

Case No: 80568  
Document No: 1084683  
Decision No: 081/20/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 8 July 2020

closing a complaint case arising from an alleged failure by Norway to comply with the Payment Services Directive and Articles 36 and 40 of the EEA Agreement by allowing for a wide-reaching application and enforcement of a prohibition of the processing of payments related to gambling activities without a licence in Norway

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

On 4 April 2017, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway concerning the Norwegian Payment Transaction Regulation<sup>1</sup> (“the Regulation”).

According to the complaint, Norwegian authorities’ enforcement of the payment transaction ban laid down in Section 4 of the Regulation is incompatible with Directive 2007/64/EC on payment services in the internal market<sup>2</sup> (“the Payment Services Directive”) and Articles 36 and 40 of the EEA Agreement. Reference was made, in particular, to two actions by the Norwegian Gaming Authority (*Lotteri- og stiftelsestilsynet*): A letter sent 15 June 2015 to banks and other financial institutions in Norway (“the Blocking Letter”, Doc No 851089), and a decision dated 29 March 2017, in which the banks and other financial institutions were required to block the use of specific bank accounts (“the Blocking Decision”, Doc No 873748).

A request for information was sent to Norway by letter dated 26 June 2017 (Doc No 859483), in which the Norwegian Government was asked to provide information on a number of factual and legal questions of relevance to the case.

On 4 October 2017, the Authority received a complaint concerning restrictions on payment transactions to gaming operators established in other EEA States (Case No 81238). That complaint was assessed jointly with the current complaint. However, during the course of the investigation, it became clear that the Authority’s assessment and reasoning in the two cases would not be the same. During the final stages of the case handling, the cases were therefore disjoined.

<sup>1</sup> Forskrift 19. februar 2010 nr. 184 om forbud mot betalingsformidling for pengespill som ikke har norsk tillatelse.

<sup>2</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 05.12.2007, p. 1), incorporated into the EEA Agreement at points 14, 16e, 23b and 31e of Annex IX by Decision of the EEA Joint Committee No 114/2008 of 7 November 2008.

By letter received 15 September 2017 (Doc No 873746), the Norwegian Government replied to the Authority's request for information from 26 June 2017. In its letter, the Norwegian Government informed the Authority of the Blocking Decision.

By letter dated 20 October 2017, the complainants provided their comments to the reply from the Norwegian Government (Doc No 878930). In that letter, the complainants requested the Authority to investigate whether the Blocking Letter and the Blocking Decision also infringe Directive 2000/31/EC concerning electronic commerce<sup>3</sup> ("the E-Commerce Directive").

The case was discussed at the package meeting in Oslo on 26 and 27 October 2017.

By letter dated 7 November 2017 (Doc No 881411), the complainants informed the Authority of the Norwegian Ministry of Culture's handling of an administrative appeal by the complainants concerning the Blocking Decision. In its decision (Doc No 881413), the Ministry dismissed the appeal and upheld the decision by the Norwegian Gaming Authority. The complainants decided to bring the appeal to the Lottery Appeals Board (*Lotteriklagenemnda*).

On 14 November 2017, a meeting was held with the complainants at the Authority's premises to discuss the case.

By letters dated 5 and 13 December 2017, the complainants provided the Authority with further information considered relevant to the case.

By letter received 18 December 2017 (Doc No 889163), the Lottery Appeals Board informed the Authority of the outcome of the appeals case. In its decision of 29 November 2017, the Lottery Appeals Board found that the decision by the Norwegian Gaming Authority had sufficient legal basis in national law and that it was not in breach of Norway's obligations under the EEA Agreement. On that basis, the appeal was dismissed and the decision upheld.

On 7 March 2019, another meeting was held with the complainants at the Authority's premises to discuss the case.

In a letter dated 29 May 2019 (Doc No 1072764), the complainants submitted further information considered relevant to the case. The letter addressed, inter alia, amendments made to the Regulation that will entail an extension of the scope of the payment transaction ban. The amendments in question entered into force on 1 January 2020.

