



REPORT FOR THE HEARING
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 freedom of establishment and the freedom to provide services in the EEA.

I Introduction

1. By a letter dated 18 August 2006, registered at the Court on 25 August 2006, Oslo tingrett made a request for an Advisory Opinion in a case pending before it between Ladbrokes Ltd. (hereinafter the “Plaintiff”) and the Government of Norway, Ministry of Culture and Church Affairs as well as the Government of Norway, Ministry of Agriculture and Food (hereinafter, jointly, the “Defendants”).

II Facts and procedure

2. The case concerns a dispute on whether the restrictions entailed in Norwegian legislation on gaming are compatible with the EEA rules on the freedom of establishment and the freedom to provide services. Whilst the parties agree that the contested national provisions constitute restrictions on the free provision of lotteries and gaming under Articles 31 and 36 EEA, the question in the case is whether the restrictions may nonetheless be accepted based on the exceptions which apply in EEA law.

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 owns about 2,500 gaming outlets in the United Kingdom, Ireland and Belgium. The Plaintiff's operations include gaming and betting on the Internet, betting and games via digital TV, as well as WAP-based gaming services via mobile telephone. The Internet portal www.ladbrokes.com has over one million registered clients around the world. The Plaintiff has a license in the United Kingdom and is therefore subject to surveillance by the Gambling Commission, the British surveillance authority.

4. The Plaintiff wishes to establish itself in Norway and offer gaming schemes which today by law may only be offered by the State gaming company or by non-profit organisations and foundations. Further, the Plaintiff wishes to provide and market its gaming services from abroad.

5. Within the Norwegian Government, the Ministry of Culture and Church Affairs is responsible for gaming activities falling under the Lottery Act and the Gaming Act respectively. The Ministry of Agriculture and Food is responsible for horserace betting under the Totalisator Act.

6. 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 operate this, subject to supervision by Norwegian authorities. The application also concerned permission to actively provide and market the games, which today are offered from abroad on the Ladbrokes.com Internet portal, but with specific web pages targeted especially at the Norwegian market.

7. The application was sent to three public authorities, since it concerned gaming activities which are regulated by three different acts. 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 license to offer horserace betting was sent to the Ministry of Agriculture. The application for a license, under the Lottery Act, to offer other lotteries was sent to The Lottery Gaming Board.

8. The application to the Ministry of Culture and Church Affairs was rejected in a decision of 27 September 2004. The basis for the rejection was that the gaming schemes regulated by the Gaming Act may only be operated by a State gaming company (Norsk Tipping), and that the Act does not allow for the granting of such licenses to others.

9. The application to the Ministry of Agriculture was rejected in a decision of 15 November 2004. The basis for the rejection was that the Plaintiff does not fulfil the Totalisator Act's requirement that licenses may only be granted to companies or organisations whose purposes include the support of horse breeding.

10. The application to the Lottery Gaming Board was rejected in a decision of 30 June 2004. This was appealed to the Lottery Council, which upheld the decision on 7 March 2005. The basis for the rejection was that the Plaintiff is a commercial gaming company, and therefore does not fulfil the Act's requirement that licenses may only be given to organisations or associations which have humanitarian or socially beneficial purposes. Further, the Lottery Council pointed out that under Lottery Act Section 11, the Plaintiff may not be granted the right to provide or market gaming schemes which are not authorized to be operated in Norway.

11. The Plaintiff filed a lawsuit before Oslo tingrett on 2 December 2004. The claim is, first, that the three decisions be declared null and void. Second, a declaratory judgment is sought to declare that the Plaintiff can not be denied the right to establish itself in Norway and 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.

12. The Defendants submitted that Norwegian laws on gaming schemes and lotteries are clear, and that there is no authority to grant the Plaintiff the licences which it has applied for. Further, the Defendants argued that the present restrictions are not in conflict with EEA law, as they were dictated by the need to guarantee six public interest objectives: (1) to keep the amount of gaming in society at a moderate and socially responsible level, (2) to channel gaming into responsible forms which protect gamblers as consumers, (3) to protect citizens against gambling addiction, (4) to hinder and prevent crime and malpractice, (5) to limit the possibility of private enrichment on gaming, and (6) to channel the profits from gaming in their entirety to charitable, humanitarian and socially beneficial activities. Moreover, the measures are suitable, necessary and proportionate. On this basis, the Defendants have pled for an acquittal.

13. By its lawsuit, the Plaintiff challenges the principles in Norwegian law that the numbers game Lotto and sports betting (except horses) may only be provided by a State gaming company (Norsk Tipping) whose profits go to cultural and sports purposes; that licences to offer horserace betting may only be granted to non-profit organisations or companies whose purposes include the support of horse breeding; that licences to offer other gaming schemes and lotteries may only be granted to organisations or associations which have a humanitarian or socially

beneficial purpose; and that it is prohibited to provide and market gaming schemes and lotteries in Norway which do not have permission to operate on the Norwegian market.

14. In a decision of 30 January 2006, the preparing judge in Oslo tingrett declared that a request for an Advisory Opinion from the EFTA Court would be prepared. This has subsequently been prepared by the court in cooperation with the parties. Oslo tingrett emphasises that, as the case stands before it, it is purely a matter of EEA law. It is not possible to interpret the contested Norwegian laws in such a way that the Plaintiff may be granted the permits for which it has applied. Should Oslo tingrett arrive at the contested rules completely or in part being in conflict with EEA law, they would have to be set aside, according to the rules which give EEA law supremacy over ordinary national law.

III Questions

15. The following questions have been referred 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 licenses 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?**

IV Legal background

1. National law

16. As described in the 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.

17. The statutory exceptions are set out in three acts: the Totalisator Act of 1927, the Gaming Act of 1992 and the Lottery Act of 1995.

The Lottery Act

18. The Lottery Act is the general statute which encompasses all forms of lottery and gaming schemes. The definition of “lottery” in Section 1, first paragraph, *litra a* of the Act is broad, and 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, a purpose provision was added as Section 1a, where it is stated 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.

19. In practice, the Lottery Act only applies to a limited part of the lottery and gaming market, as the games which traditionally are most important are specifically regulated in the Gaming Act and the Totalisator Act. What the Lottery Act regulates are the minor lotteries. One exception is gaming machines, which originally were a very modest form of gaming, but which in recent years have increased strongly. In 2003, Stortinget (the Norwegian Parliament) decided to limit gaming on gaming machines, and bring them in under the Lottery Act. This reform has not yet entered into force (cf. Case E-1/06).

20. Other than gaming machines, the most important forms of lottery and gaming schemes operated under the legal authority of the Lottery Act are 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.

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. The system in Sections 5 and 6 of the Lottery Act 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, etc. to private entrepreneurs, who must be authorized by the National Gaming Board under Section 4c, and who may receive a share of the profits. In order to receive authorisation, requirements are set regarding inter alia lack of criminal record and sufficient financing. This has been especially relevant in regard to the operation of gaming machines. The Plaintiff has not applied for such an operator's license, but for permission to hold lotteries itself.

22. Further, the Plaintiff has challenged the prohibition in Section 11 of the Act against providing and marketing lotteries which are not permitted to be operated on the Norwegian market.

23. The central managing agency under the Lottery Act is the Gaming Board, which inter alia grants the necessary permits as well as exercising continuous control. More generally, the Gaming Board is the agency in charge of administering and supervising lottery matters and 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, private entrepreneurs who assist them, and the operations of Norsk Tipping under the Gaming Act and Norsk Rikstoto under the Totalisator Act. Decisions adopted by the Lottery Gaming Board may be appealed to the Lottery Council.

The Gaming Act

24. The Gaming Act encompasses all gaming schemes related to sports events and other competitions (except horseracing), the numbers game Lotto, as well as other games to which the King may decide the Act should apply. By an amendment in 2003, gaming machines were also brought in under the Act, but this amendment has not yet been put into effect.

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 and other competitions. In addition, the act grants Norsk Tipping the exclusive right to operate the numbers game Lotto.

26. According to 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, cultural and scientific purposes.

27. Norsk Tipping AS has its own category of corporation which distinguishes it from other State-owned companies. It 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 function as sole shareholder and 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, the profits of Norsk Tipping will be distributed as follows: 1/3 to sporting purposes, 1/3 to cultural purposes and 1/3 to scientific purposes. Before this distribution, however, a specific distribution is also undertaken to combat gambling addiction. When the reform of gaming machine laws enters into force, further distributions will also be made to other socially beneficial and humanitarian causes.

29. Further, Section 2 last paragraph makes it illegal to advertise in newspapers and journals, or to announce to the public or in other ways disseminate 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. Section 1 of the Totalisator Act reads:

In horseracing, the King may award grants to set up 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.

It is awarded 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.

The ministry 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 licences were formerly tied to each individual racetrack. In 1982, the Norsk Rikstoto Foundation, a non-profit foundation for the promotion of horse sports, was established. This foundation was granted a license to operate the national game known as V6. In 1995, amendments were made which entailed inter alia that Norsk Rikstoto could be given the superordinate responsibility for all totalisator gaming. The licenses were thereby attributed to the foundation, which then enters into agreements with the individual managing company at each racetrack. Even though the Totalisator Act allows for the granting of more licenses, in the last decade only one license has been granted – to Norsk Rikstoto which in practice thus enjoys an exclusive right to arrange horserace betting.

33. Norsk Rikstoto shall contribute to the strengthening of horse sports, horse husbandry, and Norwegian horse breeding, and the revenue which the foundation earns through horse racing activities are used in their entirety for these purposes. The system of the Totalisator Act thus entails in practice that the profits from horserace betting return to horse breeding, through the non-profit foundation Norsk Rikstoto.

34. Through the powers granted to it in the Totalisator Act, the Ministry of Agriculture 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 of Agriculture appoints 1 of the 5 members of the board of directors, and otherwise also has influence on the foundation. The Ministry approves the specific types of gaming, establishes gaming rules and determines what percentage of the stake goes toward prizes (the players' share). A minor fee, set by the King, is paid to the State. Several regulations have been issued under the Act. Control over whether acts and regulations are followed is carried out by the Ministry of Agriculture, and further also by the Gaming Board.

35. The application from the Plaintiff for a licence was dismissed with reference to the company not having as its aim "to support horse breeding," and it is this principle which is being specifically challenged.

2. *EEA law*

36. 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.

37. 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.

V Written Observations

38. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

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

The Plaintiff

39. The Plaintiff's submissions fall into three parts. It argues that the restrictions entailed by the Norwegian legislation at issue cannot be justified since the economic aims it attains are not just an incidental consequence of the policy

pursued; that these restrictions do not form part of a consistent and systematic gaming policy; and that the restrictions are neither suitable, necessary nor proportionate under a classical proportionality test. In any case, the Defendants have not lifted their burden of proof.

