JUDGMENT OF THE COURT

30 May 2007*

(Right of establishment – freedom to provide services – national restrictions on gambling and betting – legitimate aims – suitability/consistency – necessity – provision and marketing of gaming services from abroad)

In Case E-3/06,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by *Oslo tingrett* (Oslo District Court), Norway, in a case pending before it between

Ladbrokes Ltd.

and

The Government of Norway, Ministry of Culture and Church Affairs;
The Government of Norway, Ministry of Agriculture and Food

concerning the interpretation of the rules on the right of establishment and the freedom to provide services in the EEA,

* Language of the Request: Norwegian.

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– the Plaintiff, represented by Jan Magne Juuhl-Langseth, advokat, and Peter Dyrberg, advokat;

– the Defendants, represented by Fredrik Sejersted, advokat, Office of the Attorney General (Civil Affairs), acting as Agent;

– the Kingdom of Belgium, represented by Annick Hubert, Attaché with the Directorate of General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, Geert Zonnekeyn, advocaat, and Philippe Vlaemminck, advocaat, acting as Agents;

– the Republic of Finland, represented by Elisabeth Bygglin, acting as Agent;

– the French Republic, represented by Géraud de Bergues and Claire Bergeot-Nunes, acting as Agents;

– the Federal Republic of Germany, represented by Moritz Lumma and Clarissa Schulze-Bahr, acting as Agents;

– the Hellenic Republic, represented by Katerina Samoni, Legal Advisor, Nana Dafniou, Deputy Legal Advisor, and Maria Tassopoulou, Legal Rapporteur, acting as Agents;

– the Republic of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, and Finnur Þór Birgisson, First Secretary and Legal Officer, acting as Agents;

– the Kingdom of the Netherlands, represented by Hanna Sevenster and Martijn de Grave, acting as Agents;

– the Portuguese Republic, represented by Luís Inez Fernandes, Director of the Legal Affairs Service of the General Directorate of European Affairs at the Ministry of Foreign Affairs, and Ana Paula Barros, Director of the

Legal Office of the Games Department at the Santa Casa de Misericórdia de Lisboa, acting as Agents;

– the Republic of Slovenia, represented by Tjaša Mihelič, State Attorney, acting as Agent;

– the Kingdom of Spain, represented by Dr Fernando Díez Moreno, Spanish State Lawyer, acting as Agent;

– the EFTA Surveillance Authority, represented by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Officer, acting as Agents; and

– the Commission of the European Communities, represented by Frank Benyon, Principal Legal Adviser, and Enrico Traversa, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by its Agents Jan Magne Juuhl-Langseth and Peter Dyrberg, the Defendants, represented by their Agent Fredrik Sejersted, the Government of Belgium, represented by its Agent Philippe Vlaemminck, the Government of the Federal Republic of Germany, represented by its Agent Clarissa Schulze-Bahr, the Government of Iceland, represented by its Agent Sesselja Sigurðardóttir, the Government of the Netherlands, represented by its Agent Martijn de Grave, the Government of Portugal, represented by its Agent Ana Paula Barros, the EFTA Surveillance Authority, represented by its Agents Niels Fenger and Per Andreas Bjørgan, the Commission of the European Communities, represented by its Agents Frank Benyon and Enrico Traversa, at the hearing on 31 January 2007,

gives the following

Judgment

I Facts and procedure

Proceedings before the Norwegian authorities and courts

1 By a letter dated 18 August 2006, registered at the Court on 25 August 2006, Oslo tingrett (Oslo District Court) submitted five questions to the Court for a preliminary

ruling in a case pending before it between Ladbrokes Ltd. (hereinafter "the Plaintiff") on the one hand and the Ministries of Culture and Church Affairs and of Agriculture and Food of the Government of Norway (hereinafter, jointly, "the Defendants") on the other.

2 Those questions arose in the context of a lawsuit over administrative decisions rejecting permission to operate and provide different gaming and betting services in Norway, and to market these games.

3 The Plaintiff is the world's largest bookmaker and gaming company, with headquarters in London. The company is registered in England and Wales and operates internationally. It holds a licence in the United Kingdom and is subject to surveillance by the British Gambling Commission.

4 On 24 June 2004, the Plaintiff applied to the Norwegian authorities for permission to operate and provide sports gaming, betting on horse and dog racing, betting on special events and random number games with set odds in Norway, and to establish gaming outlets in Norway to carry out these activities, subject to supervision by Norwegian authorities. The applications also concerned permission to actively provide and market the games which today are offered from abroad on Ladbrokes' Internet portal, with specific web pages targeted especially at the Norwegian market.

5 The applications were sent to three public authorities, since they concerned gaming activities which in Norway are regulated by three different acts and fall within the competence of different administrative bodies. The application for a licence to act as a gaming company on par with the State gaming company Norsk Tipping was sent to the Ministry of Culture and Church Affairs. The application for a licence to offer horserace betting was sent to the Ministry of Agriculture. The application for a licence under the Lottery Act to offer other lotteries was sent to the Gaming Board.