### *The Authority's assessment*

The Norwegian Payment Transaction Regulation prohibits Norwegian banks and other financial institutions from processing payments of stakes and prizes to and from gaming operators not licensed in Norway. Section 4 regulates the payment transaction ban. It follows from the third paragraph of that provision that the Norwegian Gaming Authority may, through regulation or a decision, request that Norwegian banks and other financial institutions reject electronic payment transactions to and from uniquely specified account numbers.

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<sup>3</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1), incorporated into EEA Agreement at point 5h of Annex XI by Decision of the EEA Joint Committee No 91/2000 of 27 October 2000.

The complainants have argued that the payment transaction ban and Norwegian authorities' enforcement thereof is in breach of the Payment Services Directive and Articles 36 and 40 of the EEA Agreement.

The complainants have also raised the issue of compliance with the E-Commerce Directive. However, Article 1(5)(d) of that directive excludes from its scope "gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions". As the case at hand concerns restrictions on gambling activities through the prohibition of the processing of gambling-related transactions, the Authority does not consider the E-Commerce Directive to be applicable.

### The Payment Services Directive

Pursuant to the Payment Services Directive, providers of payment services need to have an authorisation issued by the competent authorities in their home state. According to Article 10(9) of that directive, an authorisation granted by the authorities of an EEA state shall be valid in all EEA states, and it allows the payment institution concerned to provide payment services throughout the EEA.

Neither the Regulation in general nor the payment transaction ban specifically lays down a general restriction on the freedom to provide payment services in Norway.

However, by its nature, the payment transaction ban entails the blocking of certain transactions, namely those related to gambling activities without a licence in Norway. According to Article 65(2) of the Payment Services Directive, a payer's payment service provider shall not refuse to execute a payment order "*unless prohibited by other relevant [EEA] or national legislation*". Where such national legislation must itself be in conformity with EEA law, the Authority has already determined that this is the case, as will be seen in the following section. It therefore concludes that the prohibition of the processing of payments related to gambling activities without a licence in Norway does not contravene the Payment Services Directive.

The complainants seem to argue that the payment transaction ban cannot be called upon to block payment transactions of foreign payment service providers, as the provisions in the Regulation are "*purely national rules, which foreign [third-party providers] are not subject to*". The assertion is not further elaborated upon. However, the Authority notes that the payment transaction ban targets *specific payments* and the prohibition applies regardless of the place of establishment of the payment service provider. The exception in Article 65(2) of the Payment Services Directive relates to any transaction prohibited by EEA law or national legislation.

Therefore, the blocking of payments that are related to gambling activities without a licence in Norway, and thus prohibited under Norwegian law, does not appear to raise any issues with respect to the Payment Services Directive. Further, it would considerably reduce the effectiveness of Article 65(2) if it were to be interpreted in a way that would limit its applicability to only cover transactions of payment service providers established in Norway.

In light of the above, the Authority does not consider that the payment transaction ban raises any particular issues related to the Payment Services Directive.

The complainants have also argued on the basis of the new Directive 2015/2366 on payment services<sup>4</sup> ("the PSD II"), which has replaced the Payment Services Directive in

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<sup>4</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and

the EU. The PSD II is not yet in force in the EEA and consequently does not create any obligations on the EEA EFTA States. It is therefore not within the Authority's mandate to assess whether Norwegian law complies with the PSD II. The Authority notes, however, that Article 79(2) of the PSD II contains a similar rule to Article 65(2) of the Payment Services Directive, allowing for refusal of payment orders where the execution of a specific payment is prohibited by other relevant EU or national law.

#### Article 36 and 40 of the EEA Agreement

Furthermore, the issues raised by the complaint appear to concern mainly the freedom to provide services, with a mere ancillary effect on the free movement of capital.

The Authority has previously assessed five complaint cases against Norway concerning the provisions on blocking of payments to unlicensed gaming operators in Norway.<sup>5</sup> By Decision 40/11/COL of 15 February 2011 (Doc No 583964), the Authority decided to close all five cases. In its decision, the Authority concluded that the Regulation did not infringe Article 36 of the EEA Agreement, referring to the EEA States' wide discretion in devising rules aimed at protecting their citizens from unlicensed gaming operators. The Authority further concluded that the prohibition was considered proportionate to the aim it sought to achieve.