40. As to its argument that the revenue-producing effect of restricting gaming services goes beyond an incidental consequence of the restrictive policy adopted, the Plaintiff refers to the judgment in *Zenatti*.¹ First, in the Plaintiff's interpretation of the case law, a State may not by any means have revenue raising concerns as a basis for its gaming restrictions. Revenue has to be a 'consequence', not a purpose. Second, the consequence cannot be intended; it has to be 'incidental'. The Plaintiff associates *Zenatti* with more general case law wherein economic aims cannot qualify as justification grounds for restrictions on free movement.² When the Court of Justice of the European Communities (hereinafter the "ECJ") exceptionally accommodates economic concerns in the Member States, it either limits the notion of restriction or explicitly recognises the economic concerns as justification grounds. Furthermore, exceptions are made to the rule when the implication of doing otherwise would be a direct threat to cornerstones of the State such as social security and tax systems. Moreover, the concomitant occurrence of a non-valid justification ground with a valid one does not detract from the latter provided that the restriction can rest fully on this latter. In the Plaintiff's view, however, *Zenatti* does not fit into this background and does therefore not qualify as an exception. The Plaintiff finally refers to the *Fokus Bank* judgment to support the assumption that the presence of a non-valid justification ground invalidates other possible justification grounds.³

41. The Plaintiff argues that the burden of proof to show that revenue raising is only an 'incidental beneficial consequence' and thereby complies with *Zenatti* rests upon the Member State. In general, the Member State must at least be able to show that considerations of economic nature were absent from the decision-making process that fostered and maintained the restriction.

42. In conclusion, the Plaintiff maintains that the restrictions at issue do not pass the *Zenatti* test. Even if the general ban on gaming may be justifiable, the exceptions made to that ban, i.e. the creation and expansion of Norsk Tipping and the allowance of Norsk Rikstoto and other entities, are based on economic concerns. In any event, exceptions made to the general ban have to allow foreign operators into the market in order not to be discriminatory. Reserving the market

¹ Case C-67/98 *Zenatti* [1999] ECR I-7289. Further reference is made to Case C-243/01 *Gambelli* [2003] ECR I-13031.

² Reference is made to Case C-264/96 *ICI* [1998] ECR I-4695.

³ Case E-1/04 *Fokus Bank* [2004] EFTA Court Report 11, at paragraph 33.

for national actors in order to ensure income for national activities runs contrary to EEA law.

43. As regards the plea that the restrictive measures at issue do not form part of a consistent and systematic gaming policy, the Plaintiff refers to the test established in *Gambelli*,⁴ which is to be distinguished from the suitability test. In the Plaintiff's view, this test is not fulfilled in the present case. If the aim pursued is to limit gaming, then the extensive marketing of games run by Norsk Tipping and other entities, as well as the expansion of games, may not be allowed. Moreover, the activities of Norsk Tipping and Norsk Rikstoto are not targeted to address the concerns that presumably should underlie their monopolies. Furthermore, there is a confusion of interests and functions in the administration of Norsk Tipping. In that respect, the Plaintiff points out that the monopoly is administered entirely by the Ministry for Culture and Church Affairs, i.e. the same Ministry that has to distribute the proceeds of gaming and thus at the same time has an interest in enhancing the proceeds and ensuring that gaming is limited. Finally, the Plaintiff doubts that combating criminality is better served by directing consumers to Norsk Tipping's games than to the Plaintiff's games, given the fact that the latter are subject to UK legislation and administrative praxis aiming at crime prevention.

44. As regards the submission that the Norwegian gaming legislation is disproportionate, the Plaintiff invites the Court to apply what is referred to as the 'classical proportionality test', i.e. a test encompassing strict assessments of suitability, necessity and overall proportionality,⁵ or at least spell out clearly to the referring court what that test entails. In the Plaintiff's view, the proportionality test applied by the Defendants is too lax, in that reference to the aims pursued is deemed sufficient in order to lift their burden of proof. The Plaintiff concedes that in the sector of gaming in particular, the ECJ acknowledged in *Schindler, Läärä* and *Zenatti*, based on moral, religious and cultural factors, that the national authorities have a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. However, in *Gambelli*, that Court referred to *Kraus* and *Gebhard*, two judgments outside the gaming sector laying down the classical proportionality test. From this, the Plaintiff derives that the classical proportionality test is to be applied when the concerns of public morality are exhausted, and only the more tangible justification grounds – consumer protection and fighting criminality – are available. The public

⁴ Case C-243/01 *Gambelli*, at paragraphs 67 – 69.

⁵ Reference is made to Case C-212/97 *Centros* [1999] ECR I-1459 (suitability and proportionality); Case C-79/01 *Payroll Data Services* [2002] ECR I-4881 (suitability and necessity); Case E-9/00 *EFTA Surveillance Authority v Norway* [2002] EFTA Court Report 72 (necessity and proportionality); Case C-208/00 *Überseering* [2002] ECR I-9919 (necessity and proportionality).

morality ground ceases to be relevant when the State accepts that there shall be a market for gaming, as it does in Norway. In assessing the concerns submitted by the Defendants in order to justify the restrictive legislation, the Plaintiff comes to the conclusion that besides elimination of private profit, all other concerns relate to tangible justification grounds.

45. Behind the exclusion of private profit, the Plaintiff suspects the concern to prevent the money spent on gaming from going abroad and to prevent free competition. To accept the exclusion of competition as a justification ground for a restriction which in itself amounts to the exclusion of competition would make no sense. Furthermore, the exclusion of private profit does not relate to the concern of limiting gambling in the Plaintiff's view. The Plaintiff concludes therefore that limiting the possibility of private enrichment on gaming can not qualify as a justification ground.

46. In addition, the Plaintiff submits that the concern of keeping the amount of gaming in society at a moderate and socially acceptable level remains vague and, in any event, could be attained through less restrictive means such as regulating location of shops, advertising, limits on premiums, etc. As to the concern of channelling profits in their entirety to charitable, humanitarian and socially beneficial activities, the Plaintiff notes, firstly, that this brings the illicit concern of limiting the possibility of private enrichment on gaming back into the case. Secondly, Norsk Tipping being a monopoly, there are presumably efficiency losses to the detriment of consumers and the noble causes served. Thirdly, the concern is in its essence economic as Norsk Tipping was created to alleviate the State budget. Fourthly, the concern can be met by less restrictive measures. Fifthly, the Plaintiff maintains that it always has been willing to accommodate concerns of the Norwegian authorities as to ensure that noble causes will benefit from its activities.

47. The Plaintiff suggests answering the questions as follows:

Articles 31 and 36 EEA must be interpreted as precluding the present Norwegian legislation which prohibits the establishment in Norway of, as well as the providing and marketing of gaming by an economic operator from another EEA State who is approved under the national law of that State.

The Defendants

48. At the outset, the Defendants submit that there is neither direct nor any form of indirect discrimination in the case at hand. National restrictions on gaming can therefore be justified with reference to imperative requirements such as the

prevention of compulsive gambling, consumer protection for the players, restricting the volume of gambling out of other moral or social considerations, protecting public order, preventing crime and fraud, and preventing gaming from being a source of private profit. As regards national exclusive rights arrangements on gaming, the ECJ has specifically recognised that they legitimately strengthen public control and responsibility, and also that they may legitimately serve the purpose of “confining the desire to gamble and the exploitation of gambling within controlled channels”.⁶ Such considerations must be taken together and evaluated as a whole. Financial considerations, on the other hand, are not legitimate. However, if a national restriction is otherwise based on legitimate objective requirements, the fact that it also serves objectives of a financial nature does not impair the justification. The Defendants interpret *Zenatti* to the effect that such economic considerations cannot in themselves be part of the legal justification for the restriction. They may only be accessory (incidental) advantages and as such are legitimate. But when assessing whether a national restriction is based on recognised public interest considerations, they have to be subtracted. The test is then whether the remaining considerations behind the legislation are sufficient to objectively justify the restriction.

49. The Defendants argue that the reason behind excluding private commercial profit as far as possible from the gaming sector in Norway is threefold. First, there is the moral imperative that private persons should not profit from the misfortune of others. Second, private profit is the most important market incitement, and should therefore be suppressed or excluded if the aim is to contain gambling. Third, national legislators wanted to reserve gambling revenue as a source of income for charitable and socially beneficial causes. In this way, the requirement to prevent gaming from being a source of private commercial profit can both be a legitimate aim in itself, and a means to achieve other ends, namely to restrict and diminish gaming volume and opportunities, by eliminating commercial competition. The Defendants emphasise that the qualification of elimination of private profit as legitimate is restricted to the gaming sector and is not transferable to other sectors of the economy.

50. As regards the suitability of the Norwegian legislation at issue, the Defendants maintain that it is primarily for the national authorities to assess which measures are best suited to address gambling problems.⁷ In the Defendants’ view, the requirement of consistency introduced by *Gambelli* should be confined to

⁶ Reference is made to Case C-124/97 *Läärä* [1999] ECR I-6067, at paragraph 37 and Case C-67/98 *Zenatti*, at paragraph 35.

⁷ Reference is made, inter alia, to Case C-6/01 *Anomar* [2003] ECR I-8621, at paragraph 87, and to Case C-124/97 *Läärä*, at paragraph 37, where the ECJ, in the Defendants’ opinion, found that exclusive rights systems such as those found in the Norwegian gaming and lottery legislation are suitable for achieving legitimate aims.

cases where there is reason to suspect arbitrary discrimination or protectionism. The Court is invited to advise the national courts to stick to the ordinary suitability test as laid down in the first four gaming judgments given by the ECJ. In the alternative, the Defendants argue for a test confined to testing the consistency of the restrictions in themselves. As a second alternative, however deemed an almost impossible criterion for judicial review, the Defendants suggest a wide and general consistency test to check whether the contested measure is a consistent and systematic part of national gaming policy as a whole. If so, then all aspects of national gaming policy and regulation would have to be included.

51. In the Defendants' opinion, the marketing of existing games may be a relevant element among many others in the evaluations, but not the most important or decisive one. If one accepts the concept of public exclusive rights and other restrictions as a legitimate and suitable way of regulating the gaming sector, then it is necessary to give these public entities a certain possibility to market and develop their portfolios. The more moderate and responsible the public gaming portfolio is, the greater the need for a certain level of marketing, in order for it to compete with the far more aggressive and addictive forms of gaming offered over the Internet from abroad. The Defendants therefore contend that there is nothing inconsistent in the marketing of the gaming portfolio of Norsk Tipping and Norsk Rikstoto.

52. As regards the review of "necessity" in the gaming sector, the Defendants again hold the view that, under the case law of the ECJ, it is primarily for the national authorities to determine not only the level of restriction which they seek in the gaming and lotteries sector, but also to decide which means and legal instruments are appropriate and necessary in order to achieve this.⁸ The Defendants opine that, if a gaming restriction is found to be legitimate and suitable, then it should be for the national authorities (and not the courts) to assess whether it is also necessary. The Court should therefore advise the national courts that unless there are reasons to believe that the contested rules are in fact discriminatory or protectionist, then the courts should confine themselves to reviewing the justification and suitability of the rules. In the alternative, the Defendants argue for a moderate review in a sensitive sector such as gaming, confined to checking that the necessity assessments of the national authorities are not wrong or manifestly inappropriate. A strict and complete review, without leaving the national legislator any particular margin in this regard, would be impossible to reconcile with the case law of the ECJ, according to the Defendants.

