

EFTA Surveillance Authority
v/ Avenue des Arts 19H
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COMPLAINT CONCERNING THE APPLICATION OF THE NORWEGIAN PAYMENT TRANSACTION BAN

1. INTRODUCTION

- (1) On behalf of the Norwegian Trade Association for Online Gaming¹ (“**NBO**”) we hereby issue an Internal Market complaint to the EFTA Surveillance Authority (“**ESA**”) against Norway. The basis for the complaint is the application of the Norwegian Payment Transaction Ban (the “**PTB**”) requiring Norwegian banks and financial institutions to block payment transactions to and from online gambling providers not holding a Norwegian licence.
- (2) In this complaint, NBO will demonstrate how the application of the PTB goes far beyond its intended scope and is incompatible with EEA law. The widened application of the PTB covers legal transactions to and from undertakings established in other EEA States, including legal gambling transactions and non-gambling related transactions.
- (3) In summary, the PTB mainly affects:
 - (i) Norwegian customers:
 - (a) The application of the PTB hinders the customer’s access to legal gambling services, both when the customer is physically present abroad in other EEA States, and when the customer makes use of online gambling services not targeting the Norwegian market.
 - (b) The application of the PTB hinders the customer’s access to other legal services provided by gambling providers, such as hotel and restaurant services.

¹ In Norwegian: Norsk Bransjeforening for Onlinespill

- (c) The application of the PTB hinders the customer's access to other legal services provided by third parties, such as the use of eWallets and various other financial services.
 - (ii) Gambling providers established in other EEA States that are not targeting the Norwegian market:
 - (a) The application of the PTB hinders the provision of legal gambling services to Norwegian customers, both when the gambling services are provided physically abroad and when these services are provided online but do not target the Norwegian market.
 - (b) The application of the PTB hinders the provision of other legal services to Norwegian customers, such as hotel and restaurant services.
 - (c) The application of the PTB hinders foreign gambling providers' salary payments to Norwegian employees.
 - (iii) Payment service providers established in other EEA States that are not subjected to Norwegian law:
 - (a) The application of the PTB hinders payment service providers established in other EEA States from offering their services to Norwegian customers.
 - (b) The application of the PTB hinders eMoney providers and other providers of financial services established in other EEA States from offering their services to Norwegian customers.
 - (iv) Crypto currency providers established in other EEA States that are not subjected to Norwegian law:
 - (a) The application of the PTB hinders providers of crypto currency exchange platforms established in other EEA States from offering their services to Norwegian customers.
 - (b) The application of the PTB hinders providers of crypto currency trading platforms established in other EEA States from offering their services to Norwegian customers.
 - (c) The application of the PTB hinders providers of crypto currency wallets and other custodial and administrative services established in other EEA States from offering their services to Norwegian customers.
- (4) Even though none of the transactions mentioned in the list above falls under the scope of the PTB, holders of Norwegian bank accounts or credit cards are effectively hindered from making use of these services, and providers established in other EEA States are equally hindered from providing said services to Norwegian customers.
- (5) In the following, the Norwegian regulation of gambling services and the scope of the PTB is explained in section 2. Relevant EEA Law will be presented in section 3. Then, in sections 4 to 6, we demonstrate the implications of the widened application of the PTB viewed from the perspective of (i) the Norwegian customer, (ii) gambling providers established in other EEA

States that are not targeting the Norwegian market, (iii) payment service providers established in other EEA States that are not subjected to the Norwegian gaming regulation, and (iv) crypto currency providers established in other EEA States that are not subjected to Norwegian gaming regulation. Subsequently, in section 7, we make some comments to ESAs assessments of the PTB in earlier complaints before the concluding remarks are presented in section 8.

- (6) Against this background, NBO argues that the Norwegian authorities apply the PTB contrary to its obligations pursuant to EEA law and asks that ESA takes appropriate action to secure that the application of the PTB is brought in line with EEA law. NBO remains at ESA's disposal should there be any questions to this complaint or requests for any additional information.

2. FACTUAL DESCRIPTION OF THE PAYMENT TRANSACTION BAN

2.1 The Norwegian Gaming Regulations

- (7) In Norway, games of chance are regulated by the Gaming Act² and the Gaming Regulation³. The Gaming Act establishes a system of exclusive licences under which the organization or promotion of games of chance is prohibited unless a licence for that purpose has been issued, and for that reason, the chosen model for regulating gambling services in Norway is often referred to as an "exclusive rights model".
- (8) The Gaming Act imposes a general prohibition against offering⁴ and marketing⁵ gambling services targeting the Norwegian market without a licence issued by the Norwegian authorities. The state-owned operator Norsk Tipping AS is provided an exclusive licence to offer lottery, betting and casino services,⁶ and the non-profit making commercial foundation Stiftelsen Norsk Rikstoto is provided an exclusive licence to offer horse betting services.⁷
- (9) Thus, pursuant to the Gaming Act, a Norwegian licence is required in two scenarios: (i) if an operator is established in Norway and offers gambling services, and (ii) if an operator established in another EEA State targets its gambling services at the Norwegian market. If a gambling provider provides its services without a licence where it is required, it will act in breach with the general prohibition established by Section 4 of the Gaming Act. The Gaming Act does not impose any restrictions on the Norwegian customers right to make use of unlicensed gambling services.
- (10) Against this background, the Norwegian gaming authorities has consistently held that Norwegian customers can legally access the services of gambling providers established in other EEA States,⁸ and the Norwegian Gaming Authority ("NGA") has consistently held that gambling providers established in other EEA States can legally accept Norwegian customers as long as the operator does not target the Norwegian market.⁹

² LOV-2022-03-18-12, Lov 18 mars 2022 nr. 12 om pengespill (pengespilloven) (the Gaming Act)

³ FOR-2022-11-17-1978, Forskrift 18 november 2022 nr. 1978 om pengespill (pengespillforskriften) (the Gaming Regulation)

⁴ See section 4 of the Gaming Act

⁵ See section 6 of the Gaming Act

⁶ See section 10 of the Gaming Act

⁷ See section 11 of the Gaming Act

⁸ See [Document no. 15:2759 \(2022-2023\)](#) (09.08.2023, by the Minister of Culture and Equality, Lubna Boby Jaffrey), [Document no. 15:269 \(2022-2023\)](#) (07.11.2022, by the Minister of Culture and Equality, Anette Trettebergstuen), and [Document no. 15:3002 \(2020-2021\)](#) (04.10.2021, by the Minister of Culture and Equality, Abid Raja)

⁹ See [the NGA's cease-and-desist order directed at Tranel International Limited](#) on 05.04.2019 and [the NGA's cease-and-desist order directed at BML Group Limited](#) on 04.03.2022, where the NGA do not list that gambling providers must reject Norwegian customers in order to ensure compliance with the Norwegian gaming regulations, see p. 7 of both decisions.

2.2 The Norwegian Payment Transaction Ban

2.2.1 Introduction of the PTB

- (11) The PTB was first introduced into Norwegian law on 1 June 2010, as a consequence of the existing prohibition on offering and marketing unlicensed gambling services in Norway. The PTB was viewed by the Ministry of Culture and Church Affairs as an ancillary restriction and not a new restriction, therefore not requiring a separate justification.¹⁰
- (12) In the preparatory works, the Norwegian legislators noted that the purpose of the PTB was to clarify what constituted an unlawful facilitation of gambling services in Norway.¹¹ It was further underlined that the PTB was not considered a new restriction, but a measure intended to enforce the underlying restriction requiring a licence to offer gambling services on the Norwegian market.¹² As such, the PTB was introduced as an ancillary restriction in the form of an enforcement mechanism, with an aim to ensure the enforcement of the exclusive rights model.
- (13) The Norwegian legislator stated in the preparatory works that the application of the PTB should apply irrespective of whether the gambling service in question targets the Norwegian market, implying that the PTB also covers payment transactions to and from foreign gambling providers that do not target the Norwegian market.¹³ However, this statement conflicts with the presumption that the PTB is an ancillary restriction. If the PTB applies to transactions going to and from foreign operators that *do not* target the Norwegian market, it would widen the scope of the underlying prohibition and therefore require a separate justification.¹⁴
- (14) This concern was raised by both ESA and the European Commission (the “**Commission**”) before the PTB was adopted into Norwegian law. In the consultation process, ESA noted that:

¹⁰ See Ot.prp. nr. 80 (2007-2008) on p. 17 where the Ministry stated: “It is the view of the Ministry that the proposal on payment transaction ban for gambling services without a Norwegian licence is a consequence of and is connected to the existing prohibitions on offering, facilitating and marketing such services in Norway. Thus, the proposal does not entail a new restriction compared to the limitation that already follows from the requirement to operate gambling services in Norway” (office translation). *In Norwegian*: «Departementet legger til grunn at forslaget om forbud mot betalingsformidling for pengespill uten norsk tillatelse er en følge av og henger sammen med de eksisterende forbudene mot å avholde, formidle og markedsføre slike pengespill i Norge. Forslaget innebærer derfor ingen ny restriksjon i forhold til de begrensningene som allerede eksisterer gjennom kravet om norsk tillatelse for å drive pengespill her til lands.»