The complainants, initially, did not allege that current Norwegian legislation, including the Regulation, is in breach of the EEA Agreement. Instead, it was argued that Norway's *enforcement* of the payment transaction ban is in breach of EEA law. Thus, the Authority has assessed whether the enforcement actions adopted by the Norwegian authorities entail an infringement of EEA law.

The complaint is based in particular on the Blocking Letter. The complainants argue that the Norwegian Gaming Authority in its letter went beyond the scope of the Regulation by requesting Norwegian banks and other financial institutions to block all payment transactions to and from 11 payment service providers, of which several were established in the EEA. The complainants emphasised that the Blocking Letter, regardless of whether or not it is of a binding nature, must be considered a state measure that is subject to scrutiny under EEA law. According to the complainants, a request to block all payment transactions, not only those connected to gambling activities, constitutes a restriction that is neither suitable nor necessary to achieve the legitimate aim of fighting gambling addiction.

Furthermore, it has been argued that also the Blocking Decision entails a breach of EEA law. Five of the listed account numbers in the decision were registered on payment service providers. It is argued that, in the same manner as the Blocking Letter, the Blocking Decision restricts these payment service providers from lawfully providing their services in Norway.

The complainants argue that the effect of these measures is that the Norwegian market is effectively shut off for payment service providers established in other EEA States and that the Authority should assess the Blocking Letter and the Blocking Decision as two interconnected infringements of EEA law.

The Authority notes that the heading of the Blocking Letter reads: "*The prohibition on payment transactions related to games without Norwegian license (the payment*

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Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC - PSD II (OJ L 337, 23.12.2015, p. 35), adopted for incorporation into the EEA Agreement at point 16e of Annex XI by Decision of the EEA Joint Committee No 165/2019 of 14 June 2019, which is subject to the fulfilment of constitutional requirements and *not yet in force*.

<sup>5</sup> Cases No 65707, 68139, 68284, 68543 and 68615.

*transaction prohibition*)”.<sup>6</sup> Furthermore, the fourth paragraph on page 1 states: “*Through this information letter to all financial institutions in Norway [...], the Gaming Authority wishes to provide information about the content of the prohibition. Additionally, we would like to bring to the financial institutions’ attention the identity of the third party operators that exclusively or predominantly provide payments of stakes to games without Norwegian license and to encourage the financial institutions to adopt measures to block payment transactions to these operators. ...*”.<sup>7</sup>

On page 3 of the Blocking Letter, it is stated that: “*It is the Gaming Authority’s assessment that the companies listed below exclusively or predominantly provide payments of stakes to games without Norwegian license. The companies circumvent the Regulation by using other MCC codes than the money games code 7995, thus preventing payment card transactions between Norwegian gamblers and foreign gambling companies from being automatically blocked by financial institutions in Norway. In the view of the Gaming Authority, the financial institutions may on the basis of Section 4 first paragraph of the Regulation stop transactions to and from these companies*”.<sup>8</sup>

On page 4 of the Blocking Letter, it is explained that the companies in question had received letters wherein the Gaming Authority informed them about the applicable framework, that the Gaming Authority had information showing that they were circumventing the ban, and that they would be included in the list of operators circumventing the ban that would be sent to Norwegian financial institutions. The relevant companies were asked to provide documentation of any other business activities than the processing of gambling related transactions, but the Gaming Authority received no documentation of such other revenues.

Finally, in the fourth paragraph on page 4 of the Blocking Letter, the Gaming Authority explicitly states that it did not possess sufficient information to order the banks to stop financial transactions to and from specific account numbers and that it had therefore chosen to provide the financial institutions with the names and contact information of companies circumventing the ban, allowing the financial institutions to take measures of their own accord. The Gaming Authority encouraged the banks to initiate measures to stop transactions to and from these companies, and to keep the Gaming Authority informed of the steps, if any, that were taken in this regard.