53. The Defendants suggest answering the first question in the negative, referring to *Läärä*, where the ECJ held that a public exclusive rights system might

⁸ Reference is again made to Case C-6/01 *Anomar*, at paragraph 87.

be suitable and necessary as regards the operation of gaming machines, and that this was the national authorities' own assessment to determine. In the Defendants' opinion, the same argument must apply to other forms of gaming and lotteries. As regards the second question, the Defendants maintain that the *de facto* exclusive right of Norsk Rikstoto to organise horse racing, which not only moderates and confines horserace betting, but also ensures that the revenues generated by this activity are channelled back into the equine sector itself, is not precluded by EEA law. In the Defendants' view, the principles laid down by the ECJ in other parts of the gaming and lotteries sector must apply equally to the regulation of horserace betting. As to the third question of whether it is legitimate for national authorities to grant gaming and lottery licenses only to non-profit charities and other socially beneficial foundations and organisations, the Defendants maintain that this is a suitable legal instrument for confining and moderating gaming, at least as long as it is used only for the smaller and less problematic forms of gaming. The Defendants furthermore argue that the fourth question on limiting private profit in the gaming sector falls into two halves, to which the answers are different. The first half of the question should be whether it may be a legitimate part of the justification for national gaming restrictions that the revenues generated should go to humanitarian and socially beneficial purposes, or whether this should be seen as an illegitimate "purely financial" concern. In the Defendants' view, this is to be answered in accordance with its earlier remarks. The second half of the question should be whether preventing the operation of gaming from being a source of private profit and a market incentive can in itself be regarded as a legitimate concern. The Defendants plead for that question to be answered in the affirmative.

54. Finally, as regards the fifth question on the prohibition of providing and marketing gaming approved in another EEA State, the Defendants deem the prohibition on marketing of gaming from other countries an inherent part and natural consequence of the other national gaming restrictions, rather than a new restriction in itself.⁹ If a certain game is not licensed and permitted to operate then it follows that it should not be allowed to be marketed. Furthermore, a prohibition on marketing of unlicensed games such as that laid down in Article 11 of the Lottery Act is non-discriminatory and indistinctly applicable. At the same time, it is clear that the most important effect of such a rule is to prohibit the cross-border offering and marketing of games and lotteries from other countries, including EEA States. Considering that one Member State having opted for a certain level of protection as regards gaming does not mean that another Member State may not choose another and more restrictive level,¹⁰ the Defendants argue that Member States with strict gaming restrictions can not be obliged to accept cross-border marketing of gaming from more liberal countries. In this context, they emphasise

⁹ Reference is made to Case C-275/92 *Schindler*, at paragraph 62.

¹⁰ Reference is made to Case C-124/97 *Läärä*, paragraph 36.

that the need to prohibit marketing of unlicensed games has become even more imperative in recent years as the Internet has made all kinds of money games accessible to consumers. In the Defendants' opinion, it would even be inconsistent and structurally unsystematic within a restrictive national gaming regime to allow for the marketing and offering of unlicensed gaming, whether domestic or from abroad. Even if a specific kind of gaming has a licence to operate in another Member State such as the UK, this does not mean that it is legally licensed and permitted to operate in other countries, as the reach of the foreign licence only refers to that national jurisdiction.

55. The Defendants suggest answering the questions as follows:

(1) Articles 31 and/or 36 EEA do not preclude national legislation which establishes that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes, such as under the Norwegian 1992 Gaming Act, in view of the public interest objectives which justify it.

(2) Articles 31 and/or 36 EEA do not 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, such as under the Norwegian 1927 Totalisator Act, in view of the public interest objectives which justify it.

(3) Articles 31 and/or 36 EEA do not preclude national legislation which establishes that licenses for certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose, such as under the Norwegian 1995 Lottery Act, in view of the public interest objectives which justify it.

(4) It is a legitimate public requirement under EEA law for the national legislator to hold that the operation of gambling should not be a source of private commercial profit. It is furthermore legitimate for the national legislator to channel the revenues generated by gambling to humanitarian and socially beneficial purposes (including sports and culture) as long as this is an accessory advantage of the national legislation and not in itself the sole justification for it.

(5) Article 36 EEA does not preclude a national statutory provision which forbids the providing and marketing of gaming and lotteries which are not licensed to operate in Norway.

The Kingdom of Belgium

56. On the first question, the Kingdom of Belgium submits that it is the prerogative of national governments to decide whether and how the revenues of gaming should exclusively be given to charities. In *Läärä*, the ECJ emphasised that a monopoly has considerable advantages compared to non-exclusive organisation models in view of the allocation of the revenues of gaming activities to charity and in order to avoid risks of crime and fraud.¹¹ Furthermore, the ECJ leaves a considerable margin of discretion to national governments with regard to which specific public interest objectives to pursue and which legal instruments to use for attaining these objectives.¹² According to that jurisprudence, the limited authorisation on the basis of special or exclusive rights granted or assigned to certain bodies falls within the ambit of such public interest objectives.

57. With regard to the second question, the Kingdom of Belgium assumes that the provisions of the Totalisator Act are justified by imperative public interest requirements. The limitations on horserace betting appear to meet the objective of preventing gambling activities from being a source of private profit, as well as other public interest objectives acknowledged by the ECJ, such as reducing gambling addiction and combating crime and fraud. Since the Totalisator Act does not prevent organisations or companies from other Member States which have the objective of supporting horse breeding from applying for and obtaining a license to operate horserace betting in Norway, the Kingdom of Belgium considers the application of the Act non-discriminatory. As to suitability, the Kingdom of Belgium contends that given the risk of crime and fraud, the provisions of the Totalisator Act appear to be the most efficient means to ensure that limits are set to the lucrative nature of operating horserace betting.¹³ It is concluded that the system established by the Totalisator Act permits the authorities to control the activities of the licensee, whereas it also prevents the proceeds from horserace betting from becoming a source of private profit. In the Kingdom of Belgium's view, such a system is compatible with the margin of appreciation left to the Member States in the gaming sector.

58. On questions three and four, the Kingdom of Belgium maintains that by giving the authorisation to operate gaming activities to organisations or associations with a humanitarian or socially beneficial purpose, the legislation at issue meets the objectives developed by the ECJ since it prevents gaming from

¹¹ Case C-124/97 *Läärä*, paragraph 41.

¹² Reference is made, in particular to Case C-6/01 *Anomar*, at paragraph 87 and 88.

¹³ Reference is made, in particular, to Case C-124/97 *Läärä*, paragraph 37, 41-42.

being a source of private profit,¹⁴ ensures that the revenues are used for good causes and allows for a limited supply of gaming services to consumers by operators which are controlled and monitored. Furthermore, a monopoly by a State-owned operator is the best guarantee to control efficiently how and to whom the revenues will be attributed, provided that it is suitable and does not go beyond what is necessary to attain the objectives pursued. The question whether financial considerations are permitted as a subsidiary argument for the establishment of a monopoly, in addition to other justifications, is related to the Member States' margin of appreciation, in the Kingdom of Belgium's view. In the case at issue, financial considerations do not have to be considered as an actual justification but merely as a supportive argument.¹⁵

59. With regard to the fifth question, the Kingdom of Belgium contends that the principle of mutual recognition does not apply to the gaming sector. There is no harmonised legislation on gaming services in the EEA, which implies that each Member State has the right to impose restrictions on the free movement of services based on the general interest, provided they are non-discriminatory, suitable, necessary and proportionate. Furthermore, the Kingdom of Belgium is of the view that each Member State has an autonomous right to determine the level of protection and the preconditions for authorisation.¹⁶ With regard to the question of whether marketing of games authorised in a particular Member State should also be permitted in another Member State, the Kingdom of Belgium argues that private operators are actually abusing the possibilities offered by the Internet and circumvent the more restrictive legislation by the host State. In order to stop this practice, the country where the consumer is established should be deemed the country where the cross-border service is provided in the opinion of the Kingdom of Belgium. Consequently, the Plaintiff's claim in the main proceedings ought to be rejected. It would also be in contradiction with *Schindler*.

60. The Kingdom of Belgium suggests answering the questions as follows:

(1) Articles 31 and/or 36 EEA do not preclude provisions which establish that certain forms of gaming can only be offered by a State-owned gaming company, in view of the public interest objectives which justify it.

(2) Articles 31 and/or 36 EEA do not 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

¹⁴ Reference is made, in particular, to Case C-65/05 *Commission v Greece*, judgment of 26 October 2006, at paragraph 35.

¹⁵ Reference is made to Case C-275/92 *Schindler* and Case C-124/97 *Läärä*.

¹⁶ Reference is made to Case C-6/01 *Anomar*, at paragraph 79-81.

breeding, in view of the public interest objectives which justify it and in particular in view of the concern to prevent horserace betting from becoming a source of private profit.

(3) EEA law does not preclude national legislation, which either grants licenses to certain forms of gaming only to non-profit organisations and associations with a humanitarian or socially beneficial purpose, or emphasises that profit from gaming activities should go to humanitarian and socially beneficial purposes and not be a source of private profit.

(4) Article 36 EEA does not preclude a national statutory provision which forbids the providing and marketing of gaming which is not permitted in Norway, but which is approved under national law in another EEA State.

The Republic of Finland

61. The Republic of Finland suggests answering the first, second, third and fifth questions together. In its view, the answers to the first and second questions can be based on *Läärä* in particular, where the ECJ found that the provisions relating to the freedom to provide services do not preclude national legislation which grants a single public body exclusive rights to operate gaming machines, in view of the public interest objectives which justify it. The conditions for exclusive rights laid down there were not altered in *Gambelli*, which merely specified the requirements for justification.

62. With regard to the third question, the Republic of Finland recalls that according to the ECJ's case law, restrictions of fundamental freedoms in the gaming sector may be justified by overriding reasons relating to the public interest concerning the protection of consumers and the maintenance of order in society, in so far as the restrictions are non-discriminatory and do not go beyond what is necessary to achieve the intended aims or do not guarantee the achievement thereof. In the Republic of Finland's view, the ECJ specified the meaning of the last-mentioned criterion by stating in *Gambelli* that national measures must "serve to limit betting activities in a consistent and systematic manner."¹⁷

63. With regard to the fifth question, it is submitted that it is not sufficient in view of the nature of gaming that an operator providing gaming services is monitored solely in the home State. Even if the activities in that State were monitored there, the realisation of the monitoring could not be ensured in another EEA State to which gaming services are provided. Furthermore, the facts that there is no EC legislation in the field of gaming, and that each Member State has a

¹⁷ Case C-243/01 *Gambelli*, at paragraph 67.

wide margin of appreciation in respect of restrictions on gaming would be rendered meaningless if the legislation of the host State need not be complied with. Therefore, the Member States must be able to determine whether it is necessary to prohibit gaming activities totally or partially or to restrict them, and to lay down more or less rigorous procedures for controlling them.

64. The Republic of Finland recommends basing the answer to the fourth question in particular on the principles laid down in *Zenatti* and *Gambelli*.¹⁸ The national legislation on gaming and other relevant measures must be assessed as a whole. It is essential to examine how the regime regulating gaming is realised and how it functions in practice. It should also be taken into account that designating the profit from gaming towards humanitarian and socially beneficial purposes rather than making it a source of private profit restricts the number of operators and thus the supply of games based on competition consistently and systematically within the meaning of *Gambelli*.