¹¹ See Ot.prp. nr. 80 (2007-2008) on p. 26 where the Ministry stated: “The Ministry underlines that the purpose of the proposal is to clarify what constitutes unlawful facilitation and arrangement of gambling in Norway by operators subjected to Norwegian law” (office translation). *In Norwegian*: «Departementet viser for øvrig til at formålet med forslaget er å klargjøre hva som anses som rettsstridig formidling og avholdelse av pengespill i Norge av aktører underlagt norsk lov.»

¹² See Ot.prp. nr. 80 (2007-2008) on p. 26 where the Ministry stated: “Pursuant to professor Sejersted’s assessment, the proposed specification of the payment transaction ban is not a new restriction in and of itself, but is a measure to realize the underlying requirement that offering gambling services on the Norwegian market requires a licence pursuant to Norwegian law” (office translation). *In Norwegian*: «Etter professor Sejersteds vurdering er den foreslåtte presiseringen av betalingsformidlingsforbudet ikke en ny restriksjon i seg selv, men et tiltak for å realisere det underliggende kravet om at tilbud av pengespill på det norske markedet krever tillatelse etter norsk rett.»

¹³ See Ot.prp. nr. 80 (2007-2008) on p. 19 where the Ministry stated: “Based on an overall assessment, the Ministry does not find reason to differentiate between gambling services that are directed at the Norwegian market or not, but rather that the ban applies to all gambling services that has an effect on the Norwegian territory by the request of Norwegian citizens to payment providers to facilitate the game by processing the payment” (office translation). *In Norwegian*: «Ut fra en helhetlig vurdering finner departementet at det ikke er grunnlag for å differensiere mellom ulike pengespill som er innrettet mot Norge eller ikke, men at forbudet får anvendelse på pengespill som har fått virkning i Norge ved at norske innbyggere har anmodet betalingsformidlere om å bistå ved gjennomføringen av spillet ved å yte betalingsformidling»

¹⁴ The Norwegian authorities has not, neither at the time of introducing the PTB nor at any later stage, justified that blocking all transactions going to and from foreign gambling providers is a proportionate restriction to achieve the legitimate aim of preventing harmful effects of gambling.

“In the opinion of the Authority the question can be raised whether the proposed prohibition will effectively prevent persons residing in Norway from making use of gambling services offered over the internet. As has been pointed out by Norwegian public bodies, a ban on the processing of payments from Norwegians source is not difficult to circumvent. Indeed, it cannot be excluded that gamblers will make use of other payment methods, such as foreign bank accounts or e-payments schemes, such as Paypal, to transfer funds to gambling services providers active in other States than Norway.”¹⁵

(15) Moreover, ESA noted that:

“Furthermore, holders of Norwegian bank accounts or credit cards will be prevented from making use of legal gambling services in States where they are physically present during travels. The Authority has not been presented with information demonstrating the necessity thereof.”¹⁶

(16) Thus, ESA was in 2008 of the opinion that the PTB should not hinder a holder of a Norwegian bank account to make use of (i) gambling services when the person is physically present in another country, and (ii) e-payment services which, in turn, could be used to pay for gambling services. As will be demonstrated in sections 4 and 6 below, the application of the PTB today, effectively hinders holders of Norwegian bank accounts to make use of services in both these cases.

(17) During the consultation period, the Commission also noted that there was a risk that the PTB could affect legal payments transactions such as transactions to and from gambling providers relating to other services than gambling services. The Commission was concerned that the PTB would be ineffective, disproportionate and go beyond what is necessary.¹⁷ As will be demonstrated in sections 4 and 5 below, the application of the PTB also hinders access to non-gambling related services provided by gambling providers established in other EEA States.

(18) Before going into the details of how the PTB is applied today, we will explain the current PTB and how its scope has been expanded to cover transactions going to and from third-party intermediaries that facilitate payments on behalf of foreign gambling providers that do not hold a Norwegian licence.

¹⁵ See “Comments by the EFTA Surveillance Authority to Norwegian notification 2008/9001” ([3448-469864 Comments by the EFTA Surveillance Authority to Norwegian.pdf](#)) on p. 2.

¹⁶ *Ibid.*, on p. 4.

¹⁷ See Ot.prp. nr. 80 (2007-2008) on p. 25 where the Ministry stated: “In the view of the Commission, there is also a risk that the proposed regulation goes beyond what is necessary to fight gambling related problems, because the regulation may affect payments for other services connected to gambling, for example payments from foreign gambling providers to scientists, legal counsel etc. in Norway. Since the Norwegian court’s decision in Ladbroke’s lawsuit against the Norwegian Government is not decided, the Commission does not have facts to conclude whether the Norwegian gaming regulation is consistent. The Commission assumes, against this background, that the proposed regulation could be ineffective, disproportionate and go beyond what is necessary to achieve the legitimate aims of the regulation” (office translation). *In Norwegian*: «Etter Kommisjonens syn er det også en risiko for at den foreslåtte reguleringen går lenger enn det som er nødvendig for å bekjempe pengespillproblemer, fordi reguleringen kan ramme betaling for andre tjenester knyttet til pengespill, som for eksempel betaling fra utenlandske pengespillselskap til forskere, juridiske rådgivere mv. i Norge. Siden norske domstolers avgjørelse i Ladbrokes' søksmål mot norske myndigheter ikke foreligger har Kommisjonen heller ikke fakta som kan underbygge om den norske pengespillreguleringen er konsistent. Kommisjonen antar på bakgrunn av det anførte at den foreslåtte reguleringen kan være ineffektiv, disproportjonal og gå lenger enn det som er nødvendig for å nå de legitime målene med reguleringen.»

2.2.2 The current legislation on the PTB

(19) Section 5 of the Gaming Act reads as follows:

“It is prohibited to facilitate payment transactions by deposits to and winnings from gambling services that do not have the necessary permissions pursuant to this act.”
(office translation)¹⁸

(20) The prohibition in Section 5 is a continuance of the PTB as it was introduced in 2010, and pursuant to the preparatory works, it applies to Norwegian banks and financial institutions.¹⁹ Payment providers established in other States, are not subjected to the Norwegian gaming regulations and the PTB.

(21) The scope of the PTB also follows from the first paragraph of Section 96 of the Gaming Regulation, which reads:

“Undertakings that offer payment services in Norway, shall block payment transactions which the undertaking knows to be deposits to or winnings from a gambling service that do not have permission in Norway. This applies, inter alia, if the transaction is marked with the merchant code for gambling, if the account holder itself informs that the transaction is linked to gambling services without permission, if the Norwegian Gambling Authority has issued an order to block the transaction pursuant to Section 97, or where the banks own investigation uncovers that the transaction is a deposit to or winnings from a gambling service that do not have permission in Norway” (office translation).²⁰

(22) Norwegian banks and financial institutions are obligated to block payment transactions not only to and from gambling providers that do not hold a Norwegian licence, but also payment transactions going to and from third-party intermediaries that facilitate payments on behalf of such gambling providers.²¹ In the current legislation, this obligation follows from the second paragraph of Section 96 of the Gaming Regulation, which reads:

¹⁸ *In Norwegian*: «Det er forbudt å formidle betalingstransaksjoner ved innskudd til og utbetaling fra pengespill som ikke har nødvendig tillatelse etter denne loven.»

¹⁹ See Ot.prp.nr.80 (2007-2008) on p. 8 where the Ministry stated: “This clarification of the provisions of the Lottery Act, the Gaming act and the Totalizator Act will affect *Norwegian* credit card providers, financial institutions, eMoney providers, redeemers and other undertakings that are *obligated to act in accordance with Norwegian laws* and that assist in the facilitation of payments from gambling services and to players in Norway” (office translation and our italicization). In Norwegian: «Denne presiseringen av bestemmelsene i lotteriloven og pengespilloven og av straffebestemmelsen i totalisatorloven vil berøre *norske* kredittkortselskap, finansieringsinstitusjoner, e-pengeforetak, innløserer og andre virksomheter *som er forpliktet til å følge norsk regelverk* og som bistår i overføring av betaling for penge-spill fra og til spillere i Norge» (our italicization)

²⁰ *In Norwegian*: «Foretak som yter betalingstjenester i Norge, skal stanse betalingstransaksjoner som foretaket er kjent med at utgjør innskudd til eller utbetaling fra pengespill som ikke har tillatelse i Norge. Dette gjelder blant annet dersom transaksjonen er merket med brukerstedskode for pengespill, dersom innehaver av kontoen selv har opplyst om at transaksjonen er knyttet til pengespill uten tillatelse, dersom Lotteritilsynet har gitt foretaket pålegg om å stanse transaksjonen etter § 97 eller der bankens egne undersøkelser avdekker at transaksjonen utgjør innskudd til eller utbetaling fra pengespill som ikke har tillatelse i Norge.»

²¹ This was clarified in an amendment to the legislation on 1 January 2020, see PRE-2019-05-10-593, section 3, where it is stated that “In order to clarify that the payment transaction ban also covers other situations than where a transaction goes directly to or from a gambling provider without Norwegian permission, it was proposed in the consultation paper that section 4, second paragraph should clarify that the Norwegian Gaming Authority can decide to block transactions to and from payment providers that facilitate transactions on behalf of gambling providers” (office translation). *In Norwegian*: «For å tydeliggjøre at betalingsformidlingsforbudet også gjelder i andre tilfeller enn der hvor det skjer en transaksjon direkte til eller fra et pengespillselskap uten norsk tillatelse, ble det i høringsnotatet foreslått at det i § 4 annet ledd presiseres at Lotteritilsynet har hjemmel til å vedta å avvise transaksjoner til og fra betalingsformidlere som formidler transaksjoner på vegne av pengespillselskap.»