6 The application to the Ministry of Culture and Church Affairs was rejected by decision of 27 September 2004. The rejection was based on the argument that the gaming schemes regulated by the Gaming Act may be operated exclusively by the State gaming company Norsk Tipping, and that the Act does not allow for the granting of licences to others.

7 The application to the Ministry of Agriculture was rejected by decision of 15 November 2004. The rejection was based on the argument that the Plaintiff does not fulfil the Totalisator Act's requirement that licences may only be granted to companies or organisations whose purposes include the support of horse breeding.

8 The application to the Gaming Board was rejected by decision of 30 June 2004. On appeal, the Lottery Council upheld the Gaming Board's decision on 7 March 2005. The rejection was based on the argument that the Plaintiff is a commercial gaming company and therefore does not fulfil the Act's requirement that licences may only be granted to organisations or associations which have humanitarian or socially beneficial purposes. Further, the Lottery Council mentioned that under Section 11 of the Lottery Act, the Plaintiff may not be granted the right to provide or market gaming schemes which are not authorised to be operated in Norway.

9 The Plaintiff filed a lawsuit before Oslo tingrett on 2 December 2004. It claims, first, that the three decisions be declared null and void. Second, a declaratory judgment is sought to declare that the Plaintiff cannot be denied the right to establish itself in Norway and to offer the gaming schemes in question. Third, a declaratory judgment is sought to declare that the Plaintiff may not be denied the right to provide and market gaming schemes on the Norwegian market which are offered on the Internet from other EEA countries.

Questions referred to the Court

10 Oslo tingrett referred the following questions to the Court:

1. *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that certain forms of gaming may only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes?*

2. *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that licences to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding?*

3. *Do Articles 31 and/or 36 EEA preclude national legislation which establishes that licences to certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose?*

4. *Under EEA law, is it legitimate for national legislation to emphasise that the profit from gaming should go to humanitarian and socially beneficial purposes (including sports and culture), and not be a source of private profit?*

5. *Does Article 36 EEA preclude a national statutory rule which forbids the providing and marketing of gaming which does not have permission to operate in Norway, but which is approved under national law in another EEA State?*

Request for the reopening of the oral procedure

11 By a request lodged at the Court's Registry on 11 April 2007, the Plaintiff requested the reopening of the oral procedure, which was closed on 31 January 2007 in accordance with Article 46 of the Rules of Procedure.

12 In support of its request, the Plaintiff submitted that the legal views expressed by the Commission of the European Communities in the reasoned opinions delivered to three EC Member States, Finland, Hungary and Denmark, were at discordance with the views expressed by the Commission in its written and oral submissions in the present case. The Plaintiff considered a reopening of the oral procedure appropriate in order to clarify the Commission's views and to allow the parties to comment thereupon. In the alternative, the Plaintiff asked for reopening of the oral procedure with the sole purpose of permitting the Commission's reasoned opinion against Finland to be joined to the case file.

13 Upon invitation from the Court, the Defendants, the Kingdom of Belgium, the Republic of Finland, the Hellenic Republic, the Republic of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities commented on the request for reopening.

14 The Court may of its own motion or at the request of the parties order that the oral procedure be reopened, in accordance with Article 47 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, for comparison, Case C-299/99 *Philips* [2002] ECR I-5475, at paragraph 20).

15 The Court considers that views expressed in other cases, based on the factual situation in those cases, cannot, as a rule, lead to a reopening of the oral procedure, even if those views may touch upon legal issues in the case at hand before the Court. The Court has all the information it needs to answer the questions raised in the main proceedings.

16 The application made by the Plaintiff must therefore be dismissed.

II Legal background

National Law

17 As described in the national court's request, it is prohibited under Norwegian law to offer gaming and lottery services without a licence granted pursuant to specific exemptions in statutory law. Offering commercial games of chance is also

punishable by up to one year of imprisonment as long as the game is not permitted by specific statutory law (see the Penal Code Sections 298 and 299).

18 The statutory exceptions are set out in three different laws: the Totalisator Act (Act No 3 of 1 July 1927, *lov 1. juli 1927 nr. 3 om veddemål ved totalisator*), the Gaming Act (Act No 103 of 28 August 1992, *lov 28. august 1992 nr. 103 om pengespill m.v.*) and the Lottery Act (Act No 11 of 24 February 1995, *lov 24. februar 1995 nr. 11 om lotterier m.v.*).

The Lottery Act

19 The Lottery Act is the general Norwegian statute which covers all forms of lottery and gaming schemes. The definition of "lottery" in Section 1, first paragraph litra a of the Act encompasses any undertaking where the participants can, against payment of a stake, win prizes as a result of a random draw, guessing or other method that in whole or in part provides a random result. In 2003, Section 1a was added, stating that the purpose of the Act is to ensure that lotteries are held in proper forms subject to public control, with the aim of preventing negative social consequences of lotteries, while at the same time preparing the ground for lotteries to be a good source of revenues for socially beneficial and humanitarian activities.