65. The Republic of Finland suggests answering the questions as follows:

(1) Articles 31 or 36 EEA do not preclude national legislation such as that referred to in the first, second, third and fifth questions, provided that it involves no discrimination on grounds of nationality, that it applies without distinction, that it guarantees the achievement of the intended aims and that it does not go beyond what is necessary in order to achieve them. It is for the national court to decide whether the national legislation fulfils these conditions.

(2) EEA law does not preclude national legislation constituting a restriction of gaming according to which the profit from gaming should go to humanitarian and socially beneficial purposes (including sports and culture) and not be a source of private profit, provided that the financing of these activities is only an incidental beneficial consequence and not the real justification for the restrictions. It is for the national court to decide whether, having regard to the specific rules governing its application, the national legislation fulfils the conditions set out above.

The French Republic

66. The French Republic proposes to answer the first four questions together. It recalls that, whilst legislation preventing operators in other Member States from taking bets is an obstacle to the freedom to provide services, the ECJ has recognized compatibility with Community law of national legislation that limits

¹⁸ Reference is made in particular to Case C-67/98 *Zenatti*, at paragraphs 35 - 37; Case C-243/01 *Gambelli*, at paragraph 62.

monetary gaming schemes in *Schindler*, *Läärä*, *Zenatti* and *Anomar*. The French Republic emphasises that the grant of an exclusive right to an operator controlled by the State ensures control of recording operations, processing and pay outs as well as control of money laundering and fraud risks. In the view of the French Republic, a national judge must further take into consideration whether the profits generated by gaming go to public-interest activities. In this respect, it is irrelevant whether the profits go specifically to activities of social, humanitarian or cultural significance or sporting organisations, or to the State's general budget. By definition, the general budget funds of a State go to general interest activities relevant to society as a whole.

67. As regards the requirement in *Gambelli* that a Member State cannot, for purposes of obtaining funds, pursue a policy of substantial expansion of gaming and betting, the French Republic maintains that this does not preclude a Member State which pursues a policy of controlled expansion of gaming from justifying restrictions otherwise imposed on such activities. Whilst resulting in an increase in budgetary revenues, a policy of expanding gaming may still be controlled and organised so as to contribute to the objective of protecting consumers and maintaining order in society, as well as preventing fraud. In order to determine if a State is conducting a coherent and systematic policy in this regard, it is necessary to review the policy pursued for all gaming activities, and to take into account the specifics of the sector. Regardless of the expansion policy pursued by a single operator, opening up the gaming market would result in even greater expansion. Being too restrictive in gaming matters could, on the other hand, work against the protection of consumers and the maintenance of order in society, since that could encourage the introduction of illegal and underground gaming. To channel the desire for gaming in a controlled way, it is necessary that the exclusive rights holder offers games that meet the expectation of consumers and constantly adjust the gaming supply as well as the distribution channels to changes in society. This must be backed up by advertising campaigns informing consumers of available new games. Furthermore, the French Republic maintains that the mere fact that gaming generates, through high public taxes, large budgetary revenues, does not contradict the policy of limiting gaming activities. Rather, high taxation on gaming is an instrument for restricting the attractiveness of games, since it reduces the level of redistribution rates to winners.

68. With regard to the fifth question, the French Republic recalls that in *Schindler*, the ECJ recognized that the United Kingdom had the right to prohibit lottery activities although they were approved in another Member State.¹⁹ This interpretation is not challenged by the judgment in *Lindman*,²⁰ since that case did

¹⁹ Case C-275/92 *Schindler*, at paragraph 61.

²⁰ Case C-42/02 *Lindman* [2003] ECR I-13519, at paragraph 26.

not concern the prohibition of gaming schemes in a Member State but the tax treatment applied by a Member State to the winnings from gaming organised in another Member State.

69. The French Republic suggests answering the questions as follows:

(1) Articles 31 and 36 EEA do not preclude national legislation of an EEA State that, for purposes of the maintenance of order in society and the protection of consumers, reserves gaming schemes to a single operator whose profits go to funding general interest activities, whereas that State is simultaneously conducting a controlled policy of expanding such gaming schemes.

(2) Article 36 EEA does not preclude legislation of an EEA State which forbids the providing and marketing of gaming which is not permitted in that State, but which is approved in another EEA Member State.

The Federal Republic of Germany

70. With respect to the first question, the Federal Republic of Germany bases itself on the assumption that the Norwegian legislation at issue constitutes a restriction of both Articles 31 and 36 EEA, albeit neither directly nor indirectly discriminatory. In its view, the legislation does, however, pursue legitimate general interests as it is intended to ensure that gaming and sports betting are held in proper forms and subject to public control with the aim of preventing negative consequences of gambling. In that respect, the Federal Republic of Germany refers to a judgment of the Federal Constitutional Court²¹ establishing parallel requirements to those established by the ECJ. That Court held in particular that the opening up of the market would lead to a considerable increase in the betting services offered, an expansion which in turn would entail an increase in problematic and addictive conduct. However, both the ECJ and the Federal Constitutional Court held that the State's public revenue interest cannot justify the creation of a monopoly,²² unless it merely constitutes an incidental beneficial consequence. In the opinion of the Federal Republic of Germany, the Gaming Act, besides addressing legitimate aims, also aims at financing sporting, cultural and scientific purposes which in itself cannot justify a restriction on a fundamental freedom. That said, the Federal Republic of Germany maintains that the allocation of profits to public-interest purposes, alongside other genuine justifications, can be considered as an incidental benefit. Firstly, they have to be seen as part of a

²¹ Judgment of 28 March 2006 BvR 1054/01 *Sports Betting*.

²² Reference is made to Case C-67/98 *Zenatti*, at paragraphs 36-37, Case C-243/01 *Gambelli*, at paragraphs 62; BvR 1054/01 *Sports Betting* at paragraph 109.

broader scheme which aims at preventing the negative consequences of gambling. Secondly, the margin of appreciation enjoyed by Member States entails the decision on how to allocate profits from gaming and lotteries.²³ Thirdly, the ECJ regards financing public interest purposes as an important aspect of gambling regulations.²⁴ Moreover, the Federal Republic of Germany maintains that no indication is given in the request of the national court that the Norwegian legislators are pursuing a policy of expanding gaming with a view of obtaining funds as in the *Gambelli* case, nor that the Norwegian Gaming Act was introduced to generate public revenue. With regard to proportionality, the Federal Republic of Germany submits that judicial review of the national legislators' policy choices is limited due to the margin of appreciation in the area of gaming. The requirement laid down in *Gambelli* of consistent and systematic limiting of gaming does not qualify the regular proportionality test.

71. Concerning the second question, the Federal Republic of Germany argues that the national court should analyze whether the regulation of horserace betting is justified by overriding general interests, is applicable in a non-discriminatory manner and can be considered proportionate to the aims it pursues. The Federal Republic of Germany highlights that the financing of horse breeding cannot in itself be considered a legitimate general interest, and that the legislators enjoy a broad margin of appreciation also in the regulation of horserace betting.

72. As regards the third question, the Federal Republic of Germany reiterates that in its assessment, the national court should establish whether the financing of public interest constitutes only an incidental beneficial consequence, and take into account the margin of appreciation enjoyed by the national legislators. In the Federal Republic of Germany's opinion, this discretion encompasses allowing for the operation of lotteries of minor importance by organisations and associations with a humanitarian or socially beneficial purpose. This nonetheless restricts the range of games offered and avoids exploiting the population's natural urge to gamble for private and commercial profit purposes. Such a measure does not question the consistency of the regulatory scheme as such since it takes into account that forms of minor lotteries are potentially less damaging than large-scale lotteries which are reserved for a public operator under Norwegian law.

73. The Federal Republic of Germany, with regard to the fourth question, suggests that it is legitimate for the legislators to emphasise that the profit from gaming should go to humanitarian and socially beneficial purposes. However,

²³ Reference is made to Case C-275/92 *Schindler*, at paragraph 61; Case C-124/97 *Läärä*, paragraph 41; Case C-67/98 *Zenatti*, at paragraph 35.

²⁴ Reference is made to Case C-124/97 *Läärä*, paragraph 36; Case C-67/98 *Zenatti*, at paragraph 35.

such financing of social activities can be nothing more than a mere incidental beneficial consequence and not the real justification for the restriction.

74. On the fifth question, the Federal Republic of Germany disputes that a principle of mutual recognition exists in the field of gaming and lottery regulation, in the absence of harmonisation and contrary to the Advocate General's Opinion in *Placanica*. The acceptance of such a principle would lead to a 'race to the bottom' in that operators would establish themselves in the most permissive legal system, thus circumventing stricter regulations in other States. Furthermore, acknowledging such a system would be contrary to the necessary sensitivity towards the plurality of systems and level of protection in Europe due to specific cultural backgrounds for regulation. To support this, the Federal Republic of Germany refers to case law of the ECJ.²⁵ Whilst the aim of combating fraud might indeed also be achieved through regulations in the home State, this is not true for other policy objectives. Hence, a permission to operate gaming services granted by another Member State is not to be taken into account in the host State, i.e. Norway.

75. The Federal Republic of Germany suggests answering the questions as follows:

(1) Articles 31 and 36 EEA do not preclude national legislation which establishes that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes, if this is justified by overriding reasons relating to the public interest, is suitable for securing the attainment of the objective which it pursues, and does not go beyond what is necessary in order to attain it.

(2) Articles 31 and 36 EEA do not 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) Articles 31 and 36 EEA do not preclude national legislation which establishes that licences for 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, it is legitimate for national legislation to emphasise that the profit from gaming should go to humanitarian and socially

²⁵ Case C-275/92 *Schindler*, at paragraph 61; Case C-124/97 *Läärä*, paragraph 35; Case C-67/98 *Zenatti*, at paragraphs 33-34; Case C-6/01 *Anomar*, at paragraph 79-81; and Case C-36/02 *Omega* [2004] ECR I-9609, at paragraphs 31 and 38.

beneficial purposes (including sports and culture), and not be a source of private profit.

(5) Article 36 EEA does not preclude a national statutory provision which forbids the providing and marketing of gaming which is not permitted in Norway, but which is approved under national law in another EEA State.

The Hellenic Republic

76. In pronouncing itself on the first four questions, the Hellenic Republic points to the specific nature of the lottery sector, as recognized by the ECJ, entailing Member States' power of discretion as to how to regulate the gaming market.²⁶ In the Hellenic Republic's view, this even obliges the States to take all appropriate measures in order to preserve public order and consumer protection, provided they are non-discriminatory, justified by overriding reasons of public interest and in compliance with the proportionality principle. The obligation to allocate part of the revenue to good causes is not without relevance for justification,²⁷ and is, with regard to the risk of crime and fraud, more effective in ensuring that strict limits are set to the lucrative nature of gaming activities.²⁸ In addition, financing these good causes is significantly and visibly beneficial to society. Whilst it is in the Court's discretionary power to evaluate whether allocation of gaming revenues to socially beneficial purposes is essential or secondary in order to justify the deviation from the fundamental freedoms, it is up to the Member States to establish the rules governing the gaming sector, in particular (1) the way the gaming market is to function within its jurisdiction; (2) the purposes to which revenues are allocated; (3) the forms of gaming offered to the consumer; (4) the organization that may conduct games of chance. This would include conferring upon Norsk Tipping the exclusive right to conduct gaming.