“The obligation to block payment transactions pursuant to the first paragraph applies to payment transactions to and from gambling providers that do not have permission in Norway and payment transactions to and from other undertakings that facilitate payment transactions on behalf of gambling providers that do not have permission in Norway” (office translation).²²

- (23) However, please note that, neither the preparatory works²³ nor the consultation paper published in connection with the current Gaming Regulation²⁴ clarify how the concept of facilitating payments “on behalf of” a gambling provider shall be understood.
- (24) Against this background, Norwegian banks and financial institutions are obligated to block payment transactions to and from third-party intermediaries that facilitate payments on behalf of unlicensed gambling providers, in the following situations:
- (i) The transaction is marked with the Merchant Category Code (“**MCC**”) for gambling.
 - (ii) The account holder itself informs the Norwegian payment provider that the transaction is linked to gambling services without a Norwegian licence.
 - (iii) The Norwegian Gaming Authority (“**NGA**”) has issued a decision pursuant to section 97 ordering Norwegian payment providers to block the transactions.
 - (iv) The Norwegian payment provider has initiated its own investigation and uncovered that the transaction is made to or from a gambling service without a Norwegian licence.
- (25) Pursuant to Section 97²⁵ of the Gaming Act, the NGA can issue decisions requiring Norwegian payment providers to block payment transactions to and from gambling providers or intermediaries acting on its behalf, if the transaction is identified in one of the following ways:
- (i) By account number, either to the gambling provider or the intermediary facilitating payments on its behalf.

²² *In Norwegian*: «Plikten til å stanse betalingstransaksjoner etter første ledd gjelder både betalingstransaksjoner til og fra pengespillselskaper som ikke har tillatelse i Norge og betalingstransaksjoner til og fra andre foretak som formidler betalingstransaksjoner på vegne av pengespillselskaper som ikke har tillatelse i Norge.»

²³ See Prop. 220 L (2020-2021), section 20, comments to § 5.

²⁴ See [the consultation paper](#), section 10.9.2.

²⁵ *In Norwegian*: «Lotteritilsynet kan i enkeltvedtak pålegge foretak som yter betalingstjenester ved innskudd til og utbetaling fra pengespill som ikke har tillatelse i Norge, å avvise betalingstransaksjoner identifisert på en av følgende måter

1. kontonummer til pengespillselskap som gjennomfører betalingstransaksjoner eller andre foretak som gjennomfører betalingstransaksjoner på vegne av pengespillselskapet
2. navn på pengespillselskap som gjennomfører betalingstransaksjoner eller andre foretak som gjennomfører betalingstransaksjoner på vegne av pengespillselskapet.

Lotteritilsynet kan i enkeltvedtak gi pålegg etter første ledd nr. 2 når

- a. Lotteritilsynet har fattet vedtak om å avvise betalingstransaksjoner identifisert med kontonummer, og det samme foretaket som eier kontonummeret sender betalingstransaksjoner ved innskudd til og utbetaling fra pengespill fra andre kontonummer enn beskrevet i vedtaket
- b. foretaket bruker annen brukerstedskode enn pengespill for betalingstransaksjoner med betalingskort, men gjennomfører likevel betalingstransaksjoner ved innskudd til og utbetaling fra pengespill.

Lotteritilsynet er ansvarlig for entydig identifisering av foretakene i første ledd nr. 1 og 2.»

- (ii) By name, either of the gambling provider or the intermediary facilitating payments on its behalf. This option is only available if:
 - (a) The NGA has issued a decision to block payments identified by account number, and the same undertaking that owns the account number sends payments through other account numbers, or
 - (b) The undertaking does not use the MCC for gambling services but still carries out payment transactions to and from gambling services.
- (26) Pursuant to Section 98²⁶ of the Gaming Act, Norwegian payment providers have a duty to investigate transactions, including a review of information about account number, merchant ID, acquirer ID, transaction volume, and the time period for the relevant transactions, in the following scenarios:
 - (i) The NGA has issued a decision concerning a gambling provider or an intermediary acting on its behalf.
 - (ii) The NGA has informed the Norwegian payment providers about a gambling provider or an intermediary acting on its behalf.
- (27) The purpose of this section, was to provide an outline of the relevant provision of the national legislation, detailing the scope of the PTB. In the following section 3, we will present the relevant EEA Law. The purpose of section 3 is to illustrate that the application of the PTB entails new restriction which, under EEA Law, requires a separate justification, and furthermore that the PTB, as it is applied today, cannot be justified under EEA Law.

3. THE RESTRICTION MUST BE JUSTIFIED PURUSANT TO EEA LAW

3.1 The application of PTB entails a restriction that requires a separate justification

- (28) As mentioned above, the PTB was introduced as an ancillary restriction in 2010 and, for that reason, the Norwegian Government was of the opinion that the restriction did not require a separate justification.²⁷ The conclusion was reached by reference to an assessment made by professor Sejersted²⁸ which was largely based on the EFTA Court's judgement in E-3/06 *Ladbrokes*.
- (29) When the PTB was amended in 2020, and it was specified that Norwegian banks and financial institutions are obligated to block not only payment transactions going to and from unlicensed gambling providers directly, but also intermediaries acting on their behalf. However, no new assessment of EEA law was made by reference to how it was merely a specification of the

²⁶ *In Norwegian*: «Foretak som yter betalingstjenester i Norge skal undersøke alle betalingstransaksjoner til og fra pengespillselskaper og betalingsformidlingsforetak som Lotteritilsynet har sendt vedtak om eller som Lotteritilsynet har informert foretakene om at formidler pengespill uten tillatelse i Norge. Lotteritilsynet skal ha oppdatert oversikt over slike vedtak på sitt nettsted.

Lotteritilsynet kan på fastsatt skjema kreve at foretak som yter betalingstjenester i Norge gir opplysninger om identifiserte pengespillselskaper og foretak som gjennomfører betalingstransaksjoner på vegne av pengespillselskaper. Opplysningsplikten omfatter opplysninger som foretaket har om kontonummer, brukerstedskode, Merchant ID, Acquirer ID, organisasjonsnummer, transaksjonsvolum og tidsperiode for transaksjonene, men ikke personopplysninger om enkelttransaksjoner.»

²⁷ Based on the principle *accessio credit principali* or *accessorium sequitur principale*, see e.g., C-6/01 *Anomar* paragraph 53.

²⁸ Assessment by dr. juris Fredrik Sejersted «Forbud mot formidling av betalingstjenester til pengespill som ikke lovlig kan tilbys i Norge – en EØS-rettslig vurdering», see Exhibit 1

existing prohibition and, thus, the assessment of EEA law made in 2010 was still applicable.²⁹ Similarly, when the PTB was continued in the new Gaming Act, the legislator underlined that the interpretation of the prohibition should not change.³⁰ Thus, the application of the PTB must be viewed in light of its intended scope as it was adopted into law, and the reasoning provided in 2010.

- (30) In *Ladbroke's*, the Court held that a prohibition to ban the act of marketing gambling services was ancillary to the ban of offering such services. However, it should be noted that the CJEU has later viewed, on several occasions, a marketing ban as a separate restriction.³¹ Moreover, while the CJEU has accepted that the mere enforcement of existing legislation can be regarded as an ancillary restriction,³² it has held that a subsequent sanctioning of the legislation is a separate restriction.³³
- (31) Against this background, we are of the opinion that the PTB cannot be viewed as an ancillary restriction. If the PTB is to be viewed as an ancillary restriction not requiring a separate justification, it must entail a mere enforcement of the existing legislation. However, as will be demonstrated in sections 4 to 6 below, the PTB is applied far beyond the scope of the underlying prohibition on offering and marketing gambling services that *target the Norwegian market*. Rendering the question of whether widening the scope of the PTB and blocking legal transactions is a proportionate restriction to achieve the legitimate aims sought pursued by the Norwegian gaming regulations.

3.2 The widened application of the PTB cannot be justified pursuant to EEA law

- (32) To clarify, the purpose of this complaint is not to challenge the legality of the Norwegian exclusive rights model, nor is it to challenge the legality of introducing an enforcement mechanism that allows Norwegian authorities to block payment transactions going to and from gambling providers that are noncompliant with Norwegian law, i.e., that offer gambling services targeting the Norwegian market. This complaint regards the *widened application* of the PTB, which affects:
- (iii) transactions to and from gambling providers that do not target the Norwegian market,
 - (iv) transactions to and from gambling providers that offer non-gambling related services, and

²⁹ See PRE-2019-05-10-593, section 8, where it is stated that "Several consultation bodies have questioned an assessment of the proposal pursuant to EEA law. In this regard, it is noted that the relationship with EEA law was closely assessed when the original regulation was carried out in 2010, and this proposal mainly specify the duties that already follow from the original regulation" (office translation). *In Norwegian*: «Flere høringsinstanser har etterlyst en vurdering av forslaget opp mot EØS-retten. Det påpekes i denne sammenheng at forholdet til EØS-retten ble nøye vurdert i forbindelse med gjennomføringen av den opprinnelige forskriften av 2010, og at forslaget som behandles her i hovedsak bare presiserer de plikter som allerede følger av den opprinnelige forskriften.»