20 In practice, the Lottery Act only applies to a limited part of the lottery and gaming market. The economically more important games are specifically regulated in the Gaming Act and in the Totalisator Act. The Lottery Act *de facto* only regulates minor money games such as Bingo and different types of pre-drawn lotteries (so-called "scratch-off" or "tear and win") or post-drawn lotteries. These traditional lotteries are either held as local lotteries or as larger national lotteries. The legal parameters for permitted turnover, as well as the size of prizes, are limited by legal authority of the Lottery Act. In an amendment that was the subject of the Court's judgment in Case E-1/06 *EFTA Surveillance Authority* v *Norway* (judgment of 14 March 2007, not yet reported, hereinafter referred to as "*Gaming Machines*"), the operation of gaming machines, which in the past was covered by the Lottery Act, was transferred to the legal authority of the Gaming Act.

21 Under Section 5 of the Lottery Act, lotteries may only be held for the benefit of a humanitarian or socially beneficial purpose. Under Section 6, it is prohibited to hold a lottery without a permit, and such permits may only be granted to organisations or associations which have a socially beneficial or humanitarian purpose. This system entails that private commercial operators may not be granted permission to operate lotteries or gaming schemes. There is, however, a possibility for non-profit organisations to contract out the operation of their lotteries or gaming schemes to private entrepreneurs, who must be authorized by the Gaming Board under Section 4c, and who may receive a share of the profits.

22 The central managing agency under the Lottery Act is the Gaming Board, which *inter alia* grants the necessary permits and exercises continuous control. More generally, the Gaming Board is the agency in charge of administering and supervising lottery matters. It is subordinate to the Ministry of Culture and Church Affairs. In addition to its tasks of supervision and research, the Gaming Board handles individual cases, including complaints against decisions made by the police under the Lottery Act. The Gaming Board oversees non-profit organisations which have been permitted to hold lotteries and private entrepreneurs who assist them. It also monitors the operations of the State-owned company Norsk Tipping under the Gaming Act and of the Norsk Rikstoto foundation under the Totalisator Act. Decisions adopted by the Gaming Board may be appealed to the Lottery Council.

23 Section 11 of the Lottery Act prohibits providing and marketing lotteries which are not permitted to be operated on the Norwegian market.

The Gaming Act

24 The Gaming Act covers all gaming schemes related to sports events and other competitions except horseracing, as well as the numbers game Lotto and other games to be decided by the King (i.e. the government).

25 Under the Gaming Act, the wholly State-owned gaming company Norsk Tipping AS has the exclusive right to operate gaming schemes in connection with sporting events, such as the football betting game Oddsen, and in connection with other competitions. In addition, the Act grants Norsk Tipping the exclusive right to operate the numbers game Lotto. Upon the entry into force of the amendment to the Act which has been the subject of the Court's judgment in *Gaming Machines*, Norsk Tipping shall also bear sole responsibility for the operation of gaming machines.

26 According to its Section 1, third paragraph, the Gaming Act shall ensure that gaming activities are held in proper forms subject to public control with the aim of preventing negative consequences of gaming, while at the same time preparing the ground for the profits of the gaming schemes to go toward sports and cultural purposes.

27 Norsk Tipping is subject to political control through the Ministry of Culture and Church Affairs' adoption of regulations for each individual type of gaming, and through that Ministry's position as sole shareholder and function as general assembly for the company. In addition to the direction and supervision by the Ministry, Norsk Tipping is subject to supervision by the Gaming Board.

28 Pursuant to Section 12, the Ministry of Culture and Church Affairs lays down, for each individual game, how large a share of the stake is to be applied for the purpose of prize money. Section 10 stipulates that, after provisions have been made for reserves as well as for research, information, prevention and treatment with regard to gambling addiction, the profits of Norsk Tipping will be distributed as follows: 1/2 to sporting purposes and 1/2 cultural purposes. Once the reform of the gaming machine sector enters into force, further distributions will be made to other socially beneficial and humanitarian causes.

29 Section 2 last paragraph of the Gaming Act makes it illegal to advertise in newspapers and journals, to announce to the public or to disseminate in other ways information about foreign numbers pools and gaming schemes, about coupons and the like or about the cashing of prizes.

The Totalisator Act

30 Under the Totalisator Act, licences to arrange horserace betting may only be granted to organisations or companies whose aims include supporting horse breeding.

31 According to Section 1 of the Totalisator Act the King may award grants to set up horserace betting by the use of the so-called "totalisator." The grant is awarded for a duration of up to 5 years at a time, and for a limited number of times each year to organisations and companies which have been approved by the appropriate ministry, and whose purpose is to *inter alia* support horse breeding. The ministry approves the different types of games and determines the rules of the individual games and determines for each type of game what portion of the stake goes toward prizes. The State's share is determined by the King.

32 The Totalisator Act allows for the granting of more than one licence. However, based on the Act, the King has issued the Regulation on Totalisator Betting ("*Forskrift 1997-01-24 nr 85 for totalisatorspill*"). Its Section 4 provides that Norsk Rikstoto, a non-profit foundation for the promotion of horse sports, shall have the grant to set up all totalisator betting. Thus, Norsk Rikstoto enjoys an exclusive right to arrange horserace betting.