77. In response to the fifth question, the Hellenic Republic remarks that neither the so-called E-Commerce-Directive 2000/31/EC nor the upcoming Service Directive apply to gambling. Furthermore, it is pointed out that there is a prohibition under Greek law against private companies conducting games, similar to the Norwegian one.

The Republic of Iceland

78. The Republic of Iceland assumes that the first question falls into two parts. As to the first part, i.e. whether Articles 31 and/or 36 EEA prohibit the

²⁶ Case C-275/92 *Schindler*, at paragraphs 60 and 61; Case C-124/97 *Läärä*, paragraph 35.

²⁷ Case C-275/92 *Schindler*, at paragraph 61.

²⁸ Case C-124/97 *Läärä*, paragraph 41.

establishment of a state monopoly on certain forms of gaming, the Republic of Iceland points out that the Norwegian legislation does not involve discrimination on grounds of nationality. In the Republic of Iceland's opinion, the Defendants have demonstrated in the case at issue that the national measures were motivated by the imminent and increasing problem of gaming addiction and the difficulties of effective control rather than by economic considerations. In the assessment of proportionality, the Republic of Iceland suggests that the Court should follow *Lääri* and recognize that restricting the access to the gaming market by establishing exclusive rights is better suited to meet the imperative public interest objectives associated with limiting gaming than opening up the access to the market to all private operators while subjecting their operations to strict regulations. As to the second part of the first question, i.e. whether Articles 31 and/or 36 EEA preclude national legislation from stipulating that the profits from such a gaming monopoly should be channelled to cultural and sports purposes, the Republic of Iceland argues that the Member States have a sufficient degree of latitude to determine the allocation of the profits lotteries yield.²⁹ Channelling revenues to good causes is therefore considered legitimate, as long as it is only a supportive argument for the restrictive national rule in question and not the main justification for it, i.e. only an incidental beneficial consequence.

79. As regards the second question, the Republic of Iceland contends that the aim of limiting the licensing of horserace betting operators to organisations supporting horse breeding meets the objective of preventing gaming activities from being a source of private profit. The compatibility of the provisions of the Totalisator Act with EEA law rests upon the assessment of suitability. An alternative system where anyone could operate horserace betting, but would be required to give a part of the proceeds to the support of horse breeding would be less efficient in monitoring and controlling horserace betting activities. As to the necessity of the prevailing system, the Republic of Iceland, referring to *Zenatti* and *Lääri*, opines that Member States should be given a sufficient degree of latitude to determine their policy on different types of gaming activities in the light of the specific social and cultural features of each Member State. The system established under the Totalisator Act is deemed fully compatible with the Member States' wide margin of appreciation.

80. On the third and fourth questions, the Republic of Iceland holds the view that granting the authorisation to operate gaming services only to organisations whose work is devoted to charity and other good causes allows for three distinct objectives to be met, namely to prevent gaming from being a source of private profit; to ensure that the proceeds from gaming activities are directed towards good causes; and to allow for a limited supply of gaming services to consumers by

²⁹ Reference is made to Case C-275/92 *Schindler*, at paragraphs 60 and 61.

operators which are closely controlled and monitored, thus offering consumers a legal way to participate in gaming activities, thereby contributing to the prevention of illegal gambling. By recognising that preventing gambling from being a source of private profit is in itself a public interest objective, the ECJ has in fact acknowledged that it lies within the Member States' margin of appreciation to exclude private operators from the gambling sector. That said, the Republic of Iceland considers it important to verify whether the objective of measures excluding private profit operators from gaming is truly to prevent gambling from being a source of private profit, or other public interest objectives, and not unrelated concerns such as the financial benefit of the public purse.

81. With regard to the issues addressed in the fifth question, the Republic of Iceland comes to the conclusion that Article 36 EEA does not preclude a national statutory provision prohibiting the providing of gaming which is not permitted in Norway, but which is approved under national law in another EEA Member State, as long as that national statutory provision is non-discriminatory, suitable, necessary and proportionate. Whether these conditions are fulfilled in the case at issue should be answered by the national court. However, an answer in the negative would be contrary to established case law, in particular *Schindler*, as well as pending EU legislation. As regards the prohibition on the marketing of games approved in another Member State, the Republic of Iceland maintains that sustaining the Plaintiff's position would amount to giving operators the right to make publicity for illegal games, namely for games offered on the Internet and approved under foreign jurisdictions. This would deprive Member States of the possibility to provide their citizens the level of protection the State considers appropriate, as the advertisement leads players to non-authorized operators over whom the State has no control. In that context, the Republic of Iceland emphasises that the place where an Internet service is delivered must be the place where the economic activity is pursued, i.e. Norway in the case at issue.

82. The Republic of Iceland suggests answering the questions as follows:

(1) Articles 31 and/or 36 EEA do not preclude provisions of national legislation which establish that certain forms of gaming can only be offered by a State-owned gaming company, in view of the public interest objectives which justify it.

(2) Articles 31 and/or 36 EEA do not 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, in view of the public interest objectives which justify it and in particular in view of the concern to prevent horserace betting from becoming a source of private profit.

(3 and 4) EEA law does not preclude national legislation which either grants licenses to operate certain forms of gaming only to non-profit organisations and associations with a humanitarian or socially beneficial purpose, or emphasises that profit from gambling activities should go to humanitarian or socially beneficial purposes and not be a source of private profit.

(5) Article 36 EEA does not preclude a national statutory provision which forbids the providing and marketing of gaming which is not permitted in Norway, but which is approved under national law in another EEA State.

The Kingdom of the Netherlands

83. The Kingdom of the Netherlands argues that the Norwegian rules at issue are restrictive, but not discriminatory. Furthermore, the transfer of earnings to charitable causes must be seen as an ‘incidental beneficial consequence’ and not the actual goal of the restrictive national measures. It further infers from *Läärä* and *Anomar* in particular that Member States have a large degree of latitude in determining how to regulate gaming; that Member States are free to assess the level of protection they wish to have; that Member States may in this context impose a total ban or may opt to regulate gaming providers; and that Member States may create monopolies to this end if this is not disproportionate to the aim pursued. A monopoly for gaming activities is also an appropriate way of attaining the objectives invoked by the Defendants, including the reduction of gambling addiction. Thus, the choice of the type of restriction a Member State wishes to implement belongs to its margin of appreciation, as long as that choice is not disproportionate to the aim pursued.

84. In the Kingdom of the Netherlands’ opinion, the *Gambelli* judgment does not represent a significant change of direction compared with the ECJ’s earlier case law, as it should be seen against the background of the factual situation in Italy at that time, which is to be distinguished from the circumstances in the current proceedings. The Kingdom of the Netherlands interprets the consistency requirement to the effect that gaming policy as a whole, and not just aspects of it, must be assessed. The test must be limited to the question whether the approach in its totality is so imbalanced that it can no longer reasonably be considered ‘consistent and systematic’. The Norwegian legislation restricts and controls the provision of gaming services and therefore satisfies the requirement set in *Gambelli* that gaming policy be suitable and proportionate if the provision of gaming services is actually controlled. The *Lindman* judgment, on the other hand, is not relevant to the case at issue in the view of the Kingdom of the Netherlands. The final assessment on the compatibility of national law with Articles 31 and/or 36 EEA is to be made by the national judge.

85. Dealing with the fifth question in particular, the Kingdom of the Netherlands maintains that there is no duty for Norway to recognize the legislation of the United Kingdom due to lack of harmonisation in this area. Moreover, the prohibition of marketing is considered a corollary of the prohibition on gaming without a permit. If the latter is compatible with EEA law, then it is also justified to forbid the marketing of gaming services which have not been given a permit. Marketing of an illegal activity can be forbidden. In that sense, the Kingdom of the Netherlands refers to the marketing prohibition as a necessary element of the protection Norway wants to afford in respect of gaming activities. At the same time, the prohibition on the marketing of gaming services is in itself justified by reasons of overriding general interests, as it prevents consumers from being exposed to a large scale offer of gaming services. According to the Kingdom of the Netherlands, the general case law on national restrictions on advertising is not relevant, as the marketing restriction in the case at issue is limited to the channelling of the desire to gamble into responsible forms.

86. The Kingdom of the Netherlands suggests answering questions (1), (2), (3) and (5) in the negative and question (4) in the affirmative.

The Portuguese Republic

87. The Portuguese Republic suggests that the first question should be answered in the negative. In its view, the States are entitled under the case law to determine on grounds of compelling public interest the volume, type of gaming and the beneficiaries of the profits from games on their respective territories. The objectives invoked by the Defendants are such legitimate grounds, with the effect of reducing gambling addiction and preventing fraud. Arrangements less restrictive than a monopoly have not proven sufficient to control, limit and prevent the risk of addiction. *Gambelli* merely indicated that a State's decisions in the area of gaming may not be arbitrary or principally motivated by the State's financial interests. Furthermore, the Portuguese Republic contests that a State is under an obligation to accept all games authorised in another State. In conclusion, the Portuguese Republic maintains that the gaming policy pursued by the Defendants is in line with the criteria set out in jurisprudence.

88. With respect to the second question, the Portuguese Republic again suggests an answer in the negative. Under the ECJ's case law, Member States may grant the organisation of sporting bets and the profits resulting thereof to a non-profit organisation with the exclusive aim of supporting horse breeding, provided that there is no discrimination and that proportionality and necessity are warranted. The Portuguese Republic contends that the power of each Member State to define what is necessary to protect its values and principles and to establish a monopoly in the gaming sector is based on the subsidiarity principle in the EU Treaty.

89. The Portuguese Republic also suggests a negative answer to the third question in view of the Member States' margin of appreciation and the public interest objectives at stake. It further recalls that the draft Services Directive excludes gaming services from its scope of applicability.

90. As to the fourth question, the Portuguese Republic suggests an affirmative answer. The restrictions on the free provision of services entailed by the legislation at issue are non-discriminatory in nature and justifiable by overriding concerns relating to the public interest, provided they are appropriate to achieve the intended aims and do not go beyond what is necessary to achieve them. To the Portuguese Republic, the legislation at issue conferring exclusive rights on a non-profit organisation does not appear to be disproportionate. A less restrictive system of licenses proved not capable of mitigating the damaging consequences of gambling. The same must apply not only to games operated physically in Norway, but also to games operated through the Internet in Norway for the Norwegian public.

The Republic of Slovenia

91. The Republic of Slovenia recalls that for restrictions on the freedom to provide services and the right to establishment to be justified, they must (1) serve imperative requirements in the general interest such as consumer protection, prevention of fraud, prevention of incitement to squander on gaming and the need to preserve public order; (2) be suitable for achieving the objective which they pursue; (3) not go beyond what is necessary in order to attain it; and (4) be applied without discrimination. However, the restrictions may not have as sole purpose the funding of humanitarian and sports activities, nor the increase of budget revenues, which may only be incidental consequences of the restrictions.