³⁰ See Prop. 220 L (2020-2021) on section 20 comments to § 5, where it is stated: "The provision is a continuance of the payment blocking measure. The Ministry does not amend the interpretation of the payment transaction ban, and assumes that case law and administrative practices linked to the application of the existing prohibition in the three gaming laws will be relevant for the interpretation of the proposal section 5" (office translation). *In Norwegian*: «Bestemmelsen viderefører det gjeldende betalingsformidlingsforbudet. Departementet legger ikke opp til en endring av tolkningen av betalingsformidlingsforbudet, og legger til grunn at praksis knyttet til dagens forbud i de tre lovene på pengespillfeltet vil være relevant for tolkningen av lovforslaget § 5.»

³¹ See, to that effect, joined cases C-447/08 og C-448/08 *Sjöberg og Gerdin* paragraph 33-34, C-176/11 *HIT LARIX* paragraph 17 and C-695/21 *Recreatieprojecten Zeeland* paragraph 18.

³² See, to that effect, C-258/08 *Ladbroke's Betting* paragraph 50.

³³ See, to that effect, C-231/20 *Landespolizeidirektion Steiermark* paragraph 27 and the sources cited there.

- (v) transactions to and from third parties that offer non-gambling related services
- (33) Against this background, the application of the PTB affects several of the fundamental freedoms as enshrined in the EEA Agreement, including the freedom to provide services, the freedom of establishment, and the free movement of capital, depending on from what perspective the restriction is viewed but, in all instances, it represents a restriction that cannot be justified pursuant to EEA law.
- (34) It is the Norwegian customer's access to services from an undertaking established in another country that is primarily affected by the application of the PTB. As the examples will demonstrate, the Norwegian customer is effectively hindered from accessing both gambling services and other non-gambling related services. As the right to both receive and to provide services are protected by Article 36 of the EEA Agreement, it is our view that the legality of the restriction should be considered in light of that article.³⁴
- (35) Viewed from the perspective of the Norwegian customer and the gambling provider established in another EEA State, the application of PTB hinders the participation in and the provision of legal gambling services and, thus, represents a restriction in the fundamental freedom to provide services as provided by Article 36 EEA. We also note that the application of the PTB renders it less attractive for providers of gambling services, payment services, and crypto currency exchange services to establish in Norway, which could indicate that an assessment should also be made pursuant to Article 31 EEA.
- (36) As explained in section 2.2 above, the purpose of the PTB was to "effectuate the prohibition of facilitating gambling services" (office translation).³⁵ The underlying aims of the prohibition of offering gambling services directed at the Norwegian market without a licence, are to prevent harmful effects of gambling and combat financial crime, to ensure that the facilitation of gambling services is conducted in a responsible manner, and to limit private profit.³⁶
- (37) In this complaint, NBO argues that the widened application of the PTB, i.e., the blocking of payment transactions *other than* those going to and from gambling providers targeting the Norwegian market or through intermediaries acting on behalf of such gambling providers, represents a disproportionate restriction. Such a restrictive measure is neither suitable nor necessary to achieve the legitimate aims claimed to be pursued by the Norwegian gaming regulations. In this complaint, we do not consider whether the Norwegian gaming regulations or PTB fulfill the requirement of pursuing a legitimate aim, and thus solely focus on the fact that the widened application of PTB is a disproportionate restriction.
- (38) It is against this background that NBO will review examples of how legal transactions are blocked by reference to the PTB, in sections 4 to 6 in the following, demonstrating that the application of the prohibition is incompatible with EEA law. As it is explained in section 2.2.2 above, it is the Norwegian Government, by the NGA, who is responsible for enforcing the PTB even though Norwegian banks and financial institutions are the ones refusing to process the

³⁴ Pursuant to *the predominant consideration criterion*

³⁵ See Ot.prp. nr. 80 (2007-2008) on p. 18. *In Norwegian*: «Forbrukerhensyn taler for at norske myndigheter effektiviserer forbudet mot formidling av pengespill som ikke har norsk tillatelse, for å begrense spill på nettsted hvor norske myndigheter ikke kan sikre at forbrukernes interesser ivaretas.»

³⁶ See Section 1 of the Gaming Act. *In Norwegian*: «Lovens formål er a) å forebygge spilleproblemer og andre negative konsekvenser av pengespill, b) å sikre at pengespill gjennomføres på en ansvarlig og trygg måte, c) å legge til rette for at overskudd fra pengespill går til ikke-fortjenestebaserte formål.»

payment transactions. The widened scope and application of the PTB is attributable to the Norwegian Government's actions and must be assessed accordingly.

4. IMPLICATIONS FOR NORWEGIAN CUSTOMERS

4.1 Introduction

- (39) First and foremost, the application of the PTB largely hinders holders of Norwegian bank accounts from making use of a variety of legal services. In this section, we will include some examples that are currently known to NBO and that illustrate how the PTB is given a wider scope than what can be considered suitable and necessary to achieve the aims sought pursued.
- (40) The Norwegian Government has consistently held that Norwegian citizens can legally access the services of gambling providers established in other EEA States, regardless of whether the foreign gambling services are offered legally.³⁷ Holders of Norwegian bank accounts are however hindered from making use of not only legal gambling services, but also other services, due to a widened application of the PTB. This will be demonstrated in the following.
- (41) Furthermore, the application of the PTB affects Norwegian citizens right to possess property that is lawfully theirs, which is protected by Section 105 of the Norwegian Constitution and Article 1 of Protocol 1 of the European Charter of Human Rights ("**ECHR P1-1**"). That is particularly true in the event that a Norwegian customer is not able to access its legally obtained winnings, due to the application PTB, which cannot be considered a proportionate intervention.³⁸³⁹ When assessing whether the interpretation and application of the PTB is compatible with Article 36 EEA, it must also be ensured that it does not conflict with fundamental rights protected by EEA law, which can also be derived from the provisions of the ECHR.⁴⁰
- (42) In this regard, it should be noted that the Norwegian Government has, at no point in time, assessed the legality of the PTB in light of Norway's obligations pursuant to the ECHR. Moreover, the Norwegian Government expresses no willingness to assist Norwegian citizens who are unable to access their lawfully obtained winnings due to the application of the PTB.⁴¹

³⁷ See footnote no. 8.

³⁸ An infringement on the right to protection of property, may be legal if there is a "a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State", see, to that effect, case 1513/03, *Draon v France* (2005) paragraph 78.

³⁹ By comparison, the Constitutional Committee of Finland, concluded that introducing a payment transaction ban similar to the one implemented in Norway, would be unconstitutional as it represented a disproportionate intervention in the right to possess property, see GrUU 46/2021 rd, paragraphs 20 to 23, where it was, inter alia, highlighted that: "The player have obtained its potential winnings legally. The Committee considers that a blocking could constitute a significant intervention in the right to possess property as it could hinder that possessions legally obtained by a person is transferred to him or her" (office translation). In Swedish: "Spelaren har således fått sin eventuella vinst lagligen. Utskottet anser att en spärr kan anses vara ett betydande ingrepp i egendomsskyddet, eftersom den, om äganderätten kvarstår i sig, kan hindra att de tillgångar som personen lagligen har tjänat in betalas till honom eller henne."

⁴⁰ See, to that effect, E-1/20 *Kerim* paragraph 43.

⁴¹ The [NGA states on its website](#) (updated 27.05.24) that "If you experience that you are unable to access your winnings, we cannot help you... If the banks stop the payment of your winnings or your deposit, it means that they act in accordance with Norwegian law. Our advise is that you do not gamble with these operators." (office translation). *In Norwegian*: «Dersom du opplever å ikke få gevinsten din kan vi ikke hjelpe deg... Dersom bankene stopper utbetalingen din eller innskuddet ditt betyr det at de følger norsk lov. Vårt råd er at du ikke spiller hos disse selskapene.»

Additionally, the Norwegian Government requires tax payments, even though the Norwegian citizen cannot access its winnings.⁴²

4.2 The PTB hinders access to legal gambling services

4.2.1 The customer is physically present abroad

(43) While it has been explicitly stated by the Minister of Culture that the PTB does not prevent the facilitation of payment transactions that are requested while the holder of the bank account is physically present abroad,⁴³ the government has underlined that it “is up to the banks themselves to consider whether they wish to implement a solution that would let such payment transactions through” the blocking mechanisms implemented.⁴⁴

(44) There are numerous examples of Norwegian customers who are hindered from making use of gambling services while abroad. Notably, the Norwegian bank of a participant in a poker tournament on Malta, refused to accept a transfer of his NOK 700 000 winnings by reference to the PTB. The customer ended up having to travel back to Malta to collect his winnings in cash, and to physically transport it to Norway in a suitcase.⁴⁵ This example is illustrative of how the PTB is given a wider scope than intended, going beyond what is suitable and necessary to achieve the primary aim of reducing gambling related harm.