33 Section 1 of the Regulation on Totalisator Betting ("*Forskrift 1997-01-24 nr 85 for totalisatorspill*") provides that totalisator gaming shall contribute to strengthening the equestrian sports, horse husbandry and Norwegian horse breeding. According to Section 3, the gross receipts of totalisator betting should be divided between a) a players' share, b) a totalisator fee, c) the providing of the totalisator betting and the promotion of equestrian sports, horse husbandry and Norwegian horse breeding. The totalisator fee is set by the King, and the players' share is set by the Ministry of Agriculture and Food. Section 4 states that Norsk

Rikstoto has the primary responsibility for the operation and financial control of all totalisator gambling. The section also provides that the award for totalisator gambling is granted to Norsk Rikstoto, which shall enter into agreements with the operating companies providing totalisator gaming. Section 6 provides that Norsk Rikstoto shall annually grant funds for promotion of equestrian sports, horse husbandry and Norwegian horse breeding. Principally, the funds shall be controlled by the Norwegian Trotting Association and the Norwegian Jockey Club. In addition, the Ministry of Agriculture and Food annually sets down an amount that shall be controlled by the Norwegian Equestrian Centre. The Ministry has the option of giving guidelines as to the use of these funds.

34 Through the powers granted to it in the Totalisator Act and the regulations issued pursuant to the Act, the Ministry of Agriculture and Food may direct how the foundation carries out its activities. Norsk Rikstoto is an independently operating commercial foundation which is not subject to direct political control. However, the Ministry designates one of the five members of the board of directors and approves the charter establishing the foundation. The Ministry also approves the specific types of gaming, establishes gaming rules and determines what percentage of the stake goes toward prizes (the players' share). A minority in the Board of Directors may appeal decisions to the Ministry with regard to gaming rules and the distribution of the net income to equestrian sports, horse husbandry and horse breeding. A minor fee, set by the King, is paid to the State. The supervision of whether acts and regulations are followed is carried out by the Ministry, which *inter alia* has the power to withdraw a licence granted, and by the Gaming Board.

EEA Law

35 Article 31(1) EEA reads:

> Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

36 Article 36(1) EEA reads:

> Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

37 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

The first question

General

38 By its first question, the national court essentially asks whether a State monopoly system such as the one established under the Gaming Act is compatible with Articles 31 and 36 EEA.

39 At the outset, the Court recalls that all games of chance (gambling and betting) provided in return for money payment constitute economic activities falling within the scope of EEA fundamental freedoms (see to that effect *Gaming Machines*, at paragraph 25). This includes gaming schemes as covered by the Gaming Act.

40 A system under which a State-owned company such as Norsk Tipping has an exclusive right to operate gaming schemes completely denies private operators access to the respective market. Such exclusion constitutes a restriction on the right of establishment and the free movement of services under Articles 31 and 36 EEA. In a situation such as the one at issue, the case is to be examined under both provisions in parallel. At the same time, it must be noted that the restrictions are of a non-discriminatory nature, since the legislation at issue applies without distinction to domestic and foreign operators (see *Gaming Machines*, at paragraphs 26 and 27).

41 On this basis, it must be examined whether the restrictions on the freedoms set out in the EEA Agreement may be justified by reasons of overriding general interest.

42 Moral, religious and cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming,

may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order. The EEA Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures they impose must satisfy the conditions laid down in the case law of both the Court and the Court of Justice of the European Communities (hereinafter "the ECJ") as regards their proportionality (see *Gaming Machines*, at paragraph 29; and the judgment of the ECJ in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica*, judgment of 6 March 2007, not yet reported, at paragraphs 47 and 48). In that respect, the burden of proof is on the State responsible for the restriction (see *Gaming Machines*, at paragraph 31).

Legitimacy of the aims pursued by the legislation at issue

43 The Court observes, firstly, that according to the third paragraph of its Section 1, the Gaming Act aims at ensuring that gaming is held in proper forms subject to public control in order to prevent negative consequences of gaming, while at the same time preparing the ground for the profits of the gaming schemes to go toward sports and cultural purposes. Secondly, the Court notes that in their observations, the Defendants maintained that the objectives behind the Gaming Act, and behind Norwegian gaming and lottery policy in general, are to (1) prevent and protect the citizens against compulsive problem gambling; (2) keep the volume of gaming in society at a moderate and socially defensible level; (3) channel gaming desire into responsible outlets and ensure consumer protection; (4) protect public order and prevent crime and irregularities; (5) direct the revenues from gaming to humanitarian and socially beneficial causes and (6) prevent the operation of gaming from being a source of private profit. It is for the national court to identify the aims which the legislation at issue is actually intended to pursue.

44 In the field of gaming, the Court and the ECJ have held that justification grounds put forward by a State must be taken together and considered as a whole (see *Gaming Machines*, at paragraph 34, and, *inter alia*, Cases C-275/92 *Schindler* [1994] ECR I-1039, at paragraph 58, and C-67/98 *Zenatti* [1999] ECR I-7289, at paragraph 31). The Courts have recognized that the aim of fighting gambling addiction, as well as crime and malpractice, and more generally of consumer protection and the maintenance of order in society, are amongst those which may serve to justify restrictions on the right of establishment and the freedom to provide services (see *Gaming Machines*, at paragraph 34 and *Placanica*, at paragraph 46).