92. In applying these criteria to the Norwegian legislation at issue, the Republic of Slovenia is of the opinion that the six concerns brought forward by the Defendants may constitute reasons of overriding general interest. Gaming should be channelled and restricted in order to control the negative consequences (externalities). The social costs associated with gaming activities can be high and may justify the restriction of fundamental freedoms. The Republic of Slovenia further opines that the restrictions inherent in the Norwegian gaming legislation are suitable to achieve the intended goals. Granting an exclusive right to one single public law entity under the Gaming Act as well as granting licenses only to non-profit organisations under the Lottery Act and the Totalisator Act restricts the supply of gaming services in particular. Moreover, the restrictions inherent in the Norwegian legislation are proportionate in relation to the objectives they are pursuing³⁰ and do not go beyond what is necessary. With regard to possible

³⁰ Reference is made to Case C-124/97 *Läärä*, paragraph 42.

discrimination, the Republic of Slovenia argues that neither is there overt discrimination entailed by the Norwegian legislation, nor any indirect discrimination. The conditions set out by the Gaming Act are equivalent to those set out in the Finnish legislation at stake in *Läärä*, and the conditions set out in the Lottery Act and the Totalisator Act are not met with more difficulties by non-resident entities than by domestic entities. A profit-oriented Norwegian entity would be denied the permission to hold lotteries, whereas a foreign non-profit organisation could be granted one under the Lottery Act. The same goes for the condition of supporting horse breeding under the Totalisator Act.

93. As regards the requirement in *Zenatti* that funding humanitarian and sports activities or increasing budget revenues may only be incidental consequences, the Republic of Slovenia asserts that the main objective behind the Norwegian legislation is to restrict access to the gaming and betting market. Channelling profits from gaming and betting to good causes internalises and thereby neutralises negative externalities of gambling and increases the welfare of society. The costs of gambling incurred to society are borne and paid by the entity that causes these costs. The Republic of Slovenia finally mentions that under the Lottery Act, not all the profits earned must be channelled to good causes but may partly remain with private undertakings.

94. The Republic of Slovenia suggests answering questions (1), (2), (3) and (5) in the negative and question (4) in the affirmative.

The Kingdom of Spain

95. According to the Kingdom of Spain, a legal doctrine can be derived from the ECJ's jurisprudence in the field of gaming law whereby (1) national authorities have a margin of appreciation in determining what consumer protection and the preservation of public order require;³¹ (2) restrictions on the freedom of establishment and the freedom to provide services must be justified by imperative requirements in the general interest, they must be proportional (i.e. suitable for achieving the objective which they pursue and not go beyond what is necessary in order to obtain it), and non-discriminatory;³² it is for the national judge to decide whether circumstances exist that could justify the restrictions. To guide the national judge in determining whether such circumstances exist, the Kingdom of Spain proposes a list of criteria derived from *Gambelli*.³³ In the opinion of the Kingdom of Spain, the ECJ has recognized the competence of each Member State to regulate gaming in its entirety and, in *Gambelli*, accepted that granting

³¹ Case C-243/01 *Gambelli*, at paragraph 63-67.

³² Case C-243/01 *Gambelli*, at paragraphs 64 and 65.

³³ Case C-243/01 *Gambelli*, at paragraphs 61, 62, 67, 69, 70-71, 72 and 73.

exclusive rights does not violate the EC treaty as long as these restrictions are justified as meeting social and consumer protection purposes. The same is true for internet gaming activities. The competent national authorities cannot invoke the need to maintain public order if, in reality, they are favouring the expansion of gambling and betting in their territory. However, to interpret that refinement in *Gambelli* as liberalisation of gaming in EU and EEA would be erroneous in the opinion of the Kingdom of Spain. In that respect, it is emphasised that gaming has been excluded from the scope of the draft Directive on Services. The Kingdom of Spain further maintains that the Norwegian legislation at issue is not discriminatory, and is based on obligatory and legitimate legislative issues. The denial of a licence to the Plaintiff constitutes a decision coherent with Norway's gaming policy, and is proportional and necessary to achieve the level of protection against gambling problems sought by the legislators.

96. The Kingdom of Spain suggests that the EFTA Court should recognize the legitimate right of each State to conserve the public monopoly on gaming within its respective jurisdiction. Through the limitations inherent in such a system, opportunities for gambling are being curbed and the urge to gamble is being channelled into its least harmful manifestations, while a level of public control not to be achieved in an open-market system can be obtained.

97. The Kingdom of Spain suggests answering the questions as follows:

(1) National legislation establishing that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits into cultural activities and sports is compatible with Articles 31 and 36 EEA.

(2) National legislation establishing that licenses to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding is compatible with Articles 31 and 36 EEA.

(3) National legislation establishing that licenses to certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose is compatible with Articles 31 and 36 EEA.

(4) National legislation establishing that the profit from gaming should go to humanitarian or socially beneficial purposes (including sports and culture), and not be a source of private profit is compatible with Articles 31 and 36 EEA.

(5) National legislation prohibiting the providing and marketing of gaming services which are not permitted in the Member State in question, but

which are approved under national law in another EEA State is compatible with Articles 31 and 36 EEA.

The EFTA Surveillance Authority

98. ESA bases its assessment on the assumption that legislation as described in questions 1, 2 and 3 constitutes a restriction on the freedom of establishment, and that both such legislation and rules of the kind mentioned in question 5 constitute a restriction on the freedom to provide services for gaming service providers established in other EEA States. The first precondition for justification is that the restriction pursues an aim which under EEA law can be classified as an imperative requirement in the general interest.

99. In its assessment of the legality of the aims behind the restrictions, ESA first deals with the fourth question, i.e. whether national legislation may emphasise that profit from gaming should go to humanitarian and socially beneficial purposes and should not be a source of private profit. As regards the approach taken by the ECJ in *Schindler*, ESA argues that, to the extent that judgment has been interpreted in support of channelling of gambling revenue to social causes as a subordinate, but valid justification ground, later case law has made it clear that such is not the case. In ESA's view, it follows from *Gambelli* that the financing of social activities is not a legitimate aim as such.³⁴ If only for that reason, such an aim cannot serve as subordinate justification for the restriction either. At the same time, an approach of ignoring the aims relating to the financial support of charities and continuing the assessment on the basis of other, legitimate objectives, would also not be compatible with *Gambelli* and *Zenatti*. According to ESA, the test laid down in the case law specifically concerning exclusive rights is stricter. The insistence by the ECJ on making sure that economic aims have not influenced the establishment and design of an exclusive right to provide a given service must be seen as the natural counterpart to the relatively wide margin of appreciation that the EEA States enjoy in this area in order to determine what is required in the interest of consumer protection and maintenance of public order. To the extent that an EEA State uses its margin of appreciation in order to mix the pursuit of such legitimate concerns with economic aims, the entire rationale for the special leniency evaporates. ESA also concludes from the judgment in *Fokus Bank* that a restriction falls foul of the EEA Agreement if it partially pursues legitimate aims, but also is based on a wish to generate income for the Treasury.³⁵ As to the weight to be attached to the wish to bring revenue to charities, ESA submits that the courts should not embark upon an assessment of whether the aim of securing

³⁴ Case C-243/01 *Gambelli*, at paragraph 62 and Advocate General Alber in the same case, at paragraph 125.

³⁵ Case E-1/04 *Fokus Bank* [1994] EFTA Court Report, p. 11, at paragraph 33.

revenue to charities was the main aim behind the monopoly. The appropriate test is rather a causality test where the national court must find the exclusive right incompatible with Articles 31 and 36 EEA unless the State concerned can demonstrate that the exclusive right would have been introduced, and given the same scope and content, if that aim had not been relied on when the legislation was adopted.

100. With regard to the wish to eliminate private profit as a possible legitimate objective, ESA contends that the ECJ did not hold in *Schindler*³⁶ that this aim should be accepted as a consideration that can justify a monopoly solution, inter alia because the aim to avoid private profit is ultimately of an economic nature and hence not an aim that can justify a restriction to the rules on free movement. It also follows from the case law that, to the extent exclusive rights have been accepted, it has been due to imperative requirements of an overriding social nature.

101. As regards the first three questions, ESA starts out by maintaining that EEA law precludes exclusive rights based on the objective of only allowing state-owned operators or non-profit entities to provide gambling services. The EEA Agreement does not grant state-owned and non-profit entities a special, privileged position capable of justifying exclusive rights merely by reference to their status as being different from private commercial operators. Further, with respect to the four non-economic aims offered by the Defendants as imperative requirements in the general interest, ESA observes that it follows from *Gambelli* that a restriction on gaming services must in any event reflect a concern to bring about a genuine diminution of gambling opportunities.³⁷

102. On the issue of consistency, ESA states that the fact that the gaming policy in Norway limits gaming opportunities, since only certain bodies are allowed to operate such services, is not sufficient to conclude that the policy is consistent within the meaning of *Gambelli*. In that case the Italian legislation at issue also had the clear effect of limiting gaming opportunities since such services were, in principle, prohibited. Further, consistency is to be assessed with respect to gaming services in general and not related to each kind of game, as follows again from *Gambelli*. ESA understands the consistency test to require an EEA State to ensure that operators with exclusive rights exercise those rights in conformity with the social objectives that allowed for the granting of exclusive rights in the first place. If the holders of the exclusive rights are allowed to operate in the same way as normal economic operators and extensively advertise their services and develop

³⁶ Case C-275/92 *Schindler*, at paragraph 60.

³⁷ Cf. Case C-243/01 *Gambelli*, at paragraph 62, in which reference is made to case C-67/98 *Zenatti*, at paragraph 36, which in turn refers to paragraph 32 of the Advocate General's Opinion in that case.

their products in order to attract new customers and increase their market shares, the basic rationale for granting of the exclusive rights, namely the genuine diminution of gaming services in a consistent and systematic manner, ceases to exist. On that basis, the referring court should, first, examine whether the different holders of monopoly rights have extended the offer of their games and/or increased their points of sale and other modes of offering their gaming services. Second, the referring court should look closely into the marketing conducted by the different monopoly holders. In the last decade, Norsk Tipping has been the largest amongst all advertisers of goods and services on the Norwegian market, and, in 2005 spent NOK 145 020 986 on advertising. Norsk Rikstoto's marketing expenses increased from NOK 59 958 000 in 2004 to NOK 73 038 000 in 2005. Based on such information, ESA comes to the conclusion that the extensive marketing and expansion of the national gaming operators entail that the Norwegian State, via its ownership of Norsk Tipping and as regulator of other gaming services, does indeed incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse.