4.2.2 The customer makes use of online gambling services not targeting Norway

(45) Even though the NGA has consistently held that gambling providers established in other EEA States can legally accept Norwegian customers as long as the operator does not target the Norwegian market,⁴⁶ it still applies the PTB on transactions going to and from such operators.⁴⁷

(46) Such an application of the PTB hinders Norwegian citizens from “cyber travelling” to a website offered by a gambling provider established in another EEA State that do not target its services

⁴² The winnings are taxable either pursuant to the Norwegian Tax Code (*in Norwegian*: skatteloven), Section 5-1 cf. Section 5-30 or Section 5-50 dependent on whether the player operates commercially or not (*In Norwegian*: som næringsdrivende) or not. What legal basis should be applied for taxation of winnings from gambling is assessed in further detail in [LB-2014-91404 - UTV-2015-1403 - Lovdata Pro](#), [SKNS1-2019-149 - Lovdata Pro](#) and [SKNS1-2017-112 - Lovdata Pro](#). Winnings from games of chance will normally not be received in line of business and will, pursuant to Section 5-50, be taxable when the value exceeds NOK 10 000 and includes winnings from commercial operators located inside or outside of the EEA. Section 5-50 second paragraph letter b of the Tax Code provides an exception for games of chance that “correspond to” games that can legally be offered in Norway, *In Norwegian*: «pengespill og lotterier i en annen EØS-stat som godtgjøres å tilsvare de pengespill som lovlig kan tilbys i Norge, og som er underlagt offentlig tilsyn og kontroll i hjemstaten.». Due to the restrictive gaming regulation in Norway, this exemption will only apply in limited situations. See, to that effect, <https://lovdata.no/pro/#document/LGSIV/avgjorelse/lq-2015-162007>.

⁴³ See [Document no. 15:2759 \(2022-2023\)](#) (09.08.2023, by the Minister of Culture and Equality, Lubna Boby Jaffrey), where it is stated that: “Norwegian banks is, as a starting point, under an obligation to stop payment transactions linked to gambling services that do not have permission pursuant to the Norwegian Gaming Act. However, this does not apply to transactions linked to gambling services abroad if the payment card used is also physically present abroad during the transaction” (office translation). *In Norwegian*: «Norske banker plikter i utgangspunktet å stanse betalingstransaksjoner knyttet til pengespill som ikke har tillatelse etter den norske pengespiloven. Dette gjelder imidlertid ikke for transaksjoner tilknyttet til pengespill som foregår i utlandet, dersom betalingskortet som benyttes også er fysisk tilstedeværende i utlandet under transaksjonen.»

⁴⁴ *Ibid.* *In Norwegian*: «Det er imidlertid opp til bankene selv hvorvidt de ønsker å implementere en løsning for å slippe gjennom slike transaksjoner. Ofte blir slike transaksjoner med gevinster fra utenlandske kasinoer automatisk stoppet, fordi bankene ikke vet om pengene er vunnet fysisk eller ikke. Da må kunden dokumentere at pengene er vunnet fysisk, før banken kan vurdere saken.»

⁴⁵ See [Vant 700.000 i poker – Norge stopper pengene, Finansavisen](#) (25.07.23). see Exhibit 2

⁴⁶ See footnote 9.

⁴⁷ It was confirmed by the Minister of Culture and Equality, in [Document no. 15:537 \(2023-2024\)](#) (04.12.2023), that Norwegian banks and financial institutions are prohibited from facilitating payment transactions to and from online gambling providers even though the operator does not target its services at the Norwegian market.

at the Norwegian market. Norwegian citizens are hindered from freely accessing online services legally provided on the internal market, as will be further explained in section 5 below.

4.3 The PTB hinders access to other legal services provided by a gambling provider

(47) Due to how the PTB is applied even if the customer is physically located abroad, requests for payment transactions made by the holder of a Norwegian bank account are also blocked in the event that the foreign gambling provider provides other legal services than gambling services. E.g., the NBO is aware of Norwegian customers that have been hindered from paying its hotel or restaurant bills at casino hotels abroad, or that have been prevented from buying a drink at a casino in Malta or a coffee at a trotting track in Sweden. These are also illustrative examples of how the PTB is given a wider scope than intended, going beyond what is suitable and necessary to achieve the primary aim of reducing gambling related harm.

4.4 The PTB hinders access to other legal financial services provided by third parties

4.4.1 The PTB hinders the use of eMoney services and other payment services

(48) As is detailed in sections 6.3.1 and 6.3.2 below, holders of Norwegian bank accounts are prevented from accessing other legal services, such as e-payment services, provided by third parties established in other EEA States due to the application of the PTB.

(49) There are numerous examples of payment transactions requested by a Norwegian customer to a financial service provider established in another EEA State, that are blocked by reference to the PTB based on a suspicion that the money later will be used to gamble. In these situations, Norwegian customers are hindered from making use of a variety of financial services provided by third-party undertakings established in other EEA States, such as providers of eWallets and issuers of eMoney.

(50) As a consequence of the fact that Norwegian banks and financial institutions cannot ascertain whether a transaction is in fact gambling related, all transactions made to and from such providers will be blocked if decided by the NGA or the bank. Irrespective of whether the payment from the Norwegian customer later will be used for gambling services targeting the Norwegian market, this cannot justify blocking the first transaction directly to the third-party provider of financial services, particularly taking into account that it is for the customer to decide whether to keep the deposited money, e.g., in the eWallet, or use the money to purchase other services.

(51) This illustrates how the application of the PTB goes beyond its intended scope and hinders Norwegian citizens from freely accessing other legal services provided on the internal market. Moreover, it shows that the Norwegian Government applies the PTB contrary to the presumptions of ESA in 2008, which assumed that the PTB should not hinder the holder of a Norwegian bank account to make use of eMoney services and other financial services which, in turn, could be used to pay for gambling services. Such a restriction cannot be justified, particularly taking into account that (i) Norwegian citizens are not prohibited by Norwegian law to make use of gambling services not holding a Norwegian licence and (ii) that the PSPs established in other EEA States are not subject to the Norwegian gaming regulation.

4.4.2 The PTB hinders use of crypto asset services

(52) As is detailed in section 6.3.3 below, holders of Norwegian bank accounts are prevented from accessing other legal services, such as crypto asset trading platforms or crypto wallets, provided by third parties established in other EEA States due to the application of the PTB.

- (53) There are numerous examples of payment transactions requested by a Norwegian customer to, inter alia, a third-party provider of crypto asset services that are blocked by reference to the PTB based on a suspicion that the money later will be used to gamble. In these situations, Norwegian customers are hindered from making use of the crypto asset services.
- (54) Irrespective of whether the payment from the Norwegian customer later will be used for gambling services targeting the Norwegian market, this cannot justify blocking the first transaction coming directly to the third-party provider of financial services, particularly taking into account that it is for the customer to decide whether to keep the deposited money in crypto currency, trade it to another crypto currency, use the crypto as payment for other services, or use the crypto as payment for gambling services.
- (55) This illustrates how the application of the PTB goes far beyond its intended scope and hinders Norwegian citizens from freely accessing other legal services provided on the internal market. Such a restriction cannot be justified, particularly taking into account that (i) Norwegian citizens are not prohibited by Norwegian law to make use of gambling services not holding a Norwegian licence and (ii) that the PSPs established in other EEA States are not subject to the Norwegian gaming regulation.

5. IMPLICATIONS FOR FOREIGN GAMBLING PROVIDERS NOT TARGETING NORWAY

- (56) As explained in above, the Norwegian Government requires that Norwegian banks and financial institutions block payment transactions going to and from gambling providers, or its intermediaries, irrespective of whether the gambling provider in question targets the Norwegian market. Please see paragraph 45 above for additional explanations of the Norwegian Governments views regarding the applicability of the PTB in situations where a foreign gambling provider do not target the Norwegian market.
- (57) As it is explained in section 4, the interpretation and application of the PTB, unlawfully hinders:
- (i) The right of a gambling provider established in another EEA State to provide gambling services to Norwegian customers, both when the customer is physically present abroad and online, provided that the services are not targeting the Norwegian market, see section 4.2 above.
 - (ii) The right of a gambling provider established in another EEA State to provide non-gambling related services to Norwegian customers, particularly relevant when the customer is physically present abroad, see section 4.3 above.
- (58) Moreover, the NBO is aware of situations where Norwegian banks have blocked salary payments from a foreign gambling provider to its Norwegian employees.
- (59) By such an interpretation and application of the PTB, the Norwegian Government has in reality expanded the scope of the prohibition in Section 4 of the Gaming Act, rendering it illegal for all foreign gambling providers to accept Norwegian customers. That restriction is not justified by the Norwegian Government, and it cannot be considered justified, as it goes beyond what is suitable and necessary to achieve the legitimate aims sought pursued.