45 The aim of fighting gambling addiction can serve as justification only if the restrictive measures reflect a concern to bring about a genuine diminution in

gambling opportunities (see *Gaming Machines*, at paragraph 36, and, for comparison, Case C-243/01 *Gambelli* [2003] ECR I-13031, at paragraph 62). In order for there to be a genuine diminution, the gaming policy as a whole must at least provide for a lower level of gambling addiction in society than would be the case without restrictions on free movement in relation to gaming services.

46 The motive of financing benevolent or public-interest activities cannot in itself be regarded as an objective justification for restrictions on free movement. Such financing may not constitute the real justification for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory (see *Gaming Machines*, at paragraph 36; *Schindler*, at paragraph 60; *Zenatti*, at paragraphs 14 and 36; and *Gambelli*, at paragraph 62).

47 The Plaintiff has contended that already the presence of such an economic aim would invalidate other possible justification grounds. This argument cannot be accepted. National legislation often pursues several different aims. It follows from *Zenatti*, at paragraphs 4, 30 and 36–37, that in cases where the national court concludes that one of the aims cannot in itself be regarded as an objective justification for restrictions on free movement, it is still for the national court to verify whether the legislation at issue is genuinely directed to realising aims which are capable of justifying it. The national court must then assess whether the legislation at issue is proportionate in light of the latter aims, see paragraphs 49-62 below. If so, the attainment of the former aim may, for the purposes of EEA law, be regarded as an incidental beneficial consequence.

48 It follows from the case law of the ECJ that the aim of preventing gambling from being a source of private profit may in principle justify restrictions on the right of establishment and free movement of services (see *Schindler*, at paragraphs 57–61 and *Zenatti*, at paragraphs 30–31). As an aim in itself, it would seem that this aim must be based on a resentment of games of chance for reasons of morality, in particular if it relates to non-addictive games. Thus, the aim of preventing gambling from being a source of private profit can serve as justification only if the restrictive measures reflect that moral concern. If a State-owned monopoly is allowed to offer a range of gambling opportunities, the measure cannot be said to genuinely pursue this aim. In this respect, it is to be recalled that the financing of good causes may only be an incidental beneficial consequence. Accordingly, the use of the profits from the monopoly provider for the financing of good causes may not form part of a moral justification, in the form of re-establishing the moral equilibrium, for nevertheless allowing games of chance.

Suitability/consistency

49 Insofar as the national court concludes that the legislation at issue may be justified by legitimate objectives, it must further examine whether the legislation complies with the principle of proportionality under EEA law.

50 This includes an assessment of whether the system of exclusive rights is suitable for achieving the intended objectives. An exclusive rights system in relation to games such as those covered by the Gaming Act seems, at the outset, suitable for attaining the objectives which have been put forward as the aims of the legislation at issue.

51 However, the national court must consider whether the State takes, facilitates or tolerates other measures which run counter to the objectives pursued by the legislation at issue, see *Gaming Machines*, at paragraph 43. Such inconsistencies may lead to the legislation at issue being unsuitable for achieving the intended objectives. It is for the State to demonstrate that its measures in the field of games of chance fulfil these requirements, see paragraph 42 above.

52 To the extent the national court finds that the legislation at issue is based on more than one legitimate objective, it must assess the consistency of the gaming policy, of which Norsk Tipping's monopoly forms part, in relation to each of these legitimate objectives. Moreover, as the objectives pursued may not apply equally to all games of chance covered by the Gaming Act, it may also be necessary to distinguish between the different games.

53 The Plaintiff argues in its observations that the extensive marketing of Norsk Tipping as well as its expansion of games is of such a nature that they do not form part of a consistent and systematic gaming policy. In light of this, the Court notes that insofar as the legislation at issue is found to be aimed at fighting gambling addiction, the marketing activities and the development of new games by Norsk Tipping are relevant for the assessment of the consistency of the gaming policy. A system of exclusive rights can only be suitable as a means of fighting gambling addiction if it is required to operate in a way which serves to limit gaming activities in a consistent and systematic manner (see, for comparison, *Gambelli*, at paragraph 67).

54 In this context, particularly development and marketing of addictive games by the monopoly provider are relevant. This may be at odds with the aim of fighting gambling addiction. However, it follows from *Placanica*, at paragraph 55, that in order to persuade people who might otherwise engage in games which pose crime related problems, to turn instead to authorised games, controlled expansion in the gaming sector, including the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques may be necessary. Similar

channelling measures may be envisaged for the purpose of drawing players away from highly addictive games offered via the Internet or other channels which are hard to suppress. It is for the State to demonstrate that such channelling measures, including, if relevant, the development of new games, may reasonably be assumed to serve their purpose.