The letter’s wording indicates that it serves as an informational tool to ensure that financial institutions in Norway can more effectively perform the obligations already following from the Regulation. The Gaming Authority made it clear that it did not have authority to adopt any binding order in this context and that it was up to the financial institutions to decide if, and in that case which, measures were to be taken.

Even if a recipient were to assess the Blocking Letter as imposing upon it a binding obligation to block specific transactions, it follows from the title and wording of the letter that any measure should target gambling related transactions falling under the scope of

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<sup>6</sup> Unofficial translation by the Authority. The original version read: “*Forbudet mot betalingsformidling for pengespill uten norsk tillatelse (betalingsformidlingsforbudet)*”.

<sup>7</sup> Unofficial translation by the Authority. The original version read: “*Med dette informasjonskrivet til alle finansinstitusjoner i Norge [...] ønsker Lotteritilsynet å gi informasjon om innholdet i forbudet. I tillegg vil vi gjøre finansinstitusjonene oppmerksom på hvilke tredjepartsselskaper som kun eller hovedsakelig formidler innskudd til pengespill uten norsk tillatelse, samt oppfordre finansinstitusjonene om å sette i verk tiltak for å stanse betalingsstransaksjoner til disse*”.

<sup>8</sup> Unofficial translation by the Authority. The original version read: “*Det er Lotteritilsynets vurdering at selskapene som fremgår av tabellen nedenfor kun eller i hovedsak formidler betaling av innskudd til pengespill som ikke har tillatelse i Norge. Selskapene omgår forskriften ved at de bruker andre MCC koder enn 7995 for pengespill, slik at betalingskorttransaksjoner mellom norske spillere og utenlandske spillerselskap ikke blir stanset automatisk av finansinstitusjoner i Norge. Etter Lotteritilsynets vurdering kan finansinstitusjonene med hjemmel i forskriften § 4 første ledd stanse transaksjoner til og fra disse selskapene*”.

the prohibition in the Regulation. The Authority notes that the Gaming Authority had found that the companies in question exclusively “or predominantly” provided payments of stakes to games without licence in Norway. Thus, it could not be excluded that some non-gambling related transactions could have been affected by a blocking measure.

However, the Gaming Authority evidently took measures to avoid such effects. Furthermore, the lack of documentation from the companies in question of any other revenue indicates that the transactions to and from those companies were exclusively gambling related, thus falling under the scope of the Regulation.

In the same manner, the Blocking Decision did not lay down an obligation to block all transactions, but was limited to those related to non-licensed gambling activities. With reference to Section 4 of the Regulation, the Gaming Authority requested Norwegian banks and other financial institutions to reject electronic payment transactions to and from seven uniquely specified account numbers. On page 3 of the Blocking Decision, the Gaming Authority states that five of the accounts belonged to foreign companies providing payment services to foreign gambling operators without a licence in Norway and the remaining two accounts belonged to unlicensed gambling operators. All seven accounts were used for payment transactions to and from Norwegian online gamblers, falling under the scope of the Regulation.

The complainants have argued that it is likely that, in spite of the wording of the Blocking Decision only covering specific transactions, the Norwegian banks and other financial institutions would block all of the listed accounts in their entirety.

The Authority notes the following statement in the Blocking Decision (page 3, fifth paragraph): “*The foreign payment providers with which we have had a dialogue have not informed us of any other types of business in Norway that will be affected. The Gaming Authority considers it to be very unlikely that the decision will affect other types of activities than payments of stakes and prizes to and from illegal gambling operators*”.<sup>9</sup>

The Authority also notes that, similar to the actions taken prior to the Blocking Letter, the Norwegian authorities gave notice to the relevant service providers, allowing them to arrange their activity so that no legal activity would be affected: Before issuing the Blocking Decision, the Gaming Authority informed the relevant payment service providers about the applicable legal framework and encouraged them to put in place measures that would separate transactions related to non-licensed gambling activities from other transactions. According to the Blocking Decision (page 2), several companies informed the Gaming Authority that, following the letter, they had taken measures to cease all payment transactions related to non-licensed gambling.