6. IMPLICATIONS FOR THIRD-PARTY FINANCIAL SERVICE PROVIDERS

6.1 The scope of the PTB

- (60) Banks and financial institutions established in other EEA States are not themselves subjected to the Gaming Act.⁴⁸ If such third-party financial service providers established in other states act “on behalf of” a gambling provider that offers services in violation of the Gaming Act, the Norwegian banks and financial institutions are obligated to block the transaction.⁴⁹
- (61) However, the NGA and the Norwegian banks and financial institutions do not limit the decisions to only block gambling related transactions made through a third-party intermediary. The reason for this is that Norwegian financial institutions are unable to ascertain whether a transaction in fact constitutes a gambling transaction unless the merchant code for gambling services is listed.⁵⁰ Therefore, as we will demonstrate in this section, other legal payment transactions going to or from third-party intermediaries are blocked, hindering Norwegian customers from accessing financial services in the internal market and financial service providers from offering its services to Norwegian customers.
- (62) The Norwegian legislator has acknowledged this challenge, but has stated that there is no need for Norwegian financial institutions to assert that the transaction made through third-party intermediaries is in fact made to or from gambling services, as the Norwegian financial institutions will fulfill its obligations if all transactions to the intermediary or account number in question are blocked.⁵¹ This illustrates the willingness of the Norwegian Government to block legal transactions, both related to gambling services and other services, going beyond what is necessary to achieve the legitimate aims sought pursued by the PTB.
- (63) The scope of services affected by the interpretation and application of the PTB is not known, as it has never been assessed by the Norwegian Government. However, multiple third-party providers of such services have filed complaints against the Norwegian Government. These cases will be included as examples in this complaint to demonstrate the variety of the legal services that are affected by the widened application of the PTB, demonstrating its incompatibility with EEA law.
- (64) Unless proof is provided that a specific payment transaction facilitated by a third-party intermediary is carried out on behalf of a gambling provider that targets the Norwegian market

⁴⁸ This follows clearly from the preparatory works, see Prop. 220 L (2020-2021) on section 8.4, where it is stated that “The parties obligated by the provision are Norwegian banks and financial institutions” (office translation). *In Norwegian*: «Pliktsubjektet etter bestemmelsen er norske banker og finansinstitusjoner.»

⁴⁹ See the explanation in section 2.2.2 above.

⁵⁰ Finance Norway (*In Norwegian*: Finans Norge), which is the trade and employers' association for the financial industry in Norway, underlined this in [its response to the consultation paper on the Gaming Act](#). *In Norwegian*: «Der det ikke gjelder korttransaksjoner med oppgitt brukerstedskode for pengespill har finansforetakene ikke mulighet til å skille transaksjoner som gjelder ulovlige pengespill fra andre transaksjoner. Basert på generelle opplysninger som følger en betalingstransaksjon kan et finansforetak i utgangspunktet ikke vite om en betalingstransaksjon gjelder betalingsformidling til ulovlig pengespill med mindre det er oppgitt brukerstedskode for pengespill.»

⁵¹ See the [consultation paper to the Gaming Regulation](#) on p. 96. *In Norwegian*: «Problemet oppstår imidlertid når pengespillselskaper bevisst benytter betalingsformidlere som er registrert med andre MCC-koder enn pengespill og som derfor ikke fanges opp av bankenes systemløsninger, og det ikke finnes annen informasjon som tyder på at selskapet eller kontonummeret formidler betaling til og fra pengespill uten tillatelse. I slike tilfeller vil det etter departementets syn ikke være praktisk mulig for bankene å foreta undersøker på enkelttransaksjonsnivå for å bekrefte eller avkrefte hvorvidt tilsynelatende lovlige transaksjoner stammer fra lovlig virksomhet. I slike tilfeller er det derfor tilstrekkelig at banken følger opp plikten til å undersøke eller stanse betalingstransaksjoner som Lotteritilsynet har sendt vedtak om at skal undersøkes eller stanses.»

without a licence, a decision to block payment transactions to and from third-party financial services providers is disproportionate for the reasons as set out below:

- (i) The third-party provider of financial services established in another EEA State is not subjected to the Gaming Act and the PTB, and is therefore not itself obligated to hinder payment transactions between Norwegian customers and gambling providers that do not hold a Norwegian licence.
- (ii) The NGA does not have the jurisdictional power to require that financial service providers established in other EEA States block payment transactions to and from gambling providers that do not hold a Norwegian licence.
- (iii) Viewed from the perspective of the third-party provider of financial services, it is obligated to carry out requests of payment transactions between a customer and a gambling provider,⁵² either pursuant to contract, national legislation, or EEA law. The third-party provider may not freely block requests for legal payment transactions based on the application of a legislative provision it is not subjected to.
- (iv) If the third-party provider of financial services does not act in accordance with the requirements put forth by the NGA, the consequence will be that Norwegian banks and financial institutions block all payment transactions going to and from the intermediary, hindering Norwegian customers from accessing and the third-party from providing the financial services in question.

(65) In the following we will demonstrate how the NGA by its interpretation and application of the PTB in reality has widened the scope of the prohibition, both considering what payment transactions shall be blocked and which undertakings are obligated to block them, significantly affecting third-party providers of financial services established in other EEA States.

6.2 Different types of third-party financial institutions impacted by the PTB

(66) The application of the PTB by the Norwegian Government, impacts many different financial institutions and service providers in the financial market. This includes, among others, crypto asset service providers ("**CASPs**"), electronic money providers ("**eMoney Providers**") and other payment service providers ("**PSPs**") established in other EEA States.

6.2.1 Payment Service Providers

(67) PSPs are a broader term for companies that facilitate electronic payments by connecting businesses, customers and banks in transactions, enabling the secure movement of funds, and are primarily regulated by Directive 2015/2366 on payment services ("**PSD2**"). Another important directive is Directive 2014/92/EU on payment accounts ("**PAD**"). While PSD2 regulates licensing, registration, third-party access and consumer rights, PAD covers the specific requirements which ensure that all consumers have a right of access to basic payment accounts.

(68) Different types of PSPs include third-party payments providers, i.e. account information service providers ("**AISPs**", e.g. Experian) and payment initiation service providers ("**PISPs**", e.g. Klarna), issuing banks (issuers of credit, debit or prepaid cards to consumers, e.g. Bank of America), merchant acquirers (processors of card payments on behalf of merchants, e.g. Nets),

⁵² Unless a national provision in the EEA State where it is established prohibits the facilitation of payment transactions to and from gambling providers.

payment gateways (acting as the interface between the merchant's website or point-of-sale system and the payments processor, e.g. AmazonPay) and payments processors (PSPs that handle the technical processing of transactions between customers, merchants and banks, e.g. PayPal).

- (69) As noted above, PSPs established in other EEA States are not bound by Norwegian law. They are, on the other hand, bound by PSD2.⁵³ PSD2 Article 79 second subsection regulates the PSPs' access to refuse payment orders initiated by the customer:

“Where all of the conditions set out in the payer’s framework contract are met, the payer’s account servicing payment service provider shall not refuse to execute an authorised payment order irrespective of whether the payment order is initiated by a payer, including through a payment initiation service provider, or by or through a payee, unless prohibited by other relevant Union or national law.”

- (70) As such, PSPs established in other EEA States are obligated to process payment transactions ordered by their customers, regardless of the customer's nationality. It is only where national law or Union law provides a legal basis for a refusal, that the PSP can refuse to process a payment order. Thus, PSPs established in Norway, and which are subjected to the Gaming Act, can refuse a payment order based on the PTB, without acting in breach of the PSD2.

- (71) However, PSPs that are established in other EEA States⁵⁴ cannot use the Norwegian Gaming Act as legal basis for refusing payment orders between a customer and a gambling provider, and will be obligated pursuant to Article 79 of the PSD2 to carry out such payment transactions. That obligation exists regardless of the nationality of the person ordering the processing of the transaction. This means that the PSPs cannot legally discriminate against Norwegian customers and refuse their payment orders to and from legal gambling services, and precludes the PSPs from including contractual provisions allowing such discrimination.⁵⁵

- (72) As will be demonstrated in section 6.2.3 below, when the NGA requires PSPs established in other EEA States to refuse payment orders to and from its Norwegian customer's, under the threat that otherwise Norwegian banks and financial institutions will be obligated to block all transactions to the foreign PSP. As such, the NGA requires foreign PSPs to act contrary to its obligations pursuant to the PSD2. Such a restriction cannot be justified, particularly taking into account that (i) Norwegian citizens are not prohibited by Norwegian law to make use of gambling services not holding a Norwegian licence, and (ii) it is legal for Norwegian citizens to order payment transactions to and from gambling services not holding a Norwegian licence, and (iii) the PSPs established in other EEA States are not subject to the Norwegian gaming regulation.

⁵³ Which includes harmonized provisions, including Article 79, requiring that Member States shall not maintain or introduce provisions other than those laid down in this Directive, see Article 107 (1) of the PSD2.

⁵⁴ And that State does not have a national provision that prohibits the processing of a payment order to or from a gambling provider.

⁵⁵ PSPs cannot discriminate against Norwegian customers in their terms and conditions, see to that effect, paragraph 64 of the preamble of the PSD2: “Contractual provisions should not, as their object or effect, discriminate against consumers who are legally resident in the Union, on the grounds of their nationality or place of residence. For example, where a framework contract provides for the right to block the payment instrument for objectively justified reasons, the payment service provider should not be able to invoke that right merely because the payment service user has changed its place of residence within the Union.”

6.2.2 *EMoney Providers*

- (73) EMoney providers are a specific type of PSP regulated by Directive 2009/110/EC on electronic money institutions (“**EMD2**”) and the PSD2.⁵⁶ EMoney refers to a digital representation of a monetary value, which is stored electronically and used for transactions.
- (74) EMoney providers can be companies such as eMoney institutions (“**EMIs**”, which are issuers of eMoney, e.g. Revolut), providers of eWallets (a digital application or software that stores, manages and transacts money electronically, e.g. ApplePay), and mobile network operators (“**MNOs**”, who can offer eMoney services through mobile money platforms, e.g. Telenor).
- (75) As will be demonstrated in section 6.3.2, the NGAs application of the PTB requires eMoney providers to act contrary to its obligations pursuant to the PSD2 and, moreover, it hinders Norwegian customer’s access to, e.g., eWallets. Such a restriction cannot be justified, particularly taking into account that (i) Norwegian citizens are not prohibited by Norwegian law to make use of gambling services not holding a Norwegian licence (ii) It is legal for Norwegian citizens to order payment transactions to and from gambling services not holding a Norwegian licence, and (iii) the PSPs established in other EEA States are not subject to the Norwegian gaming regulation.