Necessity

55 The Defendants have argued that judicial review of national restrictions on the provision of gaming is limited, and that the courts ought to assess the necessity of the measures only where there are reasons to believe that the rules in question are in fact discriminatory or protectionist. This cannot be accepted. Even though the Contracting Parties do have discretion in setting the level of protection in the field of gambling, this does not mean that the measures are sheltered from judicial review as to their necessity (see, for comparison, *Gambelli*, at paragraphs 65–66; and *Placanica*, at paragraphs 48–49 and 58).

56 To the extent the legislation at issue is deemed suitable, it must be assessed whether the measures at issue go beyond what is necessary to meet the aims pursued. As with regard to suitability, the necessity of the measures must, at the outset, be assessed in relation to each legitimate objective. Moreover, as the objectives pursued may not apply equally to all games of chance covered by the Gaming Act, it may also be necessary to distinguish between the different games.

57 To the extent the national court finds that the Gaming Act aims at, and is applied to the effect of, pursuing legitimate objectives such as fighting gambling addiction or crime and malpractice, it will have to ascertain that there are genuine risks arising from or connected to the different games of chance. Those risks will differ considerably depending on the individual games. The Gaming Act applies to a great variety of games. For instance, Norsk Tipping's monopoly extends, *inter alia*, to operating both Lotto and various forms of sports betting. At the oral hearing, the Defendants indicated that Lotto poses no appreciable danger of causing gambling addiction. At the other end of the scale, there are highly addictive games such as gambling on gaming machines which are not at stake here (see *Gaming Machines*). Whether and to which extent a given game can lead to gambling addiction must be evaluated by the national court. The Court held in *Gaming Machines*, at paragraph 44, that a game's specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader socio-cultural environment are relevant factors in that respect.

58 The necessity test consists in an assessment of whether the exclusive rights system is functionally needed in order to achieve the legitimate objectives of the

legislation at the level of protection chosen by the Contracting Party concerned, or whether this could equally well be obtained through other, less restrictive means (see *Gaming Machines,* at paragraph 49). Thus, where other, less restrictive measures would have the effect of fully achieving the objectives at the level of protection chosen, an exclusive rights system could not be considered necessary simply because it might offer an even higher level of protection.

59 If it turns out that the national authorities have opted for a rather low level of protection, it is less probable that a monopoly is the only way of achieving the level of protection opted for. In that case, it is more likely that less restrictive means, for instance in the form of a licensing system which would allow an operator such as the Plaintiff to enter the market, could suffice. In this context, it is also relevant to assess whether channelling, to the extent the national court deems this to be relevant, could equally well be achieved under a licensing system.

60 The restrictions placed on the monopoly provider must be taken into account when identifying the level of protection actually sought by Norwegian authorities under the current exclusive rights system. A low level of protection exists if the Norwegian authorities tolerate high numbers of gaming opportunities and a high level of gaming activity. Important factors in this regard are restrictions on how often per week or per day games are on offer, restrictions on the number of outlets which offer games of chance and on sales and marketing activities of the outlets, as well as restrictions on advertising and on development of new games from Norsk Tipping.

61 With regard to marketing, several factors have to be taken into account by the national court. In particular, it will have to look into the extent and effect of marketing and development of games of chance, *inter alia* how much Norsk Tipping spends in that regard as well as the form and content of the marketing and the susceptibility of the targeted groups. Moreover, the national court must ascertain whether the advertising of the gambling and betting services is rather informative than evocative in nature.

62 In its assessment of necessity the national court will have to examine, in particular, whether Norsk Tipping has less economic incentives to breach the rules regulating the sector of games of chance or less of an interest in an aggressive marketing strategy than a commercial operator under a licensing system. Furthermore, the national court will have to evaluate whether effective control may be exercised and is actually being exercised by the State on Norsk Tipping and whether private service providers operating under a licensing system cannot be subjected to the same kind of control.

63 Based on the above, the answer to the first question must be that in order not to be precluded by Articles 31 and 36 EEA, national legislation establishing that certain forms of gaming may only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes, must pursue legitimate aims such as fighting gambling addiction and maintaining public order. The financing of benevolent or public-interest activities may not constitute the real justification for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory. The legitimate aims must be pursued in a suitable and consistent manner, and the legislation must not go beyond what is necessary in order to achieve the aims in question.

The second question

64 By its second question, the national court asks whether it is compatible with Articles 31 and 36 EEA for national legislation to provide that a licence to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding.

65 It follows from paragraph 39 above that the operation of horse race betting constitutes an economic activity falling within the scope of EEA fundamental freedoms.

66 From the information submitted to it, the Court concludes that under the regulations issued pursuant to the Totalisator Act, Norsk Rikstoto has been given the only licence for the operation of totalisator betting and thus enjoys an exclusive right to arrange horserace betting in Norway. It follows from paragraph 40 above that such an exclusive right encroaches upon Articles 31 and 36 EEA, as it completely prevents private operators from entering the market for horse race betting.

67 The Defendants have stated that the turnover from horse race betting, except for the winners' share, totalisator fee and operating expenses, is given to equestrian sports, horse breeding and horse husbandry.