103. Furthermore, in ESA's view, the so-called "channelling argument" cannot be reconciled with *Gambelli*, as exclusive rights are only justifiable if the national gaming policy is intended to ensure a genuine limitation of money games. If an EEA State considers it necessary to try to prevent its citizens from requesting services from gaming operators abroad, it would, as long as it has based its gaming policy on exclusive rights in order to limit money games, have to utilise other measures than allowing national gaming operators to extensively market and develop their services. Should the Court nevertheless find that the channelling argument can be accepted in principle, ESA suggests that the actual application of such a principle should be limited to situations where the State has convincingly demonstrated that both the purpose and effect of the national marketing is only to channel and not to increase demand. For that to be the case, the national court should require the State to prove (1) that there is a considerable existing consumer demand for money games and that the consumers, in the absence of national operators' extensive marketing, would satisfy that demand with other (foreign) gaming services although such services are not advertised in Norway; (2) that marketing only makes consumers request national games instead of, and not in addition to, foreign games; (3) that the foreign gaming services with whom the national gaming service operators compete are in fact more dangerous for consumers than the advertised services; (4) that the marketing does not have the effect of working as a "gateway" to more problematic games; and (5) that the same consumer protection effects could not be achieved by other measures such as information campaigns.

104. With regard to proportionality, ESA asserts that acknowledging State discretion in setting the level of protection should not entail that the measure is

immune to judicial review for the purposes of verifying that it is not only motivated by legitimate concerns but is both suitable and necessary to address those concerns.³⁸ In carrying out the necessity test, the national court should assess whether the monopoly is in fact necessary for the achievement of the legitimate aims, or whether they could also have been achieved in a less restrictive system. In ESA's view, a monopoly does not in itself lead to less gambling addiction as it is the content and availability of a game, and not the owner of the gaming provider, that determines the degree to which playing the game may lead to problem gambling. Moreover, to argue that a monopoly will reduce the level of gambling and gambling addiction simply because the monopolist allegedly has less incentive to develop new games and offer attractive prizes is, in the opinion of ESA, contradicted by the *de facto* situation on the European markets. As regards the objective to hinder and prevent crime and malpractice, ESA concludes that a desire to have only one operator to deal with will not be compatible with Articles 31 and 36 EEA. In contrast, the aim to prevent and hinder crime and malpractice might in principle be able to justify an exclusive right if that aim can only be achieved by using one particular service provider having special characteristics.

105. In pronouncing itself on the fifth question, ESA submits that at the current stage of EEA law, there is no general principle of mutual recognition of gaming service providers authorised in other EEA States. When exclusive rights pursue imperative requirements in the general interest and are suitable and necessary thereto, it must also be for the EEA State in question to prevent that the limiting effects of the exclusive rights are undermined by gaming service providers established in other EEA States. However, the freedom to provide services may be restricted only in so far as the legitimate interest is not safeguarded by the provisions to which the provider of the service is subject in the EEA State of his establishment.³⁹ In ESA's opinion, the fact that an operator is approved in another EEA State must influence the assessment of the State's competence to exclude the foreign service provider by invoking consumer protection objectives such as those presented by the Defendants, namely to channel gaming into responsible forms which protect consumers against gaming addiction. To the extent the foreign service provider, in its home state, has a licence to provide comparable games subject to comparable limitations as those available in Norway, and the provider is subject to a comparable system of administrative control, it is far from obvious why it is necessary, in the name of consumer protection, to prevent those operators from marketing such games in Norway. Moreover, to the extent the foreign gaming service provider is subject to similar control in its home state as regards

³⁸ Reference is made to Case C-243/01 *Gambelli*, at paragraphs 64-65 and 72-75.

³⁹ Case 279/80 *Webb* [1981] ECR 3305, at paragraph 17; Case 355/98 *Commission v Belgium* [2000] ECR I-1221, at paragraph 37; and Case C-244/04 *Commission v Germany* [2006] ECR I-885, at paragraph 31.

prevention of crime and malpractice, that should be sufficient to fulfil the said objective.⁴⁰ In that respect, ESA underlines that the U.K., like Norway, has a gaming authority that supervises gaming operators, and that the Norwegian authorities have not conducted an assessment of whether the public interest relating to the prevention of fraudulent and criminal actions is inadequately protected in the Plaintiff's host state.

106. The EFTA Surveillance Authority suggests answering the questions as follows:

(1) It is not compatible with Articles 31 and 36 EEA that an exclusive right to provide gaming services has been motivated, in full or in part, by a wish that the profit from gaming should go to humanitarian and socially beneficial purposes and should not be a source of private profit.

(2) National legislation which establishes that certain forms of gaming can only be offered by a state-owned gaming company, that horserace betting can only be offered by non-profit organisations or companies whose aim is to support horse breeding and that licences to offer certain forms of gaming may only be granted to non-profit organisations with a humanitarian and socially beneficial purpose constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 31 and 36 of the EEA Agreement. Such restrictions will, however, be in conformity with those provisions if they are both suitable and necessary for the attainment of the social objectives they pursue. In so far as an EEA State incites and encourages consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify exclusive rights such as those at issue in the main proceedings.

(3) National legislation which prohibits the providing and marketing of gaming which is not permitted in that EEA State, but which is approved under national law in another EEA State constitutes a restriction on the freedom to provide services in Article 36 of the EEA Agreement. The approval given by that other EEA State does not in itself have the effect of rendering the restriction incompatible with that provision. However, the freedom to provide services may be restricted only by provisions which are justified by the general good in so far as that interest is not safeguarded by

⁴⁰ Advocate General Colomer in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* of 16 May 2006.

the provisions to which the provider of the service is subject in the EEA State of his establishment.

The Commission of the European Communities

107. The Commission recalls, at the outset, the leitmotiv of the ECJ's jurisprudence on the freedom of establishment and the freedom to provide services, namely the four *Gebhard*-criteria restated in *Gambelli*.⁴¹

108. As to the first question, the Commission submits that the exercise of a monopoly, i.e. the existence of only one supplier, not only dissuades but clearly prevents any operator from another Member State from establishing itself in Norway, or providing services thereto, and therefore constitutes a restriction of Articles 31 and 36 EEA. For the purposes of examining the exclusive right under the Gaming Act, the Commission bases itself on the assumption of a non-discriminatory measure. It is stated that if a discrimination is to be found in the Gaming Act this concerns only advertising activities, whereas Section 2, paragraph 3, considers it unlawful to advertise about foreign games of chance. With regard to possible justification, the Commission recalls that the ECJ has systematically recognised consumer protection, prevention of fraud, prevention of incitement to squander on gaming and prevention of gambling from being a source of private profit as imperative requirements in the general interest, and that that Court has constantly and consistently declared that national authorities "have a sufficient degree of latitude to determine what is required to protect the players and ... to maintain order in society".⁴² That wide discretion applies to the legal framework the States intend to enact for protecting the players of games of chance against addiction and fraud, in particular both as to level and to the kind of protection national authorities aim at ensuring and as to the legal instrument which appears to be the most appropriate in relation to such a policy option.⁴³ The Commission infers from case law of the ECJ on gaming that it is for Member States' authorities to choose both the public interest objectives they intend to pursue and the legal instruments they intend to use for attaining such objectives.

109. To the Commission, the grounds invoked by the Defendants in the proceedings before the national court appear to be non-economic objectives, except for the channelling of profits from gaming in their entirety to charitable, humanitarian and socially beneficial activities. However, if it is ascertained that this is "not the real (and only) justification for the restrictive policy adopted"⁴⁴ by

⁴¹ Case C-243/01 *Gambelli*, at paragraph 65.

⁴² Case C-275/92 *Schindler*, at paragraph 61

⁴³ Case C-124/97 *Läärä*, paragraph 35.

⁴⁴ Case C-243/01 *Gambelli*, at paragraph 62.

the Norwegian authorities, but “only an incidental beneficial consequence”⁴⁵ related to the introduction of the exclusive right in favour of Norsk Tipping, the Commission is persuaded that the “centre of gravity” of the first question is to be found in the application to the Norwegian measure of the so-called “proportionality test”.⁴⁶

110. The Commission infers from case law that the fulfilment of suitability of a restrictive national measure is to be examined strictly.⁴⁷ With regard to the so-called “consistency test” as part of suitability, the Commission, considering the diversity of games of chance and the partial diversity of the rules governing them, finds it appropriate to examine the consistency of the national provisions firstly in relation to the specific sector regulated by such provisions and secondly, if necessary, in relation to the market strategy of competent national authorities in other sectors of games of chance. The Commission therefore suggests that the consistency of the national operator’s operations for the numbers game ‘lotto’ and sports betting, excluding horse racing, should be evaluated separately. In so doing, the following elements should be considered: (1) the national operator's product strategy (launch of new and development of existing products, frequency of draws or events, variations in the size of stakes and variations in values of ‘jackpots’); (2) the national operator’s marketing strategy (level and content of media advertising, sponsorship, sales promotions and point of sale advertising); and (3) the national operator's retail strategy (numbers of dedicated sales outlets, accessibility to lotto and sports betting products in other non-dedicated retail outlets, distance sales, notably via the Internet, and relevant age limits). In each case (i.e. lotto number games and sports betting), the test should consist of evaluating whether the relevant strategies confine themselves to informing consumers of the availability of these products and ensuring accessibility to them without actively inciting and encouraging consumers to take up such activities.

111. As to the assessment of whether no “less restrictive means” exist for ensuring effective protection of a recognised aim of general interest, the Commission emphasises that the ECJ has never escaped the verification of the existence of such last condition for justifying an admittedly restrictive national measure. In fact, the Commission infers from consistent case law that in circumstances similar to the ones of the present case, the ECJ would scrutinise any alternative and allegedly less restrictive solution suggested by the applicant in the main proceedings and would explain the reasons for which the exclusive right

⁴⁵ Case C-243/01 *Gambelli*, at paragraph 62.

⁴⁶ Case C-243/01 *Gambelli*, at paragraph 65.

⁴⁷ Case C-390/99 *Canal Satélite* [2002] ECR I-607, paragraphs 36 and 43; Case C-79/01 *Payroll Data Services* [2002] ECR I-04881, paragraphs 34 and 35; Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 45-47; Case C-451/03 *Servizi Ausiliari* [2006] ECR I-0000, paragraphs 41-43.

conferred upon a state-owned operator “goes beyond” or “does not go beyond” what is necessary for effectively “fighting gambling addiction” and attaining the other objectives invoked by the Defendants. From the way the ECJ carried out the assessment in *Gambelli* and *Läärä*, the Commission infers that, in the specific field of the operation of gaming schemes relating to sporting events and the numbers game Lotto subject of the Gaming Act, where Member States have been recognised as having a wide margin of discretion as to the objectives they want to protect and to the means they consider most suited to achieve them, a national measure such as the Gaming Act may be considered suitable to the achievement of the aims set out in the same law and not going beyond what is necessary for the same task. Furthermore, considering the objectives of “preventing negative consequences of gambling” and ensuring that “profits of the gaming schemes go towards [cultural, sports and scientific] purposes”, stated in Section 1 of the Gaming Act, the Commission sees obvious and nearly self-explanatory advantages in conferring on a fully State-owned and non-profit company the exclusive right to operate such a particular sector as gaming activities. Finally, in the Commission’s view the Government is entitled to rely on spontaneous compliance by a public enterprise with all the rules imposed by the State (laws, regulations and in particular administrative instructions, which appear very relevant in the area of supervision of gambling activities). In circumstances such as in the case at issue, a Member State’s Government is also entitled to expect that a public non-profit body neither has an economic incentive to breach the rules regulating the sector of games of chance operated by the monopolist nor has an aggressive marketing strategy aimed at expanding gambling activities and/or at maximising profits.