6.2.3 *Crypto Asset Service Providers*

- (76) CASPs can be found in many different forms offering different services within the cryptocurrency market. CASPs are regulated by Regulation 2023/1114 on markets in crypto assets (“**MiCA**”).
- (77) CASPs are providers of services such as crypto trading platforms (where you can exchange between different cryptocurrencies, similar to a stock exchange), cryptocurrency exchange platforms (where you can exchange between cryptocurrencies and fiat currencies) and custody services for crypto assets (e.g. wallets for storing cryptocurrencies).
- (78) As noted above, CASPs established in other EEA States are not bound by Norwegian law. They are, on the other hand, bound by MiCA. Similar to PSPs, CASPs cannot, pursuant to MiCA legally discriminate against Norwegian customers and limit their services on the basis of nationality by implementing contractual provisions allowing such discrimination.⁵⁷
- (79) As will be demonstrated in section 6.3.3, the NGAs application of the PTB hinders Norwegian customers’ access to crypto asset services provided by undertakings established in other EEA States. Such a restriction cannot be justified, particularly taking into account that (i) Norwegian citizens are not prohibited by Norwegian law to make use of gambling services not holding a Norwegian licence (ii) It is legal for Norwegian citizens to order payment transactions to and from gambling services not holding a Norwegian licence, and (iii) the PSPs established in other EEA States are not subject to the Norwegian gaming regulation.

⁵⁶ See the description in section 6.1.2 above regarding the obligations that follow from the PSD2.

⁵⁷ See to that effect, paragraph 84 of the preamble, where it is stated that: “To ensure the orderly functioning of markets in crypto-assets, crypto-asset service providers operating a trading platform for crypto-assets should have detailed operating rules, should ensure that their systems and procedures are sufficiently resilient, should be subject to pre-trade and post-trade transparency requirements adapted to the markets in crypto-assets, and should set transparent and non-discriminatory rules, based on objective criteria, governing access to their platforms”

6.3 Examples of third-party financial institutions affected by the PTB

6.3.1 Example of Payment Service Provider affected by the PTB

- (80) In this section, we will demonstrate how a blocking decision made by the NGA can have the impact that PSPs established in other EEA States are hindered from accepting customers residing in Norway. This will be done by reference to the *Entercash* case.
- (81) On 29 March 2017, the NGA issued a decision directed at Norwegian banks and financial institutions, ordering the refusal of all deposits and winnings to and from a list of account numbers⁵⁸, which included the account number of Entercash Ltd. ("**Entercash**").⁵⁹ The basis for the decision was that the NGA had found that the account number⁶⁰ carried out payment services to gambling providers not holding a Norwegian licence.⁶¹
- (82) While the NGA made attempts⁶² to minimize the risk that the decision would affect legal transactions, such as entering into dialogue with the undertakings affected by the blocking decision before the decision was made, that implied widening the scope of the PTB to cover undertakings that are not subjected to the Gaming Act. If Entercash did not comply with the NGA's requirements of how to comply with the Gaming Act, the consequence would be that Norwegian banks and financial institutions would be ordered to block all gambling related payments to and from the account number of Entercash. However, as stated above in paragraph 60, the banks will block all payments, both gambling and non-gambling related, as they cannot ascertain that a specific transaction is in fact gambling related. Thus, a decision to block gambling related payments would affect legal transactions and, thus, widen the scope of the PTB. Entercash filed a lawsuit challenging the decision issued by the NGA, but the blocking decision was upheld.⁶³ Moreover, Entercash filed a complaint with ESA, see section 7 below for a description of this case.
- (83) As a result of the decision made by the NGA, Entercash withdrew from the Norwegian market. This case illustrates how the Norwegian Government has widened the scope of the PTB:
- (i) Either subjecting a PSP established in another EEA State to the requirements of the Gaming Act (which would widen the scope of undertakings subjected by the PTB), or if the PSP did not comply by:

⁵⁸ See the NGAs decision, «Vedtak med pålegg om å avvise betalingstransaksjoner til og fra utenlandske pengespill på nett», reference no. 17/00736-1/334 ([Overskrifta på brevet](#)) where it was stated that "Banks and financial institutions in Norway must refuse all facilitation of payments of deposits and winnings to and from the following account number..." (office translation). *In Norwegian*: «Banker og finansinstitusjoner i Norge må avvise all betalingsformidling av innskudd og gevinst til og fra følgende kontonumre ...»

⁵⁹ Entercash Ltd. was registered as a financial institution on Malta and delivered payment services across the EEA. Entercash was subjected to control by the Maltese Financial Supervisory Authority, the Maltese Central Bank and the Financial Intelligence Analysis Unit. See a description of the services provided by Entercash in TOSLO-2018-78344-1 *Fremstilling av saken*.

⁶⁰ The account number of Entercash: DE95700111103456789004

⁶¹ *In Norwegian*: «Lotteritilsynet har gjennom tilsynet funnet at fem av kontonumrene som følger vedlagt her tilhører utenlandske selskap som gjennomfører betalingsformidling til utenlandske pengespillselskap på nett som ikke har tillatelse til å tilby pengespill i Norge»

⁶² Such as sending a letter to Entercash on 15 December 2016, where Entercash was asked to confirm if they had taken the "... necessary action to comply with Norwegian legislation (payment ban), in the way that you have stopped the possibility for gambling transactions from your company's bank accounts to and from Norwegians", see Exhibit 3.

⁶³ See TOSLO-2018-78344-1.

- (ii) Requiring Norwegian financial institutions to block all transactions, including legal transactions, to and from the PSP (which would widen the scope of what transactions are subjected to the PTB).
- (84) Expanding the PTB to cover legal transactions and providers of financial services established in other EEA States, cannot be justified. Such an interpretation and application of the PTB, would entail that the PSPs, even though they are not subjected to Norwegian law, would be required to act in conflict with their obligation to carry out payment orders in a non-discriminatory manner pursuant to Article 79 of the PSD2. Moreover, it hinders the access to and the provision of financial services in the internal market contrary to Article 36 EEA. As such, the restriction goes far beyond what is suitable and necessary to achieve the legitimate aims sought pursued by the PTB.

6.3.2 **Example of eMoney Provider affected by the PTB**

- (85) In this section, we will demonstrate how a blocking decision made by the NGA can have the impact that eMoney providers established in other EEA States are hindered from accepting customers residing in Norway. This will be done by reference to the *MuchBetter* case
- (86) On 6 April 2021, the NGA issued a decision ordering Norwegian financial institutions to block all payments to and from an account number⁶⁴ linked to Mir Limited UK LTD (“MIR”).⁶⁵ The account number belong to MIRs app “MuchBetter”, an eWallet service⁶⁶. However, as stated above, as the Norwegian financial institutions cannot ascertain whether a specific transaction is in fact related to an unlicensed gambling service, the blocking decision also affected legal transactions. The decision of the NGA, in reality, affected all payment transactions to and from MuchBetter.
- (87) To prevent such a consequence, the NGA informed MIR that they could implement the following measures, otherwise Norwegian financial institutions would be required to block all payment transactions going to and from Muchbetter:
- (iii) “Contact their gambling merchants which offers gambling in Norway without a license to inform them that they will no longer permit payment for Norwegian customers.
 - (iv) Direct gambling merchants which offers gambling in Norway without a licence to remove Mir Limited UK Ltd. as a deposit and winning option for Norwegian customers.
 - (v) Implement technical restrictions in their systems such that a Norwegian customer cannot use the services to make payments to or accept payments from a gambling merchant”⁶⁷
- (88) MIR appealed the NGAs blocking decision and highlighted how the blocking decision would affect both gambling and non-gambling related transactions. The appellate bodies⁶⁸ upheld the

⁶⁴ Account number SK319952000002107189439.

⁶⁵ <https://lottstift.no/content/uploads/2021/08/Vedtak-med-palegg-om-a-avvise-betalingstransaksjoner-til-og-fra-utenlandske-pengespill-pa-nett-kontonummer-til-Mir-Limited-UK-Ltd..pdf>

⁶⁶ MIR, in its letter to the NGA dated 24 June 2021 see Exhibit 4, described MuchBetter as an payment app which includes an eWallet used for storing and payment processing and is used to process different kinds of payments not just gambling-related payments.

⁶⁷ See Exhibit 5, Letter from The Norwegian Gaming and Fundation Authority to Mir Limited UK Ltd – Regarding the Norwegian payment ban for illegal gambling (03.02.2021)

⁶⁸ The Ministry of Agriculture and Food, the Ministry of Culture and the Lottery Appeals Board.