68 The Court notes that the commercial breeding of horses constitutes an economic activity. The financing of such an activity does not qualify as a legitimate reason in the public interest. To the extent the profits yielded by horserace betting go to horse breeding for other than commercial purposes, such as the preservation of specific breeds of horses, the Court recalls that the financing of public-interest causes may only constitute an incidental beneficial consequence and not the real justification for the restrictive policy adopted, see paragraphs 46-47 above.

69 The Defendants maintain that the six objectives set out in paragraph 43 above are also underlying the Totalisator Act. It is for the national court to identify the aims

which the legislation at issue is actually intended to pursue (see paragraphs 43-48 above). With regard to the assessment made in paragraph 48 above, the Court cannot see any relevant difference between a State-owned monopoly and an entity controlled by the State such as Norsk Rikstoto.

70 Insofar as the national court concludes that the legislation at issue may be justified by legitimate objectives, it must further examine whether the legislation complies with the principle of proportionality under EEA law as set out in paragraphs 49–62 above.

71 In light of the above, the answer to the second question must be that in order not to be precluded by Articles 31 and 36 EEA, national legislation which establishes that a licence to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding must pursue legitimate aims such as fighting gambling addiction and maintaining public order. The financing of benevolent or public-interest activities may not constitute the real justification for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory. The legitimate aims must be pursued in a suitable and consistent manner, and the legislation must not go beyond what is necessary in order to achieve the aims in question.

The third question

72 By its third question, the national court asks whether Articles 31 and 36 EEA preclude national legislation which establishes that licences to provide certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose.

73 It follows from paragraphs 39-40 above that the lotteries regulated under the Lottery Act constitute economic activities falling within the scope of EEA fundamental freedoms, and that the prohibition on granting commercial operators permission to operate lotteries encroaches upon Articles 31 and 36 EEA. That restriction is not offset by the possibility to arrange lotteries on behalf of non-profit organisations. As all commercial operators are excluded by law, foreign commercial operators are not subject to discrimination based on nationality.

74 As concerns the existence of legitimate aims that could potentially justify the restriction inherent in the Lottery Act, the Defendants maintain that the six objectives set out in paragraph 43 above also form the motivation behind the Lottery Act. It is again for the national court to identify the aims which the legislation at issue is actually intended to pursue (see paragraphs 43-48 above).

75 In this respect, it is to be recalled that the financing of benevolent or public-interest activities may not constitute the real justification for the restrictive policy

adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory. With regard to preventing private profit from lotteries as an aim in itself, it should be noted, that this, as mentioned in paragraph 48 above, appears to be based on a general resentment of games of chance, and that a policy to further this aim must reflect the moral concern on which it is based. However, national authorities cannot be required to oppress all games of chance offered by socially beneficial organisations. The acceptance of certain games of chance of a limited volume offered by such organisations, typically in local communities, constitutes a reasonable use of statutory prohibitions which does not fatally undermine the moral position on which the aim is based. The same margin of discretion must apply with regard to using private sub-contractors for such games.

76 Insofar as the national court concludes that the legislation at issue may be justified by legitimate objectives, it must further examine whether the legislation complies with the principle of proportionality under EEA law as set out in paragraphs 49–62 above.

77 In light of the above, the answer to the third question must be that in order not to be precluded by Articles 31 and 36 EEA, national legislation which establishes that licences to provide certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose must pursue legitimate aims such as fighting gambling addiction and maintaining public order. The financing of benevolent or public-interest activities may not constitute the real justification for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory. The legitimate aims must be pursued in a suitable and consistent manner, and the legislation must not go beyond what is necessary in order to achieve the aims in question.

The fourth question

78 By its fourth question, the national court asks whether Articles 31 and 36 EEA preclude national legislation which emphasises that the profit from gaming should go to humanitarian and socially beneficial purposes including sports and culture, and not be a source of private profit. There is nothing in the case to indicate that the national court is seeking an answer to question 4 with respect to legislation other than that at issue in the first three questions.

79 The Court has addressed the issue of the financing of humanitarian and socially beneficial purposes in paragraphs 46-47 above when dealing with the first question and in paragraph 68 and 75 when dealing with the second and third question respectively. As stated in the Court's answers to the first three questions, the financing of benevolent or public-interest activities may not constitute the real

justification for the restrictive gaming policy at issue, but only a beneficial consequence which is incidental in the meaning that it is accessory, cf. paragraphs 63, 71 and 77.

80 The Court has dealt with the legitimacy of the aim of preventing gambling from being a source of private profit in paragraph 48 above. In that paragraph, the Court also addresses the question of the relationship between this aim and the financing of good causes. These considerations apply equally to the second and third question, cf. paragraphs 69 and 75.

81 In light of these considerations, the answer to the fourth question must be that the financing of humanitarian and social beneficial purposes may not constitute the real justification for legislation such as the one at issue, but only a beneficial consequence which is incidental in the meaning that it is accessory. Preventing private profit as an aim in itself may, on the other hand, in principle justify such legislation. However, the national gaming policy must then reflect the moral concerns underlying this aim.

