercial undertakings. Thus, the exemption from ordinary income tax for Norsk Tipping AS does not constitute State aid within the meaning of Article 61 EEA.

⁽¹⁾ Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 26.

⁽²⁾ See, *inter alia*, Section 3(3) of the State Aid Guidelines on the application of State aid rules to measures relating to direct business taxation.

⁽³⁾ See Case E-1/06 *EFTA Surveillance Authority v Norway*, cited above, paragraph 29 with further references.

⁽⁴⁾ The additional 60 % were divided between the charity and the owner of the premises, see facts part above.

3. Possibility for Norsk Tipping AS to determine its own profits

The second issue raised in the complaint was that Norsk Tipping AS benefited from more freedom with regard to its profits than the private AWP operators. While the private operator had to pay 40 % of the AWP surplus to charity, Norsk Tipping AS had to pay all its profits to charity. The amount of those profits however depended largely on Norsk Tipping AS' decision to set aside money for the investment fund or in general how it spent the money. The complainant thus argued that private operators did not have this possibility as their share to charity was based on a non flexible approach.

The Authority cannot see that state resources within the meaning of Article 61(1) of the EEA Agreement are involved. In line with the findings of the Court of Justice in *Preussen Elektra* ⁽¹⁾, the Authority considers the obligation to set aside certain revenues for charity purposes to be a state intervention stemming from the Norwegian Regulation on instructions for the reserves of Norsk Tipping AS No 797 of 8 June 1998, but without leading to foregone revenues by the State ⁽²⁾. Furthermore, the same considerations with regard to selectivity, including the non-comparability of private gaming machine operators and Norsk Tipping AS discussed above would apply in this context.

4. Conclusion

On the basis of the above, the Authority considers that the exemption from ordinary income taxation for Norsk Tipping AS and its possibility to determine its own profit do not

constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The tax exemption for Norsk Tipping AS laid down in section 2.30(g) No 3 of the Norwegian Tax Act and the possibility for Norsk Tipping AS to determine its own profit do not constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English text is authentic.

Done at Brussels, 2 December 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kristján A. STEFÁNSSON
College Member

⁽¹⁾ Case C-379/98 *Preussen Elektra v Schleswig* [2001] ECR I-2099, paragraphs 54-67.

⁽²⁾ The legal basis for that Regulation is Section 10 of the Gambling Act.