112. As regards the second question, the Commission initially points to two circumstances: First that the requirement of the non-profit nature of the organisations applying for licences to operate horseracing betting does not appear in the part of the Totalisator Act quoted in the order of reference. Second, Section 1 of the Totalisator Act subjects the granting of a licence to “*inter alia* [the] support of horse breeding” (emphasis added). However, this provision does not explain whether organisations or companies applying for licences *must* also have other by-law purposes or simply *may* also have purposes other than the support of horse breeding.

113. The Commission assumes that the Totalisator Act is of a restrictive nature, and the requirements set out for the granting of a horseracing betting licence do not seem to be discriminatory. If, however, the fact that Norsk Rikstoto is the only operator that has been granted a licence did not happen fortuitously but was the result of the combined action of Norsk Rikstoto’s agreements with all the racetracks and the 1995 amendments which eventually provided Norsk Rikstoto with “the superordinate responsibility for all totalisator gaming”, this could result in discrimination. Finally, the Commission observes that the Ministry of

Agriculture has very important powers of approval concerning the types of games and their rules, the portion of games' stakes that should go toward prizes and the by-laws of the applicant associations. Were these powers to be discretionary, and not bound by other precise non-discriminatory rules, the Commission believes that their exercise could easily result in a discriminatory restriction.

114. With regard to justification, the Commission observes that there is no evidence of the six public interest objectives referred to by the Defendants, as far as horseracing betting is concerned, in the relevant texts of law or in their preparatory works resulting from the order of reference. On the contrary, the only aims that one might infer that the Totalisator Act is supposed to pursue, according to its Section 1, are the support of horse breeding and the collection of revenues for the State. The question of whether the Totalisator Act has clear public interest objectives and the assessment of these objectives is therefore something that is up to the national court to verify. As regards the (apparent) objective of channelling profits to charitable, humanitarian and socially beneficial activities, the Commission has not seen any demonstration of how the support of horse breeding could be so regarded. Horse breeding, like the activity of breeding any animal, would appear to be an economic activity like any other.⁴⁸ If it were to be established that horse breeding has to be directly linked to the organisation of horse sports, the Commission recalls the ECJ's case law to the effect that the organisation of sports events is a lucrative activity.⁴⁹ As regards the supposed objective of securing revenues for the State's benefit, the Commission recalls that the aim of securing tax revenues cannot be regarded as an overriding reason in the public interest.⁵⁰ Finally, as to the possible aim of preventing gambling from being a source of private profit, the Commission finds that, according to the case law of the ECJ in the peculiar sector of gambling, such an aim may constitute, within the framework of the general objective of protecting players against gambling addiction, an overriding reason of public interest capable of justifying a restriction of one of the fundamental freedoms.⁵¹

115. As to suitability and proportionality, the Commission observes that the purpose to support horse breeding appears to be just a mere consequence of the

⁴⁸ Reference is made to Case C-206/05 *Commission v Sweden* [2006] ECR I-0000 and Case C-320/02 *Förvaltnings AB Stenholmen* [2004] ECR I-3509.

⁴⁹ Case 36/74 *Walrave* [1974] ECR 1405; Case 13/76 *Dona & Mantero* [1976] ECR 1333 and Case C-415/93 *Bosman* [1995] ECR I-4921.

⁵⁰ See, *ex multis*, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-0000, paragraph 59, and, in the specific field of gambling, *Gambelli*, paragraph 69; Case C-275/92 *Schindler*, at paragraph 60; *Läära*, paragraph 37.

⁵¹ Case C-275/92 *Schindler*, at paragraph 60. Also see Case C-124/97 *Läärä*, paragraph 13; Case C-67/98 *Zenatti*, at paragraph 14 and more recently ECJ Judgment of 26.10.2006, Case C-65/06, *Commission v Greece* [2006] ECR I-0000 paragraph 35.

circumstance that Norsk Rikstoto, being a non-profit foundation, will return, in practice, all the profits derived by horseracing betting to horse breeding initiatives. In this case the requirement of having the purpose to support horse breeding is not a suitable measure for the achievement of the objective, since this cannot guarantee that betting profits will return to the financing of horse breeding initiatives. Moreover, this requirement seems also to go beyond what is necessary for the achievement of the apparent objective. In the absence of further specifications on how the licensee should concretely support horse breeding and in the (supposed) absence of any prohibition of profit-making operators, an obligation to distribute all or part of the profits derived from horseracing bets to organizations actively supporting horse breeding would have equally guaranteed the achievement of the legislative (stated) objective, although such an obligation would have imposed less restrictive measures on betting operators. Finally, as regards the (supposed) non-profit requirement, this seems to be a suitable measure to avoid gambling being a source of private profit and does not appear to go beyond what is necessary to attain that aim. However, the (supposed) non-profit requirement would be a restriction which is inconsistent with other provisions contained in the same Act, since the legitimate aim of preventing gambling from being a source of private profit cannot be completely achieved as long as private companies will also be authorised to operate horseracing betting.

116. With regard to the third question, the Commission again assumes the existence of a restriction of non-discriminatory nature. However, the Commission wonders whether the humanitarian or socially beneficial purposes mentioned by the law are intended to apply, or are applied, only to good cause initiatives undertaken in Norway or may be intended to apply, or are applied to foreign initiatives as well. If the former were true, that requirement would result in a *de facto* discrimination. If not, the restrictions would, in the Commission's view, in principle be justifiable based on imperative requirements in the public interest. However, with regard to the objective of avoiding the risk of crime and fraud subsumed in the "proper forms and public control" provision, the Commission does not see any justification for why the nationwide, regional and local organisations with humanitarian or socially beneficial aims, in the absence of any clear state control thereon and in view of the multiplicity of eligible organisations, should better ensure the avoidance of crime and fraud than commercial licensees.

117. As regards the requirement of a humanitarian or socially beneficial purpose for license-holding organisations, the Commission considers that the circumstance that non-profit organisations may then contract out the operation of their lotteries to private undertakings which may receive part of the profits creates a serious inconsistency in the Lottery Act. This hinders the suitability of the restriction to the achievement of the afore-mentioned objectives, since part of the profits are no longer channelled to good causes and private operators benefit from them.

Moreover, the prohibition to operate lotteries for the benefit of activities other than the humanitarian or socially beneficial ones provided for in Section 5 of the Lottery Act, together with the non-profit requirement, should suffice to guarantee the achievement of the same objectives. The requirement that license holder organisations or associations have a humanitarian or socially beneficial purpose then goes beyond what is necessary for the achievement of its supposed legitimate objective.

118. With respect to the fourth question, the Commission, in the first place, believes that it is inappropriate to answer theoretical questions out of the context of specific rules which have to be evaluated as a whole. That said, it opines that a non-profit requirement seems to be a justified measure since it is suitable for preventing betting revenues from going to the benefit of private commercial operators and does not appear to go beyond what is necessary. However, in specific circumstances, the non-profit requirement may be a restriction which is inconsistent with other provisions contained in the same Act and therefore not suitable to attain the public interest objective it is purported to pursue.

119. In dealing with the fifth question, the Commission maintains that, where Member States make the provision of certain games subject to prior authorisation, if this restriction is justified by overriding reasons of general interest and the requirements for the granting of the authorisation are not disproportionate, those Member States shall then consider whether the same public interest concerns that justify the restriction are not already satisfied by the rules of the Member State of origin of the foreign gaming services provider.⁵² Consequently, if the Member State of origin, to whose rules the gaming services provider is subject, effectively pursues the same public interest concerns and the same level of protection pursued by the Member State where the services are to be provided, the latter may not prohibit the gaming services provider legally operating in such a Member State of origin to offer games which are authorized in both Member States. It will be for the national court to ascertain not only whether the operation of the same authorized game is already subject to prior authorization in the Member State of origin, but also whether that authorization is aimed at ensuring the same level of protection pursued by the host Member State. However, if the national restriction consists in a total ban of certain games of chance the national court will only have to verify whether the national prohibition is legitimate, suitable, consistent and necessary to the achievement of its aim. In fact, it will not be necessary to consider whether the Member State of origin guarantees the same level of protection.⁵³

⁵² Reference is made to Case 279/80 *Webb*, [1981] ECR 3305 paragraph 20.

⁵³ Case C-67/98 *Zenatti*, at paragraph 33. Also see Case C-124/97 *Läärä*, paragraph 35; and Case C-275/92 *Schindler*, at paragraph 61.

120. Section 11 of the Lottery Act should be read not only with reference to those lotteries which are totally prohibited in Norway and to Norsk Tipping's activities, but also to those whose operation is subject to prior authorisation. Accordingly, since the requirements set out in the Lottery Act for the granting of licenses seemed to be inconsistent in the Commission's appraisal, the consequent prohibition of foreign lotteries approved in other EEA States appears to be incompatible with Article 36 EEA as well.

121. The Commission suggests answering the questions as follows:

(1) Provided that such legislation is indeed found to be non-discriminatory and provided that the objectives of the national legislation are pursued in a consistent manner, national legislation such as the Gaming Act 1992 which establishes that the forms of gaming covered thereby can only be offered by a State-owned gaming company which channels all its profits to cultural and sports purposes, is not precluded by Articles 31 and/or 36 EEA.

(2) National legislation such as the Totalisator Act 1927 which establishes that licenses to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding is precluded by Articles 31 and/or 36 EEA insofar as neither the collection of monies for the public purse, foreseen in that Act, nor the support of horse breeding are imperative requirements in the public interest and, even were this to be so, the said restrictions are not suitable for the achievement of such objectives nor necessary therefore.

(3) National legislation such as the Lottery Act 1995 which establishes that licences to operators of certain forms of gaming may only be granted to non-profit organisations and associations with a humanitarian or socially beneficial purpose is precluded by Article 31 and/or 36 EEA insofar as the conditions of operation of such forms of gaming are not suitable for the attainment of the objectives envisaged and go beyond what is necessary therefore.

(4) There is no need to reply to question 4 in a separate manner in the light of the replies given to questions 1, 2 and 3.

(5) Article 36 EEA does not preclude a national statutory provision such as Section 2 of the Gaming Act, which forbids the advertising and thus the providing of gaming services offered by providers established in another EC or EEA Member State, if the games the advertising of which is prohibited are operated by a monopoly which has been found to be in conformity with the rules of the EEA agreement.

Article 36 EEA precludes a national statutory provision, such as Section 11 of the Lottery Act, which forbids the providing and the marketing of games offered by operators established in another EC or EEA Member State, if the requirements set out in the legislation of the host Member State for the granting of licences are found to be incompatible with the rules of the EEA agreement and if the provider of such gaming services is already subject in its Member State of origin to controls ensuring the same or an equivalent level of consumer protection as that pursued by the host Member State.

Carl Baudenbacher
Judge-Rapporteur