The fifth question

82 By its fifth question, the national court asks whether Article 36 EEA precludes a national statutory rule prohibiting the provision and marketing of gaming for which no licence has been granted in Norway, but which is approved under national law in another EEA State.

83 To the extent the national court concludes that the exclusive rights systems established under the Gaming Act and the Totalisator Act constitute lawful restrictions under the criteria laid down in the answers to the first two questions, the host State has the right to prohibit the provision and marketing of games of chance from abroad, no matter whether or not these are lawful in their State of origin. Further, to the extent the national court concludes that the exclusion of commercial operators under the Lottery Act constitutes a lawful restriction on the free movement of services, the State may correspondingly prevent commercial operators from providing and marketing games of chance from abroad.

84 If, however, and to the extent the national court comes to the conclusion that the bans implied in the three Acts on commercial operators organising any form of game of chance are not justified, national authorities may still require foreign operators to seek a national licence under the same conditions that apply to domestic operators.

85 In that respect, the Court recalls that when determining the objectives of their policy on gambling and betting, the Contracting Parties enjoy a margin of discretion to define the level sought with respect to the protection of consumers,

the maintenance of public order and other legitimate aims (see paragraph 42 above). Consequently, different levels of protection may exist throughout the EEA. A licence permitting the offering of gaming services may be less strict in the home State of the gaming operator than in the host State. Levels of protection may differ, in particular, with respect to the kind of games permitted, the frequency of gambling opportunities being made available, and the forms of marketing deemed acceptable. Moreover, protecting consumers in highly specific areas such as gambling and betting, as well as maintaining public order, may require different approaches depending on the respective characteristics of each society. Even if the legislation and practice in the home State of the operator ensures a high level of protection in relation to the sociological features characterizing that state, this may not necessarily amount to the same level of protection with respect to the features characterizing the state where the services are to be provided.

86 At the outset, the EEA State where the services are to be provided thus has a right to require possession of a licence issued on the same conditions as its own nationals, even if the service provider already holds a licence issued by the home State. However, national measures must not be excessive in relation to the aims pursued. This would be the case if the requirements to which the issue of a licence is subject coincided with the requirements in the home State. That means, firstly, that in considering applications for licences and in granting them, the Contracting Party in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of establishment and secondly, that it must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State (see, for comparison, Case 279/80 *Webb* [1981] ECR 3305, at paragraphs 19–21).

87 The answer to the fifth question must therefore be that under Article 36 EEA, to the extent the national court concludes that the exclusive rights systems established under the Gaming Act and the Totalisator Act constitute lawful restrictions, the host State has the right to prohibit the provision and marketing of games of chance from abroad, no matter whether or not these are lawful in their State of origin. Further, to the extent the national court concludes that the exclusion of commercial operators under the Lottery Act constitutes a lawful restriction on the free movement of services, national authorities may correspondingly prevent commercial operators from providing and marketing games of chance from abroad.

88 To the extent the national court comes to the conclusion that the prohibitions following from the three Acts on commercial operators organising any form of game of chance are not justified, the answer must be that a licence may still be required in view of possible differences in the level of protection throughout the EEA. However, national measures must not be excessive in relation to the aims

pursued. They have to be non-discriminatory and must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State.

IV Costs

89 The costs incurred by the EEA Contracting Parties, the EFTA Surveillance Authority and the Commission of the European Communities which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before Oslo tingrett, any decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Oslo tingrett hereby gives the following Advisory Opinion:

1.–3. In order not to be precluded by Articles 31 and 36 EEA, national legislation which establishes (1) that certain forms of gaming may only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes, (2) that a licence to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding, or (3) that licences to offer certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose, must pursue legitimate aims such as fighting gambling addiction and maintaining public order. The legitimate aims must be pursued in a suitable and consistent manner, and the legislation must not go beyond what is necessary in order to achieve the aims in question.

4. Under EEA law, the financing of humanitarian and socially beneficial purposes may not constitute the real justification for legislation such as the legislation at issue, but only a beneficial consequence which is incidental, in the meaning that it is accessory. Preventing private profit as an aim in itself may, on the other hand, in principle justify such legislation. However, the national gaming policy must then reflect the moral concerns underlying this aim.

5. Under Article 36 EEA, to the extent the national court concludes that the exclusive rights systems established under the Gaming Act and the Totalisator Act constitute lawful restrictions, national authorities have the right to ban the provision and marketing of games of chance from abroad, no matter whether or not these are lawful in their State of origin. The same applies to the extent the national court concludes that the exclusion of commercial operators under the Lottery Act constitutes a lawful restriction on the free movement of services.

To the extent the national court comes to the conclusion that the bans implied in the three Acts on commercial operators organising any form of game of chance are not justified, the answer must be that a licence may still be required in view of possible differences in the level of protection throughout the EEA. However, national measures must not be excessive in relation to the aims pursued. They have to be non-discriminatory and must take into account the requirements already fulfilled by the provider of the services for the pursuit of activities in the home State.

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 30 May 2007.

Skúli Magnússon
Registrar

Carl Baudenbacher
President