NGAs decision and confirmed that the PTB allowed the NGA to issue a blocking order which, not only covered gambling related payment transactions, but also payment transactions to other legal services.⁶⁹

- (89) Although MIR was not subjected to the Norwegian gaming regulation, the blocking decision imposed an obligation on the undertaking and affected legal transactions going to and from its application, MuchBetter. As a result of the decision made by the NGA, MIR withdrew from the Norwegian market. This case illustrates how the NGAs has widened the scope of the PTB by:
- (i) Either subjecting an eMoney Provider established in another EEA State to the requirements of the Gaming Act⁷⁰ (which would widen the scope of undertakings subjected by the PTB), or if the eMoney Provider did not comply, by
 - (ii) Requiring Norwegian financial institutions to block all transactions, including legal transactions, to and from the eMoney Provider (which would widen the scope of what transactions are subjected to the PTB).
- (90) Expanding the PTB to cover legal transactions and providers of financial services established in other EEA States, cannot be justified. Such an interpretation and application of the PTB, would entail that eMoney Providers, even though they are not subjected to Norwegian law, would be required to act in conflict with their obligation to carry out payment orders in a non-discriminatory manner pursuant to Article 79 of the PSD2. Moreover, it hinders the access to and the provision of financial services in the internal market contrary to Article 36 EEA. As such, the restriction goes far beyond what is suitable and necessary to achieve the legitimate aims sought pursued by the PTB.

6.3.3 *Example of Crypto Asset Service Providers*

- (91) Finally, NBO has identified examples of other financial services such as Crypto Asset Services that have been affected by the PTB.
- (92) On 11 April 2023, the NGA informed Quickbyte Global OÜ (“**Quickbyte**”), a CASP, that it had informed Norwegian banks and financial institutions to examine all transactions to and from Quickbyte, and if payment transactions to and from unlicensed gambling services were uncovered, the Norwegian banks and financial institutions would be obligated to block these transactions.⁷¹ As a result of this letter, NBO has been made aware that Norwegian banks and financial institutions blocked all payments to and from Quickbyte.
- (93) Even though the NGA did not issue a formal blocking decision ordering the refusal of transactions made to and from Quickbyte, the informational letter illustrates that it is the NGAs understanding that payment transactions to and from such providers are covered by the PTB, even though no evidence can be found that the payment, in the next transaction, will be used for unlicensed gambling services. It is evident that the use of crypto asset services may entail a large number of transactions and crypto services may be used for various purposes. It is for the customer to decide whether to keep the deposited money in crypto currency, trade it to

⁶⁹ Ministry of Agriculture and Food, ref.21/940-4, in Norwegian: “Departementet er ikke enig med klager i at ordlyden stenger for at Lotteritilsynet kan treffe det aktuelle vedtaket i saken, selv om vedtaket også vil ramme lovlige transaksjoner”. Exhibit 6

⁷⁰ Which conflicts with the eMoney Provider’s obligations pursuant to the PSD2, as explained in section 6.2.1 and 6.3.1 above.

⁷¹ See Exhibit 7, Letter from the NGA to Quickbyte dated 11.04.2023, where the NGA stated that Norwegian banks and financial institutions are under “an obligation for ... to examine all transactions to and from your [Quickbyte] company. If the entities uncover gambling transactions (deposits to or pay-outs from gambling without a permit) they are obliged to stop these, pursuant to the Gambling regulation section 96.”

another crypto currency, use the crypto as payment for other services, or use the crypto as payment for gambling services. Furthermore, CASPs will often, as is their right, be contractually obligated, either by contract with the gambling provider or by contract with their customer, to process the requested to and from gambling providers not holding a Norwegian licence. Requiring CASPs to not process gambling related transactions on behalf of Norwegian customers will further require them to act in conflict with their obligation to carry out their services in a non-discriminatory manner pursuant to MiCA.

- (94) However, Norwegian customer's use of CASPs is hindered by the widened application of the PTB, which requires Norwegian banks and financial institutions to refuse payment transactions going to and from providers of crypto asset services established in another EEA State. Furthermore, CASPs established in another EEA State will be prevented from offering their service to Norwegian customers. Similarly to what is explained in sections 6.3.1 and 6.3.2 above, this would imply that CASPs established in other EEA States are subjected to Norwegian law, without any legal basis and contrary to the jurisdictional limits of the Norwegian authorities, and/or that the PTB would affect legal transactions. All of which underscores how the interpretation and application of the PTB goes far beyond what is suitable and necessary to achieve the legitimate aims sought pursued.

7. ESAS PREVIOUS ASSESSMENTS OF THE PTB

- (95) In earlier decisions, ESA has assessed the legality of prohibiting the facilitation of payment transactions to and from gambling providers that act contrary to Norwegian law.⁷² As explained in paragraph 32 above, this is not disputed in this complaint.
- (96) Moreover, ESA assessed the legality of the blocking decision⁷³ that affected Entercash,⁷⁴ where the compatibility of the decision was assessed in light of Directive 2007/64/EC on payment services in the internal market ("PSD")⁷⁵, and Articles 36 and 40 EEA. In its assessment, ESA noted that "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."⁷⁶ Then, in its assessment of whether the decision was compatible with Articles 36 and 40 EEA, ESA noted the following regarding the risk that the blocking order would also affect legal transactions:

"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.⁷⁷ (...)

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

⁷² See decision no. 40/11/COL (15.02.11) where the Authority concluded that the payment transfer ban affecting gambling providers that act contrary to Norwegian law, "... falls within the discretion offered to EEA States when issuing legislation in the field of gambling and must be considered proportionate to the aim it seeks to achieve." ([4932-583964_College-Decision-40_11_COL-to-close-cases-65707,-68139,-68284,-68543,-68615.pdf](#))

⁷³ That decision was made pursuant to the previous PTB, in FOR-2010-02-19-184.

⁷⁴ See decision no. 081/20/COL (08.12.2020) [Letter](#)

⁷⁵ Entercash, argued that the NGAs blocking decision de facto would block all payments to and from Entercash's account number, gambling and non-gambling related, and would therefore infringe the Norwegian Government's obligations pursuant to Article 10(9) and Article 65 (2) of the PSD.

⁷⁶ See decision no. 081/20/COL page 3.

⁷⁷ See decision no. 081/20/COL page 6.

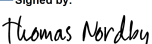
transactions than those prohibited under the Regulation would be subject to a blocking measure.”⁷⁸

- (97) Against this background, ESA concluded that the PTB complied with EEA law and that the enforcement and practice of the Norwegian rules did not breach EEA law.⁷⁹ However, in the *Entercash* complaint, ESA did not assess whether the widened application of the PTB – where the PSP established in another EEA State is subjected to the requirements of the Gaming Act, or otherwise, all transactions to and from the PSP will be blocked by Norwegian financial institutions (which would widen the scope of what transactions are subjected to the PTB) – would, in reality, require the PSP to act contrary to its contractual obligations or other obligations pursuant to the PSD2. Moreover, ESA did not assess the compatibility of widening the scope of the PTB, while taking into account the discriminatory effect it would have on Norwegian customers and that such an application of the PTB would entail a circumvention of the jurisdictional limitations of Norwegian authorities.

8. CONCLUSION

- (98) As illustrated by this complaint, the application of the PTB goes far beyond its intended scope and is therefore incompatible with EEA law. The widened application of the PTB covers legal transactions to and from undertakings established in other EEA States, including legal gambling transactions and non-gambling related transactions. The scope is furthermore widened by subjecting Financial Providers established in another EEA State, which are therefore not subject to Norwegian law, to the requirements of the Gaming Act, in conflict with their legal and contractual obligations. Where the consequence of not acting in line with the requirements set out in the Gaming Act, is that they will be hindered from offering their services to Norwegian customers, and consequently that Norwegian customers will not be able to use said services.
- (99) The PTB was introduced as an ancillary mechanism to enforce the prohibition on offering and marketing unlicensed gambling services in Norway, but as illustrated by this complaint the application goes beyond the underlying prohibition. The application of the PTB entails a new restriction that requires a separate justification and as illustrated, the application of the PTB cannot be justified pursuant to EEA Law.
- (100) On behalf of the Complainant, we hereby request that ESA takes the necessary action in order to secure that the enforcement and application of PTB is brought in line with EEA Law.

Yours sincerely
ADVOKATFIRMAET SCHJØDT AS

Signed by:

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⁷⁸ See decision no. 081/20/COL page 6.

⁷⁹ See decision no. 081/20/COL page 7.

EXHIBIT LIST

- Exhibit 1 Assessment by dr. juris Fredrik Sejersted «Forbud mot formidling av betalingstjenester til pengespill som ikke lovlig kan tilbys i Norge – en EØS-rettslig vurdering» (20.06.2008)
- Exhibit 2 Vant 700.000 i poker - Norge stopper pengene, Finansavisen (25.07.23)
- Exhibit 3 Letter from the NGA to Entercash - Information relating to Norwegian payment ban for gambling (15.12.2016)
- Exhibit 4 Letter from MIR to the NGA - Letter re. appeal of decision regarding the Norwegian payment ban for gambling (24.06.2021)
- Exhibit 5 From the NGA to MIR - Regarding Norwegian payment ban for illegal gambling - Mir Limited UK Ltd (02.03.2021)
- Exhibit 6 Decision ref. 21 940-4 against MIR from the Ministry of Agriculture and Food (09.11.2021)
- Exhibit 7 From the NGA to Quickbyte - Information regarding the Norwegian payment ban for illegal gambling - Quickbyte Global OU (11.04.2023)
- Exhibit 8 Norwegian legal sources