Furthermore, with regard to three service providers, the Blocking Decision was subsequently repealed following the adoption by those providers of measures preventing transactions to and from non-licensed gambling operators.<sup>10</sup>

Thus, according to the information provided to the Authority, it appears that, in addition to explicitly restricting the Blocking Decision to transactions related to non-licensed gambling, the Norwegian authorities have also taken measures to prevent that other transactions than those prohibited under the Regulation would be subject to a blocking measure.

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<sup>9</sup> Unofficial translation by the Authority. The original version read: “*De utenlandske betalingsleverandørene vi har hatt dialog med har ikke gitt uttrykk for at de har en annen type virksomhet i Norge som kan bli rammet. Lotteritilsynet mener sannsynligheten er svært liten for at vedtaket vil ramme annet enn betalingsformidling av innskudd og gevinst til og fra ulovlige pengespill*”.

<sup>10</sup> Page 1 of the Lottery Appeals Board’s decision of 29 November 2017 (Doc No 889163).

The information provided to the Authority does not give reason to conclude that Norwegian banks and other financial institutions went beyond their obligations under the Regulation and the Blocking Decision. Furthermore, the Authority has found no grounds for stating that payment service providers were blocked from providing payment services related to other activities than those prohibited under Norwegian law.

In light of the above, the Norwegian authorities' actions appear to be proportionate, especially by including preventive measures to ensure that the restrictive effect of the payment transaction ban does not go further than what is necessary and permitted under EEA law.

On this basis and in light of the Authority's previous finding that the Payment Transaction Ban complies with EEA law, the Authority considers the enforcement and practice of the Norwegian rules not to be in breach of EEA law.

By letter dated 12 June 2019, the Internal Market Affairs Directorate of the Authority informed the complainants of its intention to propose to the Authority that the case be closed. The complainants were invited to submit any observations on the Directorate's assessment of the complaint or present any new information by 12 July 2019. After a request for an extension of the deadline to reply, a new date was set for 15 August 2019.

By letter dated 15 August 2019 (Doc No 1083670), the complainants submitted their reply. Reference was *inter alia* made to the information provided in their letter dated 29 May 2019 and the amendments made to the Regulation, in particular the scope of the payment transaction ban. It was stated that the complaint should be understood as also including the payment transaction ban itself, not merely the enforcement.

The letter led the Authority to re-examine its assessment of the framework and the enforcement thereof, and to expand on its reasoning in order to address the additional concerns raised by the complainants, as outlined in the assessment above. However, the complainants' submissions have not led the Authority to alter the preliminary conclusions set out by its Internal Market Affairs Directorate in its letter dated 12 June 2019.

As regards the adopted amendments to the payment transaction ban, which entered into force on 1 January 2020, the Authority notes that these aim at clarifying the obligation for payment service providers under the Regulation and at closing loopholes that have been misused in order to circumvent the payment transaction ban. They are designed to make the current system more efficient and further strengthen its suitability for achieving the objective sought. Furthermore, the amendments are consistent with the general system laid down by the payment transaction ban, as required under EEA law.<sup>11</sup>

For the sake of completeness, the Authority notes that the Norwegian Government notified these legislative amendments to the Authority, as prescribed by *Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations*<sup>12</sup>. In the context of that notification process, dealt with in Case No 82170, the Authority has not identified any issues of EEA law that would require looking into the matter further.

In light of the above, there are no grounds for pursuing the case further.

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<sup>11</sup> E-1/06 *Gaming Machines* [2007] EFTA Ct. Rep. 8, paragraph 43.

<sup>12</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37), incorporated into EEA Agreement at point 1 in Chapter XIX of Annex II by Decision of the EEA Joint Committee No 146/1999 of 5 November 1999.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with the Payment Services Directive and Articles 36 and 40 of the EEA Agreement is hereby closed.

For the EFTA Surveillance Authority

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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*